

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

**AB-2005-1**

*Report of the Appellate Body*



I.	Introduction .....	1
II.	Arguments of the Participants and the Third Participants.....	6
A.	<i>Claims of Error by the United States – Appellant</i> .....	6
	1. Antigua's <i>Prima Facie</i> Case .....	6
	2. United States' Schedule of Specific Commitments .....	8
	3. Article XVI:2(a) and XVI:2(c) of the GATS – "limitations ... in the form of" .....	10
	4. Article XIV of the GATS: General Exceptions .....	12
	5. "Practice" as a "Measure".....	15
B.	<i>Arguments of Antigua – Appellee</i> .....	15
	1. Antigua's <i>Prima Facie</i> Case .....	15
	2. United States' Schedule of Specific Commitments .....	16
	3. Article XVI:2(a) and XVI:2(c) of the GATS – "limitations ... in the form of" .....	17
	4. Article XIV of the GATS: General Exceptions .....	18
	5. "Practice" as a "Measure".....	19
C.	<i>Claims of Error by Antigua – Appellant</i> .....	19
	1. The "Total Prohibition" as a "Measure".....	19
	2. Article XVI:1 of the GATS – Conditional Appeal.....	20
	3. Article XVI:2(a) and XVI:2(c) of the GATS – Measures Aimed at Consumers .....	21
	4. Article XIV of the GATS: General Exceptions .....	22
D.	<i>Arguments by the United States – Appellee</i> .....	25
	1. The "Total Prohibition" as a "Measure".....	25
	2. Article XVI:1 of the GATS – Conditional Appeal.....	26
	3. Article XVI:2(a) and XVI:2(c) of the GATS – Measures Aimed at Consumers .....	27
	4. Article XIV of the GATS .....	27
E.	<i>Arguments of the Third Participants</i> .....	30
	1. European Communities.....	30
	2. Japan.....	32
	3. Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu .....	33
III.	Issues Raised in This Appeal.....	34
IV.	Measures at Issue.....	37
A.	<i>"Total Prohibition" as a Measure</i> .....	37
B.	<i>"Practice" as a Measure</i> .....	41
C.	<i>Antigua's Prima Facie Case</i> .....	42

V.	Interpretation of the Specific Commitments Made by the United States in its GATS Schedule .....	51
A.	<i>Interpretation of Subsector 10.D According to the General Rule of Interpretation: Article 31 of the Vienna Convention</i> .....	52
B.	<i>Interpretation of Subsector 10.D in Accordance with Supplementary Means of Interpretation: Article 32 of the Vienna Convention</i> .....	67
C.	<i>Summary</i> .....	73
VI.	Article XVI of the GATS: Market Access .....	73
A.	<i>Preliminary Matters</i> .....	75
B.	<i>The Meaning of Sub-paragraphs (a) and (c) of Article XVI</i> .....	76
1.	Sub-paragraph (a) of Article XVI:2.....	77
2.	Sub-paragraph (c) of Article XVI:2.....	81
3.	Article XVI:2(a) and (c) – Prohibitions Directed at Consumers.....	84
C.	<i>Does the Second Paragraph of Article XVI Exhaust the Market Access Restrictions that are Prohibited by the First Paragraph?</i> .....	85
D.	<i>Application of Article XVI to the Measures at Issue</i> .....	86
VII.	Article XIV of the GATS: General Exceptions .....	89
A.	<i>Did the Panel Err in Considering the United States' Defence Under Article XIV?</i> .....	89
B.	<i>Did the Panel Err in its Treatment of the Burden of Proof Under Article XIV?</i> .....	92
C.	<i>The Panel's Substantive Analysis Under Article XIV</i> .....	97
1.	Justification of the Measures Under Paragraph (a) of Article XIV .....	98
2.	Justification of the Measures Under Paragraph (c) of Article XIV .....	111
3.	The Chapeau of Article XIV.....	111
4.	Overall Conclusion on Article XIV .....	122
VIII.	Findings and Conclusions.....	123

- ANNEX I Notification of an Appeal by the United States under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)
- ANNEX II Notification of Other Appeal by Antigua and Barbuda under Article 16.4 and Article 17 of DSU, and under Rule 23(1) of the *Working Procedures for Appellate Review*
- ANNEX II(a) Notification of Other Appeal by Antigua and Barbuda under Article 16.4 and Article 17 of DSU, and under Rule 23(1) of the *Working Procedures for Appellate Review*: Corrigendum
- ANNEX III The United States of America – Schedule of Specific Commitments, GATS/SC/90

## TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
<i>Canada – Dairy (Article 21.5 – New Zealand and US II)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003
<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Tariff Preferences</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003

Short Title	Full Case Title and Citation
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WTDS244/AB/R
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>US – Tuna (Mexico)</i>	GATT Panel Report, <i>United States – Restrictions on Imports of Tuna</i> , 3 September 1991, unadopted, BISD 39S/155
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

WORLD TRADE ORGANIZATION  
APPELLATE BODY**United States – Measures Affecting the  
Cross-Border Supply of Gambling and  
Betting Services**

United States, *Appellant/Appellee*  
Antigua, *Appellant/Appellee*

Canada, *Third Participant*  
European Communities, *Third Participant*  
Japan, *Third Participant*  
Mexico, *Third Participant*  
Separate Customs Territory of Taiwan, Penghu,  
Kinmen and Matsu, *Third Participant*

AB-2005-1

Present:

Sacerdoti, Presiding Member  
Abi-Saab, Member  
Lockhart, Member

**I. Introduction**

1. The United States, and Antigua and Barbuda ("Antigua"), each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (the "Panel Report").<sup>1</sup> The Panel was established to consider a complaint by Antigua concerning certain measures of state and federal authorities that allegedly make it unlawful for suppliers located outside the United States to supply gambling and betting services to consumers within the United States.<sup>2</sup>

2. Before the Panel, Antigua claimed that certain restrictions imposed by the United States through federal and state laws resulted in a "total prohibition" on the cross-border supply of gambling and betting services from Antigua.<sup>3</sup> Antigua contended that such a "total prohibition" was contrary to obligations of the United States under the *General Agreement on Trade in Services* (the "GATS"). In particular, Antigua asserted that the GATS Schedule of the United States includes specific commitments on gambling and betting services. Antigua argued that, because the United States made full market access and national treatment commitments (that is, inscribed "None" in the relevant columns of its GATS Schedule), the United States, in maintaining the measures at issue, is acting

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<sup>1</sup>WT/DS285/R, 10 November 2004.

<sup>2</sup>Panel Report, para. 1.1.

<sup>3</sup>*Ibid.*, paras. 6.154, 6.156-6.157.

inconsistently with its obligations under its GATS Schedule<sup>4</sup>, as well as under Articles VI, XI, XVI, and XVII of the GATS.<sup>5</sup>

3. On 17 October 2003, after receiving Antigua's first written submission to the Panel and before filing its own first written submission, the United States requested the Panel to make certain preliminary rulings, including a ruling that Antigua had failed to make a *prima facie* case that specific United States measures are inconsistent with the GATS.<sup>6</sup> In particular, the United States argued that a "total prohibition" on the cross-border supply of gambling and betting services could not constitute a "measure".<sup>7</sup> According to the United States, by challenging such an alleged "total prohibition", rather than the laws and regulations underlying that prohibition, Antigua had failed to satisfy its burden as the complaining party to "identif[y] ... specific measures that are the subject of [its] *prima facie* case."<sup>8</sup> The Panel denied the United States' request on the ground that it was premature, given that Antigua had "two sets of written submissions and two panel hearings to convince the Panel that it [had] established a *prima facie* case."<sup>9</sup>

4. In its oral and written submissions to the Panel, the United States maintained its objections to the Panel's consideration of Antigua's claims on the basis of an alleged "total prohibition", reiterating its argument that Antigua had failed to establish a *prima facie* case.<sup>10</sup> In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 10 November 2004, the Panel addressed this argument by "identify[ing] the measures that the Panel [would] consider in determining whether the specific provisions of the GATS that Antigua [had] invoked have been violated."<sup>11</sup> The Panel determined, first, that Antigua was not entitled to rely on the alleged "total prohibition" as a "measure" in and of itself.<sup>12</sup> The Panel then determined that the following laws of the United States

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<sup>4</sup>Panel Report, para. 2.1(a).

<sup>5</sup>*Ibid.*, para. 2.1(b).

<sup>6</sup>Panel's Decision on the Request for Preliminary Rulings, para. 49, attached as Annex B to Panel Report, p. B-13.

<sup>7</sup>Panel's Decision on the Request for Preliminary Rulings, para. 51, attached as Annex B to Panel Report, p. B-14.

<sup>8</sup>Panel's Decision on the Request for Preliminary Rulings, para. 50, attached as Annex B to Panel Report, p. B-13. (footnote omitted)

<sup>9</sup>Panel's Decision on the Request for Preliminary Rulings, para. 40, attached as Annex B to Panel Report, p. B-9.

<sup>10</sup>United States' first written submission to the Panel, paras. 40-58; United States' statement at the first substantive panel meeting, paras. 11-21; United States' second written submission to the Panel, paras. 6-9; United States' statement at the second substantive panel meeting, paras. 2-3 and 8-18.

<sup>11</sup>Panel Report, para. 6.148.

<sup>12</sup>*Ibid.*, para. 6.185.

had been "sufficiently identified [by Antigua] so as to warrant a substantive examination by the Panel"<sup>13</sup>:

- (A) Federal laws:
  - (i) Section 1084 of Title 18 of the United States Code (the "Wire Act");
  - (ii) Section 1952 of Title 18 of the United States Code (the "Travel Act"); and
  - (iii) Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act", or "IGBA").
- (B) State laws:
  - (i) Colorado: Section 18-10-103 of the Colorado Revised Statutes;
  - (ii) Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);
  - (iii) Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;
  - (iv) Minnesota: Section 609.755(1) and Subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated);
  - (v) New Jersey: Paragraph 2 of Section VII of Article 4 of the New Jersey Constitution, and Section 2A:40-1 of the New Jersey Code;
  - (vi) New York: Section 9 of Article I of the New York Constitution and Section 5-401 of the New York General Obligations Law;
  - (vii) South Dakota: Sections 22-25A-1 through 22-25A-15 of the South Dakota Codified Laws; and
  - (viii) Utah: Section 76-10-1102 of the Utah Code (Annotated).<sup>14</sup>

5. After evaluating Antigua's claims with respect to these federal and state measures, the Panel concluded that:

- (a) the United States' Schedule under the GATS includes specific commitments on gambling and betting services under sub-sector 10.D;
- (b) by maintaining the following measures, ... the United States fails to accord services and service suppliers of Antigua treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule, contrary to Article XVI:1 and Article XVI:2 of the GATS:

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<sup>13</sup>Panel Report, para. 6.219.

<sup>14</sup>See *ibid.*, para. 6.249.

- (i) Federal laws
  - (1) the Wire Act;
  - (2) the Travel Act (when read together with the relevant state laws);<sup>1072</sup> and
  - (3) the Illegal Gambling Business Act (when read together with the relevant state laws).<sup>1073</sup>
- (ii) State laws:
  - (1) Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.;
  - (2) Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws;
  - (3) South Dakota: § 22-25A-8 of the S.D. Codified Laws; and
  - (4) Utah: § 76-10-1102(b) of the Utah Code.
- (c) Antigua has failed to demonstrate that the measures at issue are inconsistent with Articles VI:1 and VI:3 of the GATS;
- (d) The United States has not been able to demonstrate that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws):
  - (i) are provisionally justified under Articles XIV(a) and XIV(c) of the GATS; and
  - (ii) are consistent with the requirements of the chapeau of Article XIV of the GATS.<sup>15</sup>

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<sup>1072</sup> That is, state laws that prohibit a "business enterprise involving gambling". Such state laws would include but are not limited to § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code.

<sup>1073</sup> That is, state laws that prohibit a "gambling business". Such state laws would include but are not limited to § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code.

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<sup>15</sup>Panel Report, paras. 7.2(a)-(d).

6. The Panel further found that the following state laws are not inconsistent with of Article XVI: (i) Section 18-10-103 of the Colorado Revised Statutes<sup>16</sup>; (ii) Section 609.755(1) and Subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated)<sup>17</sup>; (iii) paragraph 2 of Section VII of Article 4 of the New Jersey Constitution, and Section 2A:40-1 of the New Jersey Code<sup>18</sup>; and (iv) Section 9 of Article I of the New York Constitution and Section 5-401 of the New York General Obligations Law.<sup>19</sup> The Panel decided to exercise judicial economy with respect to Antigua's claims under Articles XI and XVII of the GATS.<sup>20</sup> The Panel accordingly recommended that the Dispute Settlement Body ("DSB") request the United States to bring the measures that the Panel had identified as GATS-inconsistent into conformity with the United States' obligations under the GATS.<sup>21</sup>

7. On 7 January 2005, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal<sup>22</sup> pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").<sup>23</sup> On 19 January 2005, Antigua also notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Other Appeal<sup>24</sup> pursuant to Rule 23(1) of the *Working Procedures*. On 14 January 2005, the United States filed its appellant's submission.<sup>25</sup> Antigua filed an other appellant's submission on 24 January 2005.<sup>26</sup> The United States and Antigua each filed an appellee's submission on 1 February 2005.<sup>27</sup> On that same day, the European Communities, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu each filed a third participant's submission.<sup>28</sup> Also on 1 February 2005, Mexico notified the Appellate Body Secretariat of its

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<sup>16</sup>Panel Report, para. 6.383.

<sup>17</sup>*Ibid.*, paras. 6.397-6.398.

<sup>18</sup>*Ibid.*, para. 6.402.

<sup>19</sup>*Ibid.*, para. 6.406.

<sup>20</sup>*Ibid.*, para. 7.2(e).

<sup>21</sup>*Ibid.*, para. 7.5.

<sup>22</sup>Notification of an Appeal by the United States, WT/DS285/6, 13 January 2005 (attached as Annex I to this Report).

<sup>23</sup>WT/AB/WP/5, 4 January 2005.

<sup>24</sup>Notification of Other Appeal by Antigua and Barbuda, WT/DS285/7, 16 February 2005; WT/DS285/7/Corr.1, 17 February 2005 (attached as Annexes II and II(a), respectively, to this Report).

<sup>25</sup>Pursuant to Rule 21(1) of the *Working Procedures*.

<sup>26</sup>Pursuant to Rule 23(3) of the *Working Procedures*.

<sup>27</sup>Pursuant to Rule 22 and Rule 23(4) of the *Working Procedures*.

<sup>28</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

intention to make a statement at the oral hearing as a third participant, and Canada notified its intention to appear at the oral hearing as a third participant.<sup>29</sup>

8. The oral hearing was held on 21 and 22 February 2005. The participants and third participants each made an oral statement (with the exception of Canada and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu) and responded to questions put to them by the Members of the Division hearing the appeal.

## II. Arguments of the Participants and the Third Participants

### A. *Claims of Error by the United States – Appellant*

#### 1. Antigua's *Prima Facie* Case

9. The United States argues that Antigua did not make a *prima facie* case that any particular United States measure is inconsistent with any provision of the GATS. The United States therefore requests the Appellate Body to find that the Panel erred in law because it nevertheless made findings on Antigua's claims and thereby absolved Antigua from establishing a *prima facie* case. The United States further submits that the Panel made the case for Antigua with respect to three United States federal laws and eight state laws and thus denied the United States a "fair opportunity"<sup>30</sup> to defend the laws at issue, inconsistent with the Panel's obligations under Article 11 of the DSU.

10. According to the United States, Antigua made its case on the basis that the measure at issue was "the total prohibition on the cross-border supply of gambling and betting services."<sup>31</sup> The United States emphasizes, Antigua never specifically alleged that any particular law or laws violate Article XVI of the GATS. The United States emphasizes that, Antigua never specifically alleged that any particular law or laws violate Article XVI of the GATS. Thus, Antigua did not identify precisely what measures it was challenging or provide evidence and argumentation sufficient to establish a presumption of inconsistency of any measures with any provision of the GATS.

11. The United States contends that the Panel rejected Antigua's reliance on the alleged "total prohibition" as the measure at issue in this dispute and properly found that it could not identify the individual laws supporting Antigua's case where Antigua itself had not. Nevertheless, according to the United States, the Panel proceeded to review Antigua's submissions and exhibits and identify for itself whether and how particular laws resulted in a prohibition on the remote supply of gambling services. In so doing, the Panel exceeded the limits of its authority, and erred in the same way that the

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<sup>29</sup>Pursuant to Rule 24(2) of the *Working Procedures*.

<sup>30</sup>United States' appellant's submission, para. 43.

<sup>31</sup>*Ibid.*, para. 8 (quoting Antigua's first written submission to the Panel, para. 136). (emphasis omitted)

Appellate Body found the panels in *Japan – Agricultural Products II* and *Canada – Wheat Exports and Grain Imports* to have erred.<sup>32</sup> The United States further contends that the Panel mistakenly found support for its approach in the Appellate Body decisions in *Canada – Autos* and *Thailand – H-Beams*.<sup>33</sup> The Panel is said to have further erred in referring to a purported admission by the United States that "federal and state laws are applied and enforced so as to prohibit what it describes as the 'remote supply' of most gambling and betting services"<sup>34</sup>, when the United States never conceded that any particular measure had this effect. The United States maintains that the approach taken by the Panel in this case—namely identifying a subset of United States measures from the "remarkably broad" list of "possibly relevant"<sup>35</sup> laws in Antigua's panel request, and assembling arguments regarding their meaning, application and consistency with Article XVI—unfairly deprived the United States of any opportunity to respond and defend those specific measures.

12. In addition to alleging legal error on the basis that the Panel made findings on claims in the absence of a *prima facie* case by Antigua, the United States asserts that the Panel did not comply with its obligations under Article 11 of the DSU.<sup>36</sup> Although the Panel explicitly recognized its lack of authority to make the case for the complaining party, the Panel is said to have nevertheless assumed the role of the complaining party in this dispute. Moreover, the Panel did not merely "fill in small gaps" in Antigua's claim, but rather, "created an entirely new approach to the case on behalf of the complaining party".<sup>37</sup> In the submission of the United States, the "egregious" nature of the Panel's approach to Antigua's claims gives rise to a separate and distinct error, namely that the Panel failed to satisfy its duty under Article 11 of the DSU to "make an objective assessment of the matter before it".<sup>38</sup> The United States thus requests that the Appellate Body find that the Panel failed to satisfy its obligations under Article 11 of the DSU.

13. For these reasons, the United States argues that the Panel erroneously concluded that: (i) it "should consider" three federal laws and eight state laws in order to determine whether the United States violated its obligations under the GATS; and (ii) Antigua had met its burden of proof that these laws result in a prohibition on the remote supply of gambling and betting services. "Separate and in

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<sup>32</sup>United States' appellant's submission, paras. 12-14 (referring to Appellate Body Report, *Japan – Agricultural Products II*, paras. 125-131; and Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 191).

<sup>33</sup>*Ibid.*, paras. 31-35 (citing Appellate Body Report, *Canada – Autos*, para. 184; and Appellate Body Report, *Thailand – H-Beams*, para. 136).

<sup>34</sup>*Ibid.*, para. 36 (quoting Panel Report, para. 6.164).

<sup>35</sup>*Ibid.*, para. 38.

<sup>36</sup>*Ibid.*, para. 39.

<sup>37</sup>*Ibid.*, para. 42.

<sup>38</sup>*Ibid.*, para. 39.

addition to" this error<sup>39</sup>, the United States argues that the Panel's resolution of Antigua's claims was inconsistent with the Panel's obligations under Article 11 of the DSU. Should the Appellate Body find error on either ground, the United States requests that the Appellate Body determine that the remaining Panel findings are "without legal effect".<sup>40</sup>

## 2. United States' Schedule of Specific Commitments

14. The United States appeals the Panel's finding that the United States' Schedule to the GATS includes specific commitments on gambling and betting services under subsector 10.D, entitled "other recreational services (except sporting)". The United States maintains that it expressly excluded "sporting", the ordinary meaning of which includes gambling, from the United States' commitment for recreational services. In the United States' submission, the Panel misinterpreted the ordinary meaning of "sporting" and improperly elevated certain preparatory work for the GATS to the status of context for the interpretation of the relevant United States' commitment.

15. According to the United States, in concluding that the ordinary meaning of "sporting" does not cover gambling, the Panel misapplied the customary rules of treaty interpretation and disregarded relevant WTO decisions. The Panel is said to have disregarded numerous English dictionaries that confirm that "sporting" in English includes activity pertaining to gambling and, thus, failed to give the word "sporting" in the United States' Schedule this ordinary English-language meaning, as required by the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").<sup>41</sup> Furthermore, the United States contends that the Panel erred in relying on the meaning of the term "sporting" in French and Spanish, because the cover page of the United States' Schedule clarifies that "[t]his is authentic in English only".<sup>42</sup>

16. The United States also asserts that the Panel erred in treating two documents, referred to in the Panel Report as "W/120"<sup>43</sup> and the "1993 Scheduling Guidelines"<sup>44</sup>, as context instead of as negotiating documents that constitute preparatory work. The United States points out that Members never agreed to memorialize W/120 and the 1993 Scheduling Guidelines, and that the disagreement of parties to the Uruguay Round services negotiations as to the content of these two documents prepared by the Secretariat is apparent in the divergent approaches adopted by Members in scheduling their

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<sup>39</sup>United States' appellant's submission, heading II.A.10, p. 23.

<sup>40</sup>*Ibid.*, para. 3. (footnote omitted)

<sup>41</sup>Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

<sup>42</sup>United States' appellant's submission, para. 51.

<sup>43</sup>Services Sectoral Classification List: Note by the Secretariat, MTN.GNS/W/120, 10 July 1991.

<sup>44</sup>Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993.

specific commitments. Therefore, the United States asserts, neither W/120 nor the 1993 Scheduling Guidelines reflects an "agreement between the parties" or an "agreement made by all participants", within the meaning of Article 31(2) of the *Vienna Convention*.

17. According to the United States, the characterization of these documents carries important implications because, under Articles 31 and 32 of the *Vienna Convention*, context has primary interpretative significance, whereas preparatory work is merely a supplementary means of interpretation. A panel may look to preparatory work only to confirm an interpretation made in accordance with Article 31 of the *Vienna Convention*, or if such interpretation leaves the meaning ambiguous or unclear or leads to a result that is manifestly absurd or unreasonable. In this case, however, the Panel is said to have erred in using W/120 and the 1993 Scheduling Guidelines, which are "mere preparatory work"<sup>45</sup>, to support a meaning that is at odds with the ordinary meaning of the "sporting" exclusion in the United States' Schedule. According to the United States, the Panel could not have reached the conclusion that it did, had it treated the 1993 Scheduling Guidelines and W/120 as preparatory work.

18. In the United States' submission, the proper context for its Schedule is the Schedules of other WTO Members. Consistent with the principle of effective treaty interpretation, the absence of any reference in the United States' Schedule to the United Nations' Provisional Central Product Classification<sup>46</sup> (the "CPC"), in contrast to other Schedules, must be given legal effect. Therefore, the United States' Schedule must be interpreted according to its ordinary meaning and cannot be presumed to follow the meaning given to various terms by the CPC. Similarly, other Members' Schedules confirm that at least one Member made a commitment for gambling and betting services in subsector 10.E. Thus, the United States argues, the Panel erred in failing to find that, in the United States' Schedule, gambling properly resides in 10.E—where the United States made no commitment—rather than in the broad category of "recreational services" in 10.D.

19. The Panel is said, however, to have ignored the ordinary meaning of the United States' Schedule, read in the proper context, and instead erroneously created a "presumption" that, unless the United States "expressly" departed from W/120 and the CPC, it could be "assumed to have relied on W/120 and the corresponding CPC references."<sup>47</sup> In this respect, the United States contends that the Panel confused the *structure* of W/120 with the cross-references to the CPC contained in that document, failing to recognize that Members, such as the United States, may have elected to adopt the former without necessarily embracing the latter. Thus, the Panel is said to have been wrong in

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<sup>45</sup>United States' appellant's submission, para. 65.

<sup>46</sup>Provisional Central Product Classification, Statistical Papers, Series M No.77, United Nations (1991).

<sup>47</sup>United States' appellant's submission, para. 75 (quoting Panel Report, paras. 6.103-6.106).

construing any purported ambiguity against the United States and failing to acknowledge that there was no mutual understanding between the parties to the services negotiations as to the coverage of gambling in the United States' Schedule. In the United States' submission, such an approach, if upheld, would allow Members to expand negotiated commitments through dispute settlement.

20. The United States therefore requests the Appellate Body to reverse the Panel's finding that the United States undertook specific commitments on gambling and betting services in its GATS Schedule. Should the Appellate Body reach this issue and reverse the Panel's finding, the United States requests that the Appellate Body determine that the remaining Panel findings are "without legal effect."<sup>48</sup>

3. Article XVI:2(a) and XVI:2(c) of the GATS – "limitations ... in the form of"

21. The United States challenges the Panel's finding that the United States acts inconsistently with paragraphs (a) and (c) of Article XVI:2 by failing to accord services and service suppliers of Antigua "treatment no less favourable than that provided for" in the United States' Schedule. According to the United States, the Panel erred in converting two of the prohibitions on *specific forms* of market access limitations set out in Article XVI:2 into *general prohibitions* on any measure having an effect similar to that of a "zero quota", regardless of form.

22. The United States contends that, in interpreting Article XVI, the Panel failed to give meaning to the text and expanded the obligations set out in that provision. The Panel is said to have ignored the fact that Article XVI "represents a precisely defined constraint on certain problematic limitations specifically identified by Members"<sup>49</sup> and that measures not caught by Article XVI remain subject to disciplines set out elsewhere in the GATS, including in Article XVII and Article VI. According to the United States, these errors are revealed in the Panel's misinterpretation of sub-paragraphs (a) and (c) of Article XVI:2.

23. As to Article XVI:2(a), the United States argues that the Panel misunderstood the ordinary meaning of this provision because the Panel ignored the requirement that limitations be "in the form of numerical quotas". In particular, the United States contends, the Panel erroneously found that "a measure that is not expressed in the form of a numerical quota or economic needs test may still fall within the scope of Article XVI:2(a)" if it has the "effect" of a zero quota.<sup>50</sup> In the United States' submission, a limitation that has only the "effect" of limiting to zero the number of service suppliers, or their output, does not satisfy the "form" requirements of Article XVI:2.

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<sup>48</sup>United States' appellant's submission, para. 3. (footnote omitted)

<sup>49</sup>*Ibid.*, para. 97.

<sup>50</sup>*Ibid.*, para. 109 (quoting Panel Report, para. 6.332).

24. As to Article XVI:2(c), the United States contends that the Panel did not come to the proper ordinary meaning of this provision because it used an incorrect reading of the French and Spanish versions as the basis for its interpretation, which is at odds with a plain reading of the English text. This approach, which is contrary to Article 33(4) of the *Vienna Convention*, is said to have led the Panel to the erroneous conclusion that Article XVI:2(c) refers to limitations "expressed in terms of designated numerical units" and limitations "in the form of quotas", when in fact the absence of a comma in Article XVI:2(c) requires these to be read together as a unitary requirement, namely, limitations "expressed in terms of designated numerical units in the form of quotas".

25. The United States submits that none of the United States state and federal laws imposes a limitation on the number of service suppliers "in the form of numerical quotas" or limitations on service operations or output "expressed as designated numerical units in the form of quotas". Rather, these laws represent domestic regulation limiting the *characteristics* of supply of gambling services, not the *quantity* of services or service suppliers. More specifically, these laws are "in the form of" and "expressed" as non-numerical, non-quota criteria that restrict certain activities, rather than restricting numbers of suppliers, operations, or output. As these laws match none of the "forms" identified in Article XVI:2(a) or XVI:2(c), the United States argues that the Panel should have found that these laws are not inconsistent with those provisions.

26. The United States contends that the Panel's interpretation of Article XVI:2(a) and XVI:2(c) would "unreasonably and absurdly"<sup>51</sup> deprive Members of much of their right to regulate services by not allowing them to prohibit selected activities in sectors where commitments are made. The approach to market access liberalization reflected in the GATS is said *not* to provide an unlimited right to supply services throughout each committed sector or mode of supply. Such an approach would be at odds, so it is argued, with the balance between liberalization and regulation reflected in the Members' recognized right to regulate services. According to the United States, there is no reason why a Member's imposition of nationality-neutral limitations should violate Article XVI *provided that* they do not take the form of numerical quotas or any other form prohibited by Article XVI:2. Such limitations remain subject to other GATS provisions, however, including Article VI. In this regard, the United States also questions the Panel's finding that Article XVI, and Article VI:4 and VI:5, are mutually exclusive.

27. For these reasons, the United States requests that the Appellate Body reverse the Panel's findings that the United States failed to satisfy its obligations under Article XVI:2(a) and XVI:2(c) of

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<sup>51</sup>United States' appellant's submission, para. 129.

the GATS. Should the Appellate Body so decide, the United States requests the Appellate Body to determine that the remaining Panel findings are "without legal effect."<sup>52</sup>

4. Article XIV of the GATS: General Exceptions

28. The United States appeals the Panel's findings that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are not justified under paragraph (a) or (c) of Article XIV of the GATS and are inconsistent with the requirements of the chapeau of Article XIV.

(a) Paragraphs (a) and (c) of Article XIV: "Necessary"

29. According to the United States, the Panel erroneously interpreted the term "necessary" in Article XIV(a) and XIV(c) to require the United States to "explore and exhaust reasonably available WTO-consistent alternatives"<sup>53</sup> that would ensure the same level of protection as the prohibition on the remote supply of gambling and betting services. The United States contends that the Panel then misunderstood this obligation, in conjunction with the specific market access commitments set out in the United States' Schedule, as requiring the United States to hold consultations with Antigua before and while imposing the prohibition on the remote supply of gambling and betting services.

30. The United States underlines that the Panel erroneously read a "procedural requirement" of consultation or negotiation into Article XIV(a) and XIV(c).<sup>54</sup> Such a requirement is said to find no support in either the text of Article XIV or in previous decisions of GATT panels and the Appellate Body. Pointing to Articles XII:5 and XXI:2(a) of the GATS, the United States asserts that the treaty drafters were explicit when they intended to impose a prerequisite of consultations before a Member could take certain actions, and that no such explicit requirement is found in the text of Article XIV. The United States also contends that, when examining whether a WTO-consistent alternative was reasonably available, the Panel departed from previous GATT and WTO decisions interpreting the term "necessary" under Article XX of the GATT and, in particular, from the decision of the Appellate Body in *Korea – Various Measures on Beef*.<sup>55</sup> According to the United States, these decisions clarified that alternatives that are only "theoretical"<sup>56</sup>—such as a *possible* negotiated outcome following consultations—cannot be regarded as "reasonably available".

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<sup>52</sup>United States' appellant's submission, paras. 3 and 101. (footnote omitted)

<sup>53</sup>*Ibid.*, para. 136.

<sup>54</sup>*Ibid.*, para. 138.

<sup>55</sup>*Ibid.*, paras. 147-152.

<sup>56</sup>*Ibid.*, para. 152.

31. Furthermore, the United States argues that a *possible* negotiated outcome following consultations does not qualify as a legitimate "alternative" in this case because it could not ensure the same level of protection vis-à-vis the remote supply of gambling. If the United States were to withdraw its prohibition and pursue consultations instead, it could not guarantee that the risks associated with the remote supply of gambling would not recur. Such an outcome, according to the United States, cannot be reconciled with the finding of the Appellate Body in *EC – Asbestos* that a Member is not required to adopt a measure that would render that Member vulnerable to the very risks sought to be avoided by the allegedly WTO-inconsistent measure.

32. The United States additionally contends that the mere fact that a Member made a specific commitment in its Schedule cannot, as the Panel found, imply some obligation to carry out consultations if that measure is to be justified under Article XIV. The Panel failed to explain how the inscription of the term "None" in the United States Schedule provided textual support for its conclusion. Moreover, according to the United States, the Panel's finding of a prerequisite of consultations is incompatible with the opening text of Article XIV, which provides that "nothing in this Agreement"—including in the Schedules of Members—can prevent Members from adopting measures that meet the requirements of Article XIV.

33. Finally, the United States asserts that the alleged failure to consult with Antigua was the sole basis for the Panel's findings that the United States' measures are not provisionally justified under paragraph (a) or (c) of Article XIV. Without the requirement of consultations, then, the Appellate Body is left with the Panel's finding that the measures serve important interests and with the absence of any finding on a reasonably available alternative measure. In this light, the United States argues, the Appellate Body has sufficient basis to complete the analysis and conclude that the United States' measures are provisionally justified under paragraphs (a) and (c) of Article XIV.

34. For the foregoing reasons, the United States requests that, in the event that the Appellate Body reaches the issues under Article XIV, it reverse the Panel's findings under Article XIV(a) and XIV(c), complete the analysis, and find that the Wire Act, the Travel, and the Illegal Gambling Business Act are "provisionally" justified under those provisions.

(b) The Chapeau of Article XIV

35. The United States claims that the Panel applied the wrong legal standard when interpreting the chapeau of Article XIV of the GATS, because it required the United States to demonstrate "consistent" treatment of foreign and domestic supply of services. The United States observes that the chapeau prohibits "arbitrary" and "unjustifiable" discrimination, and "disguised restriction[s] on trade in services". The United States argues that "inconsistent" treatment as between services supplied

domestically and services supplied from other Members, in and of itself, does not necessarily constitute arbitrary or unjustifiable discrimination, or a disguised restriction on trade in services.<sup>57</sup>

36. The United States additionally contends that the Panel improperly made the rebuttal for Antigua under the chapeau of Article XIV. The United States emphasizes that, in its analysis under Article XIV, the Panel "recycled" certain evidence and argumentation brought forward by Antigua in the context of its national treatment claim under Article XVII<sup>58</sup>, as to which the Panel exercised judicial economy. Given the distinct legal standard of the chapeau—in particular, its focus only on discrimination that is "arbitrary" or "unjustifiable"—the United States argues that reliance on Antigua's argumentation and evidence in relation to its national treatment claim is inapposite when analyzing the United States' defence under Article XIV.<sup>59</sup>

37. Furthermore, the United States alleges that, "[a]s a matter of law"<sup>60</sup>, the fact that three domestic service suppliers have not been prosecuted under United States law, and that an Antiguan supplier has been prosecuted, does not rise to the level of "arbitrary or unjustifiable discrimination" or a "disguised restriction on trade" under the chapeau of Article XIV, and the Panel erred in finding otherwise. In addition, the United States contends that a relatively small sampling of cases, where a government has not prosecuted allegedly criminal acts, is not probative because "neutral considerations", such as resource limitations, prevent prosecutors from pursuing *all* violations of the law in a given jurisdiction.<sup>61</sup>

38. The United States also claims that the Panel failed to satisfy its obligations under Article 11 of the DSU in its evaluation of the evidence relating to the chapeau of Article XIV. According to the United States, the Panel erred in assessing the United States' enforcement of certain federal laws because the Panel did not take into account "uncontroverted" evidence of the overall enforcement of United States law.<sup>62</sup> The Panel is said to have also erred by failing to recognize that the Interstate Horseracing Act ("IHA") could not repeal pre-existing criminal statutes, including those challenged by Antigua and found by the Panel to be inconsistent with Article XVI of the GATS.

39. Should the Appellate Body reverse the Panel's findings under the chapeau, the United States requests that the Appellate Body complete the analysis and find that the Wire Act, the Travel Act, and

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<sup>57</sup>United States' appellant's submission, para. 183.

<sup>58</sup>*Ibid.*, para. 188.

<sup>59</sup>*Ibid.*, para. 189.

<sup>60</sup>*Ibid.*, para. 184.

<sup>61</sup>*Ibid.*, para. 185.

<sup>62</sup>*Ibid.*, para. 194.

the Illegal Gambling Business Act meet the requirements of the chapeau of Article XIV and are thus justified under Article XIV of the GATS.

5. "Practice" as a "Measure"

40. The United States challenges the Panel's finding, in the course of its analysis of the measures at issue, that "practice" can be considered an autonomous measure that can be challenged "in and of itself".<sup>63</sup> The United States contends that, in arriving at this finding, the Panel erred in two respects. First, it went beyond its terms of reference, as Antigua had not challenged any of the items that the Panel indicated could be considered "practice". Secondly, the Panel based its conclusion that "practice" can be challenged "as such" on a mischaracterization of prior WTO decisions with respect to what constitutes a "measure" under WTO law.<sup>64</sup> The United States therefore requests that the Appellate Body reverse this finding of the Panel.

B. *Arguments of Antigua – Appellee*

1. Antigua's *Prima Facie* Case

41. Antigua requests the Appellate Body to uphold the Panel's findings that Antigua made a *prima facie* case of GATS-inconsistency with respect to the relevant federal and state statutes. Antigua argues that, although the Panel should have considered this case on the basis of the "total prohibition" that the United States maintains against the cross-border supply of gambling and betting services, Antigua had in any event made out its case under Article XVI with respect to discrete federal and state legislation.

42. Antigua contends that, after searching through United States federal and state laws to identify those statutes it believed to be the source of the prohibition on the cross-border supply of gambling and betting services, it provided the Panel with the text and a summary of each statute. Antigua referred in its submissions to specific laws, such as the Wire Act, the Travel Act and the Illegal Gambling Business Act, as prohibiting the cross-border supply of gambling and betting services. Antigua emphasizes that it submitted evidence as to how the United States' authorities themselves understood various laws as operating to prohibit the cross-border supply of gambling services. In addition, Antigua referred the Panel to secondary sources that confirmed this understanding. According to Antigua, the discussion and evidence it presented were sufficient to substantiate its

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<sup>63</sup>United States' appellant's submission, para. 205 (quoting Panel Report, para. 6.197).

<sup>64</sup>*Ibid.*, paras. 209-211 (citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 84; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 12-16; and Appellate Body Report, *US – Carbon Steel*, para. 157).

allegation that the United States acts inconsistently with Article XVI of the GATS as a result of this prohibition.

43. Antigua contests the argument that the United States has been denied a fair opportunity to defend itself in this case. The United States admitted on several occasions—including during consultations—that the cross-border supply of gambling and betting services is prohibited. Furthermore, the federal and state laws challenged by Antigua were identified at the outset of the dispute in Antigua's panel request. As a result, Antigua contends, the United States was aware that it would be expected to defend itself with respect to those laws.

44. As regards the United States' claim under Article 11 of the DSU, Antigua maintains that the Panel did not exceed its authority in determining that Antigua had established a *prima facie* case. In arguing to the contrary, Antigua submits, the United States fails to recognize the discretion afforded panels in the assessment of parties' *prima facie* cases, as determined by relevant WTO decisions.

45. Antigua accordingly requests that the Appellate Body uphold the Panel's findings regarding the United States measures identified by Antigua as the subject of its challenge.

## 2. United States' Schedule of Specific Commitments

46. Antigua requests the Appellate Body to uphold the Panel's findings that the term "sporting" does not include gambling and that, consequently, the United States undertook a specific market access commitment in its Schedule with respect to gambling and betting services.

47. Antigua argues that when examining the words of a treaty, a treaty interpreter must seek to determine the "common intention" of the parties. Although this should be done in accordance with Article 31 of the *Vienna Convention*, Antigua submits that this provision should be regarded as *one* "general rule of interpretation" rather than a hierarchical *sequence* of tests.<sup>65</sup>

48. In Antigua's submission, the ordinary meaning of the word "sporting" does not include gambling and betting services. Because a Schedule is a classification of mutually exclusive services categories, an entry in such a classification can have only one meaning.<sup>66</sup> Thus, it is inappropriate to interpret an entry in the United States' Schedule on the basis of the entry's divergent dictionary definitions. In order to determine the ordinary meaning of the term "sporting" in the United States' Schedule, it is more appropriate to examine the term in the light of other classifications, such as W/120, the CPC, other classification systems, and other WTO Members' GATS Schedules.

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<sup>65</sup>Antigua's appellee's submission, para. 44 (quoting Article 31 of the *Vienna Convention*).

<sup>66</sup>*Ibid.*, para. 50.

Antigua submits that the Panel properly analyzed these classifications and found that they do not support the conclusion that "sporting" includes gambling, a result confirmed by the fact that the United States could not point to *any* classification that uses the word "sporting" to refer to gambling.

49. Given that, as the Panel itself observed, GATS Schedules simply cannot be understood without reference to the 1993 Scheduling Guidelines, Antigua urges the Appellate Body to uphold the Panel's findings that W/120 and the 1993 Scheduling Guidelines are "context" for the interpretation of the United States' Schedule and Article XVI of the GATS. In addition, the revised Scheduling Guidelines of 2001 should be considered a "subsequent agreement" and/or "subsequent practice", as provided for in Article 31(3)(a) and 31(3)(b) of the *Vienna Convention*. According to Antigua, the 2001 Scheduling Guidelines confirm that the existing GATS Schedules were prepared in accordance with the 1993 Scheduling Guidelines and W/120.

50. Antigua emphasizes that the United States' attempt to distinguish the structure of the W/120 from the meaning of its categories is without merit. When a Member uses the structure of the W/120, Antigua argues, it "inevitably" uses the content of its categories, unless this Member indicates explicitly that it is diverging from that content with respect to a sector or subsector.<sup>67</sup> Antigua notes, in this respect, that the United States' Schedule includes no such indication with respect to "sporting" or "other recreational services".

3. Article XVI:2(a) and XVI:2(c) of the GATS – "limitations ... in the form of"

51. Antigua requests the Appellate Body to uphold the Panel's findings with respect to Article XVI:2(a) and XVI:2(c) of the GATS. According to Antigua, a good faith interpretation of Article XVI:2 of the GATS, on the basis of its text, context, and object and purpose, reveals the flaws in the United States' understanding, and supports the Panel's interpretation of the relevant provisions.

52. Antigua contests the United States' understanding of the coverage of Article XVI:2 as limited to measures that take a certain "form", without regard to the effects of those measures. Instead, Antigua contends that the text of Article XVI:2(a) and XVI:2(c) is intended to provide a broad description of the types of measures caught by these provisions. For example, the word "whether" in these provisions suggests an illustrative list of prohibited measures, while the absence of any definition in the GATS of the terms "numerical quotas", "monopolies", "exclusive service suppliers", or "economic needs test" supports the view that these terms cannot be used to restrict the scope of Article XVI:2 to precisely defined "forms".<sup>68</sup>

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<sup>67</sup>Antigua's appellee's submission, para. 52.

<sup>68</sup>*Ibid.*, para. 61.

53. Antigua emphasizes that the 1993 Scheduling Guidelines and the Schedules of the United States and other WTO Members confirm that the United States' "narrow"<sup>69</sup> interpretation does not represent the common intention of the parties. Antigua finds support in other Members' Schedules, including that of the United States, that list measures, including prohibitions, that are not caught by the United States' interpretation of Article XVI:2.<sup>70</sup> According to Antigua, this context validates the Panel's view that Article XVI:2(a) and XVI:2(c) capture measures that are equivalent to a zero quota.

4. Article XIV of the GATS: General Exceptions

54. Antigua submits that the Panel did not err in interpreting Article XIV of the GATS or in applying its interpretation to the Wire Act, the Travel Act, and the Illegal Gambling Business Act.

(a) Paragraphs (a) and (c) of Article XIV: "Necessary"

55. According to Antigua, the Panel correctly found that the United States had not established that the laws in question were "necessary" within the meaning of Article XIV(a) and XIV(c) of the GATS. Antigua argues that, contrary to the United States' understanding of the Panel's conclusion, the Panel determined that the United States had failed to meet its burden of proof as to the necessity of the three federal laws, and that the lack of consultations with Antigua "was simply evidence of that failure".<sup>71</sup>

56. With respect to Article XIV(a), Antigua submits that the United States bore the burden of proving that its three federal laws were "necessary" to protect its citizens from organized crime and underage gambling in the context of the services from Antigua at issue in this dispute, but the United States submitted no evidence in this regard. Similarly, as regards Article XIV(c), it was incumbent on the United States to prove that the three federal statutes were "necessary" to secure compliance with the RICO statute in order to protect United States citizens against organized crime in the context of gambling and betting services from Antigua. Again, Antigua asserts, the United States submitted no evidence in this regard.

57. Antigua underlines that the United States would have met its burden of proof had it proven that there were no WTO-consistent alternative measures reasonably available that would provide the United States with the same level of protection. Instead, the United States argued that it was for Antigua or the Panel to establish that one or more reasonably available WTO-consistent alternatives

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<sup>69</sup> Antigua's appellee's submission, para. 64.

<sup>70</sup> *Ibid.* Antigua submits a summary of listed measures of several Schedules in Annex B of its appellee's submission.

<sup>71</sup> *Ibid.*, para. 76.

to prohibition existed.<sup>72</sup> In Antigua's submission, such a reversal of the burden of proof would not be justified in the light of previous WTO decisions examining affirmative defences.

(b) The Chapeau of Article XIV

58. Antigua recalls that it is for the party invoking an Article XIV defence to prove all elements of the defence, including the requirements laid down in the chapeau of Article XIV. According to Antigua, the United States did not accomplish this task.

59. Antigua submits that the Panel did not act inconsistently with Article 11 of the DSU in finding that, in the light of the evidence of: (i) the legality of inter-state remote access gambling under the IHA; and (ii) the non-enforcement of laws against major domestic suppliers of internet gambling services, the United States had not met its burden of proof. In particular, the IHA, on its face, allows interstate betting on horseracing over the telephone and over the internet. The United States' arguments regarding this statute amount to an assertion that the law has no legal effect and this, submits Antigua, is simply "not credible".<sup>73</sup>

60. For these reasons, Antigua requests the Appellate Body to uphold the Panel's findings that the United States did not prove that the three federal laws at issue were "necessary" within the terms of Article XIV(a) or XIV(c) of the GATS.

5. "Practice" as a "Measure"

61. With respect to the Panel's finding that practice "can be considered as an autonomous measure that can be challenged in and of itself"<sup>74</sup>, Antigua submits that this finding is *obiter dictum*.<sup>75</sup> Because, however, there may be circumstances under which the "practice" of a WTO Member should be considered as a measure for purposes of dispute resolution, Antigua requests the Appellate Body to dismiss the United States' appeal on this issue.

C. *Claims of Error by Antigua – Appellant*

1. The "Total Prohibition" as a "Measure"

62. Antigua argues that the Panel erred by failing to assess Antigua's claims on the basis of the "total prohibition" of the cross-border supply of gambling and betting services in the United States.

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<sup>72</sup>Antigua's appellee's submission, para. 89 (citing United States' appellant's submission, paras. 152-153 and 157, and footnote 227 to para. 153).

<sup>73</sup>*Ibid.*, para. 106.

<sup>74</sup>*Ibid.*, para. 108 (quoting Panel Report, para. 6.197).

<sup>75</sup>*Ibid.*, para. 109.

Antigua requests that the Appellate Body so find and that it complete the analysis and find the "total prohibition" to be inconsistent with Article XVI of the GATS.

63. According to Antigua, the Panel erroneously concluded that Antigua had not identified the "total prohibition" as a "measure" in the panel request. Antigua states that its characterization of the prohibition as "total" was "nothing but a description"<sup>76</sup> that did not alter the focus of Antigua's challenge from the outset of the dispute, which was the undisputed prohibition on the cross-border supply of gambling and betting services. Although it did not expressly state in the panel request that the "total prohibition" is a measure "in and of itself", Antigua submits that it clearly identified the "total prohibition" in the panel request in a manner consistent with panel requests previously examined by panels and the Appellate Body. In the alternative, Antigua contends that any ambiguity regarding its challenge to the "total prohibition", in and of itself, was resolved by reading its first submission to the Panel.

64. Antigua also contests the Panel's legal conclusion that, in any event, the "total prohibition" does not constitute a measure that could be challenged in and of itself in WTO dispute settlement proceedings. According to Antigua, the Panel misinterpreted *US – Corrosion-Resistant Steel Sunset Review* in finding that a measure must be an "instrument", and that the total prohibition "is a description of an effect rather than an instrument containing rules or norms."<sup>77</sup> According to Antigua, in that case, the Appellate Body regarded *any* act or omission attributable to a WTO Member as a "measure".

65. In addition, Antigua argues that the United States admitted not only the existence of the "total prohibition", but also its effect as prohibiting the cross-border supply of gambling and betting services in the United States.<sup>78</sup> The Panel's failure to accord weight to this admission is inconsistent with the Panel's obligation under Article 11 of the DSU to "make an objective assessment of the facts of the case". Antigua asserts that, on the basis of the United States' admission and the other evidence submitted to the Panel, it had met its burden of proving the existence of the "total prohibition" and its effect, and that it was entitled to proceed in making out a case that the "total prohibition", as such, is inconsistent with the United States' obligations under the GATS.

## 2. Article XVI:1 of the GATS – Conditional Appeal

66. Should the Appellate Body reverse the Panel's legal interpretation of Article XVI:2(a) and XVI:2(c) of the GATS, as requested by the United States in its appeal, Antigua seeks reversal of

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<sup>76</sup>Antigua's opening statement at the oral hearing.

<sup>77</sup>Antigua's other appellant's submission, para. 24 (referring to Panel Report, para. 6.176).

<sup>78</sup>*Ibid.*, para. 45.

the Panel's erroneous conclusion that Article XVI:2 exhaustively defines those measures that would be inconsistent with the obligation in Article XVI:1. As a result of the Panel's interpretation, Antigua argues, a Member would be permitted to maintain measures inconsistent with the broad prohibition in Article XVI:1, provided only that they are not among those listed in Article XVI:2. Antigua submits that such an interpretation reduces Article XVI:1 to an introductory clause with no legal effect of its own, contrary to the principles of treaty interpretation. Therefore, Antigua requests the Appellate Body to find that the Panel erred in concluding that Article XVI:1 is limited by Article XVI:2 of the GATS and to complete the analysis by concluding that the United States' measures are inconsistent with Article XVI:1, regardless of their consistency with Article XVI:2.

3. Article XVI:2(a) and XVI:2(c) of the GATS – Measures Aimed at Consumers

67. Antigua challenges the Panel's conclusion that measures preventing consumers from using services supplied by a service provider in another WTO Member are not inconsistent with subparagraph (a) or (c) of Article XVI:2.

68. The Panel found that certain state laws of the United States are not inconsistent with subparagraph (a) or (c) of Article XVI:2 on the ground that they are not directed at "service suppliers", nor to "service operations" and "service output", but, rather, are directed at service consumers. In Antigua's submission, if the Panel were correct in its distinction between prohibitions directed at *consumers* and those directed at *suppliers*, then a Member that has made a full commitment on mode 1 would still be able to eliminate the possibility of cross-border supply of services, and thus circumvent that commitment, by imposing restrictions on the ability of its citizens to consume those services. It is argued that this would be an "absurd" result.<sup>79</sup>

69. Instead, for the same reasons that the Panel found that a prohibition on the supply of a service falls within the scope of Article XVI:2(a) and XVI:2(c)—because it has the effect of a zero quota—the Panel should have found that a prohibition on the consumption of a service also falls within those provisions. A measure that imposes a prohibition on the consumption of services also has the effect of a zero quota on "service suppliers", "service operations" and "service output" within the meaning of Article XVI:2(a) and XVI:2(c). Antigua submits that such an interpretation nevertheless preserves Members' right to regulate because a Member that wants to maintain such a prohibition may continue to do so, provided that the Member either clarifies this in its Schedule or leaves the sector unbound.

70. Accordingly, Antigua requests the Appellate Body to reverse the findings of the Panel in paragraphs 6.383, 6.398, 6.402, and 6.406 of the Panel Report.

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<sup>79</sup>Antigua's other appellant's submission, para. 57.

4. Article XIV of the GATS: General Exceptions

71. Antigua challenges the Panel's decision to consider the defence raised by the United States under Article XIV of the GATS. Antigua also argues that the Panel erroneously relieved the United States of its burden of proof with respect to Article XIV. In so doing, the Panel denied Antigua the right to respond to the defence, contrary to principles of due process and equality of arms, and inconsistent with the Panel's duty under Article 11 of the DSU. In addition, the Panel erred in its evaluation under paragraphs (a) and (c) of Article XIV, as well as under the chapeau of Article XIV. Antigua contends that the Panel's errors in this regard include a failure to make an objective assessment of the matter and the facts before it, contrary to Article 11 of the DSU.

(a) The Panel's Consideration of the United States' Defence

72. According to Antigua, the Panel should not have evaluated the United States' defence in this proceeding. The United States' invocation of Article XIV only in its second written submission—and even then in an ambiguous manner—constituted an "extraordinary delay" and a "simple litigation tactic", contrary to the obligation in Article 3.10 of the DSU for parties to participate in dispute settlement proceedings in good faith.<sup>80</sup> Antigua emphasizes that due process requires that a party be given fair opportunity to respond to claims made and evidence submitted by the other party in a dispute, and that the delay of the United States in invoking Article XIV prejudiced Antigua's ability to rebut the defence. As an example of such prejudice, Antigua contends that the evidence and argumentation relied upon by the Panel for much of its discussion under the chapeau was originally presented by Antigua in the context of its claim under Article XVII of the GATS, relating to national treatment afforded to "like" foreign service suppliers. In this regard, Antigua asserts that Article XVII is "a different GATS provision altogether with completely different issues and context".<sup>81</sup> Therefore, those arguments may not necessarily be the same as those Antigua would have advanced had it been provided the opportunity required by due process.

(b) Burden of Proof

73. Antigua asserts that because Article XIV is an affirmative defence, the United States bears the burden of proving it. Yet, in this case, the Panel made the defence for the United States and, in doing so, failed to comply with its obligations under Article 11 of the DSU.

74. With respect to Article XIV(a), Antigua claims that the Panel added defences that the United States never made and created a coherent argument in support of the United States' defence under this

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<sup>80</sup>Antigua's other appellant's submission, para. 72.

<sup>81</sup>*Ibid.*, para. 76.

provision. Although the United States raised only *two* concerns regarding public morals or public order—organized crime and underage gambling—the Panel examined Article XIV(a) in relation to *five* concerns, including money laundering, fraud, and health concerns. Thus, the Panel added to the United States' defence three concerns that the United States itself never raised.<sup>82</sup>

75. Antigua argues that the Panel also erred in taking into account health concerns in its Article XIV(a) discussion because such concerns expressly come under the scope of Article XIV(b). With respect to Article XIV(c), Antigua contends that the United States did not identify sufficiently the RICO statute and its relevance for the United States' defence under Article XIV(c). Finally, Antigua claims that the Panel should not have addressed the chapeau of Article XIV at all, because the argumentation and evidence contained in the Panel's discussion under the chapeau was not submitted by the United States in the context of its Article XIV defence.

(c) Paragraph (a) of Article XIV

76. With regard to Article XIV(a), Antigua submits that the Panel erred in three respects: (i) it failed to consider the entire text of Article XIV(a); (ii) it improperly assessed the United States' defence under Article XIV(a), particularly in the light of the standard set out by the Appellate Body in *Korea – Various Measures on Beef*; and (iii) it failed to make an objective assessment of the evidence before it.

77. Antigua asserts that the Panel's analysis of Article XIV(a) is incomplete because, although the Panel recognized the relevance of footnote 5 to Article XIV(a) when interpreting the provision, the Panel failed to assess whether the interests that the United States purports to protect through its challenged measures meet the standard set forth in that footnote.

78. Furthermore, Antigua contends that the Panel misinterpreted the Appellate Body's decision in *Korea – Various Measures on Beef*, with respect to the standards and the level of scrutiny to be employed by a panel reviewing a defence. More specifically, in that decision, the Appellate Body established a "weighing and balancing" test with three particular components to assess whether a measure is "necessary". Yet, the Panel's analysis of the three components in this dispute falls short of the demanding inquiry outlined by the Appellate Body in that decision. Most notably, according to Antigua, in the absence of a factual finding that the United States' concerns as regards "remote" gambling relate to "actually existing" risks, the measures at issue are not justifiable under Article XIV(a).<sup>83</sup>

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<sup>82</sup>Antigua's other appellant's submission, para. 81.

<sup>83</sup>*Ibid.*, para. 96.

79. Antigua also argues that the Panel failed to make an objective assessment of the facts and evidence before it when applying the "weighing and balancing" test mandated by the Appellate Body in *Korea – Various Measures on Beef*. First, in its analysis of whether the measures at issue are designed to protect public morals or maintain public order, the Panel considered only evidence submitted by the United States, without discussing or taking into account the contrary evidence submitted by Antigua. Secondly, as to the importance of the interests or values protected, the Panel "ignored" a contemporary assessment by the United States Supreme Court of the prevailing attitude in the United States towards gambling, while taking into account Congressional hearings and political statements made more than 40 years ago.<sup>84</sup> Thirdly, the Panel relied on no evidence at all when concluding that the challenged measures contributed to the realization of the ends that the United States claimed are pursued through those measures. Finally, with respect to the trade impact of the measures, Antigua objects to the fact that none of the evidence cited by the Panel relates to factual matters involving the cross-border gambling and betting services provided specifically by Antigua. Antigua adds that "substantially all" of the evidence on this particular issue is "unsubstantiated statements of United States government employees or elected public officials"<sup>85</sup> that were taken into account by the Panel without consideration of Antiguan evidence to the contrary.

(d) Paragraph (c) of Article XIV

80. Antigua argues that the Panel should not have considered the RICO statute in its evaluation of the United States' defence under Article XIV(c) because the RICO statute is "wholly dependent" on a violation of other federal or state laws for its effective operation.<sup>86</sup> The other federal statutes before the Panel were found to be inconsistent with the GATS, and the Panel determined that no state laws were before it for consideration under Article XIV(c). As a result, Antigua reasons, no other laws could form part of the Panel's evaluation under Article XIV(c). Furthermore, the societal interest allegedly pursued by the RICO statute relates exclusively to organized crime, whereas the Panel had already determined that organized crime does not constitute a societal interest of particularly greater significance in the context of the remote (as opposed to non-remote) supply of gambling services.

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<sup>84</sup> Antigua's other appellant's submission, para. 110.

<sup>85</sup> *Ibid.*, para. 113.

<sup>86</sup> *Ibid.*, para. 127.

81. Finally, Antigua claims that, as in its analysis under Article XIV(a), the Panel did not satisfy its obligations under Article 11 of the DSU, because the Panel's conclusions were premised either on "unsubstantiated"<sup>87</sup> or "conclusory"<sup>88</sup> statements of United States government officials, or on no evidence at all.

(e) The Chapeau of Article XIV

82. With respect to the chapeau of Article XIV, Antigua argues that the Panel erred, first, in deciding to continue its evaluation of the United States' defence under the chapeau, even though the Panel had found that none of the federal laws was provisionally justified under paragraph (a) or (c) of Article XIV. Secondly, Antigua contends that the Panel improperly "segmented" the gambling industry and limited its discussion to the *remote* supply of gambling services. Instead, the Panel should have examined how the United States addresses the supply of gambling services with respect to the entire industry and compared this treatment with that given to foreign suppliers of gambling services. Finally, Antigua alleges that the Panel failed to comply with its obligations under Article 11 of the DSU by again drawing its conclusions on the basis of "unsubstantiated assertions"<sup>89</sup> of the United States, rather than on the "independent"<sup>90</sup> evidence submitted by Antigua, and thereby effectively "shift[ing]"<sup>91</sup> the burden of proof to Antigua.

83. For these reasons, Antigua requests the Appellate Body to find that the Panel erroneously considered the defence by the United States under Article XIV and, in doing so, also relieved the United States of the burden of justifying its measures under Article XIV. In the alternative, Antigua requests that the Appellate Body find that the Panel erred in its evaluation of the United States' defence under paragraphs (a) and (c) of Article XIV and the chapeau of Article XIV.

D. *Arguments by the United States – Appellee*

1. The "Total Prohibition" as a "Measure"

84. The United States agrees with the Panel that Antigua did not identify the "total prohibition" as such in its panel request and that, even if Antigua had properly identified it, a "total prohibition" cannot be a "measure in and of itself" subject to WTO dispute settlement proceedings.

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<sup>87</sup>Antigua's other appellant's submission, para. 133.

<sup>88</sup>*Ibid.*, paras. 136-137.

<sup>89</sup>*Ibid.*, para. 143.

<sup>90</sup>*Ibid.*

<sup>91</sup>*Ibid.*, para. 144.

85. The United States submits that Antigua did not challenge, in its panel request, the "total prohibition" as a distinct measure because the panel request makes clear that, in discussing a "prohibition", Antigua was referring to the *effect* of one or more laws listed in the Annex. According to the United States, therefore, the Panel correctly concluded that a challenge to the "total prohibition" as a distinct measure was beyond its terms of reference.

86. The United States claims that the Panel's conclusion—that the "total prohibition" cannot be deemed a single and autonomous measure that can be challenged in and of itself—finds support in the record in this dispute as well as in the Appellate Body's reasoning in past disputes. Both parties agreed before the Panel that the alleged "total prohibition" was a description of the purported *effect* of the laws at issue.<sup>92</sup> The effect of a measure may not itself become a "measure" subject to WTO dispute settlement. The United States adds that the Panel's conclusion in this regard is also in line with the Appellate Body's analysis in *US – Oil Country Tubular Goods Sunset Reviews*, because in this dispute, Antigua's interpretation of the effect of the United States law as a "total prohibition" has no "normative value" in United States municipal law.<sup>93</sup>

87. The United States accordingly requests that the Appellate Body reject Antigua's appeal relating to whether Antigua may rely on the "total prohibition" as a measure challenged in and of itself in this dispute. As a result, the United States submits, it is not necessary for the Appellate Body to complete the analysis on the consistency of the "total prohibition" with Article XVI of the GATS, as requested by Antigua.

## 2. Article XVI:1 of the GATS – Conditional Appeal

88. The United States requests that the Appellate Body uphold the Panel's finding that the only limitations falling within the scope of Article XVI of the GATS are those listed in paragraph 2 of Article XVI. According to the United States, Article XVI:2, on its face, exhaustively defines, by means of a "closed list", the limitations that cannot be maintained by a Member that undertook a full market access commitment.<sup>94</sup> If, as Antigua suggests, Article XVI:1 alone prohibits any limitation to the supply of services in the market of a Member, then *all* limitations would be covered by this Article. Such an interpretation would render Article XVI:2 ineffective. Therefore, the United States requests the Appellate Body to find that the Panel did not err in its interpretation of the relationship between Article XVI:1 and XVI:2 of the GATS.

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<sup>92</sup>United States' appellee's submission, para. 16 (citing Panel Report, para. 6.176).

<sup>93</sup>*Ibid.*, para. 17.

<sup>94</sup>*Ibid.*, paras. 27-28.

3. Article XVI:2(a) and XVI:2(c) of the GATS – Measures Aimed at Consumers

89. The United States supports the Panel's interpretation that sub-paragraphs (a) and (c) of Article XVI:2 do not cover measures addressed to *consumers* of services rather than to service *suppliers* or *output*. The United States emphasizes that sub-paragraphs (a) and (c) of Article XVI:2 cover only the limitations that are precisely mentioned in their text—limitations on service suppliers, operations, or output—and that a prohibition on consumers should not be read into the text of that provision. Therefore, the United States requests the Appellate Body to uphold the Panel's conclusion that sub-paragraphs (a) and (c) of Article XVI:2 do not cover measures directed towards consumers of services.

4. Article XIV of the GATS

90. The United States requests that the Appellate Body reject Antigua's appeal with respect to Article XIV of the GATS in its entirety. In particular, the United States asserts that the Panel correctly decided to consider the United States' arguments under Article XIV, and the Panel did not make the defence for the United States. The United States submits further that the Panel's evaluation of the United States' "concerns" under paragraph (a) of Article XIV was consistent with previous WTO decisions examining general exceptions, and that the Panel properly recognized that the RICO statute operated independently of other federal and state laws. With respect to the chapeau of Article XIV, the United States contends that Antigua has failed to identify how the Panel erred in allegedly "segment[ing]" the industry.<sup>95</sup>

(a) The Panel's Consideration of the United States' Defence

91. According to the United States, the Panel properly considered the United States' defence under Article XIV. The United States emphasizes that Antigua had sufficient opportunity to respond to the defence after the United States invoked Article XIV in its second written submission to the Panel. The United States argues that this is confirmed by the fact that Antigua made no allegation of prejudice to its interests as a result of the alleged tardiness of the United States in raising its Article XIV defence. The United States finds support in the WTO decisions where it is established that the complaining party can bring new arguments in its second submission or even later.<sup>96</sup>

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<sup>95</sup>United States' appellee's submission, para. 78.

<sup>96</sup>*Ibid.*, para. 37 (citing Appellate Body Report, *EC – Bananas III*, para. 145; and Appellate Body Report, *Chile – Price Band System*, paras. 154-162).

(b) Burden of Proof

92. The United States agrees with Antigua that panels cannot make the case for a complaining party. The United States argues that, contrary to Antigua's arguments, the United States met its burden of proof and did not leave it to the Panel to prove the Article XIV defence. In addition, the United States contests Antigua's submission that the Panel acted inconsistently with the principles of due process and the equality of arms, and with Article 11 of the DSU.

93. The United States asserts that it provided evidence of how the relevant statutes were enacted and the operation and purpose of each statute. The United States also contends that it made arguments regarding the relevant legal standards under Article XIV and provided argumentation and evidence that the specific measures satisfy the legal requirements of an Article XIV defence.

94. According to the United States, all five concerns acknowledged by the Panel with respect to gambling activities had been identified by the United States in its submissions to the Panel. Thus, in recognizing these concerns, the Panel did nothing more than what the United States requested it to do. With respect to the "health concerns", the United States asserts that the health risks associated with addiction to gambling fall within the scope of protection of public morals and/or public order under Article XIV(a), and the Panel was correct in so finding. Finally, regarding the chapeau of Article XIV, the United States asserts that it did allege that the United States' measures satisfy the requirements set out in the chapeau of Article XIV and referred the Panel to evidence in support of its claim.<sup>97</sup>

(c) Paragraph (a) of Article XIV

95. The United States disagrees with Antigua's allegations of error regarding certain aspects of the Panel's analysis under paragraph (a) of Article XIV. The United States contends that it provided specific evidence of grave threats to public morals and public order, and made an argument that the evidence provided met the specific requirements of Article XIV(a), including its footnote 5. According to the United States, the Panel fully understood and applied the requirements laid down in footnote 5 of Article XIV, as is evident from its discussion in the Panel Report. Furthermore, the Panel correctly applied the "weighing and balancing" test from the Appellate Body's decision in *Korea – Various Measures on Beef*. The United States argues that, in doing so, the Panel found, first, that the concerns identified by the United States "actually did exist"<sup>98</sup> with respect to the remote

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<sup>97</sup>United States' appellee's submission, para. 48 (referring to United States' appellant's submission, para. 187, and United States' second submission to the Panel, paras. 117-122).

<sup>98</sup>*Ibid.*, para. 55.

supply of gambling services; secondly, that prohibiting this activity contributes to the realization of the ends pursued; and thirdly, that potential alternatives to the measures at issue existed.<sup>99</sup>

(d) Paragraph (c) of Article XIV

96. In the same vein, the United States argues that the Appellate Body should dismiss Antigua's appeal with respect to the Panel's findings under Article XIV(c). The United States contests Antigua's characterization that the RICO statute depends on other laws for its effective operation, stating instead that the RICO statute imposes criminal liability not only for gambling under state laws, but also for other acts not related to gambling or to other prohibitions under the laws of the states. Thus, according to the United States, the RICO statute "has independent meaning and protects independent interests and values apart from any other law."<sup>100</sup> In addition, the United States argues, the "ends pursued" by the RICO statute include remote supply of gambling as well as organized crime, and Antigua is incorrect in its assumption that the "ends pursued" by a law being enforced must relate only to the precise service to which the enforcement measure applies. Finally, the United States asserts that Antigua's claims under Article 11 of the DSU do not meet the "high standard of argumentation required of Article 11 claims"<sup>101</sup> and appear to hinge on the notion that the Panel was wrong to give weight to statements by United States government officials and testimony before Congress.

(e) The Chapeau of Article XIV

97. The United States requests that the Appellate Body dismiss Antigua's appeal with respect to the chapeau of Article XIV of the GATS. According to the United States, Antigua did not explain in its other appellant's submission where and how the Panel allegedly "segmented" the industry, nor did Antigua provide a legal basis for its argument that a panel may not segment an industry in its evaluation. The United States also submits that Antigua's claims with respect to the Panel's alleged failure to comply with Article 11 of the DSU do not meet the "high standard" required of successful claims under that provision relating to a panel's assessment of evidence.<sup>102</sup>

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<sup>99</sup>This last finding is challenged by the United States in its appellant's submission. See *supra*, paras. 29-34.

<sup>100</sup>United States' appellee's submission, para. 71.

<sup>101</sup>*Ibid.*, para. 76.

<sup>102</sup>*Ibid.*, para. 80.

E. *Arguments of the Third Participants*

1. European Communities

98. The European Communities agrees with the Panel's conclusions regarding the interpretation of the United States' Schedule of specific commitments. The European Communities further supports the Panel's conclusion that Article XVI:2(a) and XVI:2(c) of the GATS prohibit measures that have the effect of a quota, even if they are not expressly cast in the form of numerical ceilings. In the European Communities' submission, however, the Panel erred in ruling that measures directed at consumers may not be limitations within the terms of Article XVI:2(a) and XVI:2(c) and, therefore, the Appellate Body should correct this finding. In addition, if the Appellate Body reaches the issue of the Panel's interpretation and application of Article XIV of the GATS, the European Communities would encourage it to review fully the Panel's reasoning.

99. The European Communities contests the United States' challenge to the Panel's interpretation of the United States' Schedule of specific commitments. The European Communities asserts that Members' Schedules form an integral part of the *WTO Agreement* and constitute an agreement of all the Members. Therefore, the Panel correctly resorted to the interpretative rules of the *Vienna Convention* when evaluating the United States' commitments in its Schedule. In particular, the European Communities argues, the Panel correctly followed Article 33 of the *Vienna Convention* in comparing the terms of the Schedule used in the French and Spanish texts.

100. The European Communities disagrees, however, with the Panel's characterization of W/120 and the 1993 Scheduling Guidelines. According to the European Communities, the fact that Members entrusted the GATT Secretariat with producing a document, and that Members used such a document for negotiations, cannot render that document one produced *by the Members themselves*. Therefore, the European Communities submits, W/120 and the 1993 Scheduling Guidelines are better understood as "preparatory work" within the meaning of Article 32 of the *Vienna Convention*. Nevertheless, according to the European Communities, qualifying W/120 and the 1993 Scheduling Guidelines as preparatory work does not alter the Panel's conclusion regarding the scope of the United States' commitments.

101. The European Communities agrees with the Panel that Article XVI:2(a) and XVI:2(c) cover measures that are not expressly cast in the form of numerical ceilings, because a contrary interpretation would permit Members easily to evade market access commitments undertaken in their Schedules. The European Communities argues, however, that the Panel erred in interpreting the scope of sub-paragraphs (a) and (c) of Article XVI:2. The European Communities contends that the GATS covers not only measures regulating trade in services, but also those measures "affecting" trade

in services. Such a measure may include a prohibition on the consumption of a given service, which, although directed at consumers, has the effect of restricting the activity of suppliers. The European Communities finds no limitation in sub-paragraph (a) or (c) that suggests that measures may not be covered "by reason of their impact".

102. Regarding Article XIV of the GATS, the European Communities contends that this Article seeks to preserve the right of WTO Members to regulate the supply of services. The European Communities contends that Article XIV is to be interpreted in the light of the pertinent *acquis* with regard to Article XX of the GATT 1994, as the wording and function of the two Articles correspond closely. Should the Appellate Body reach this issue, the European Communities requests that it make a "full review" of the Panel's reasoning and of the justification for the Article XIV defence, based on the uncontested facts and evidence on record.<sup>103</sup>

103. The European Communities asserts that consultations with other Members "cannot be an absolute condition to justify a measure under GATS Article XIV".<sup>104</sup> Contrary to the finding of the Panel, neither Article XIV nor the United States' market access commitment in its Schedule supports such a conclusion. Nevertheless, a respondent may rely on a good faith attempt to negotiate a resolution with other Members as evidence in support of its claim that it explored reasonably available WTO-consistent alternatives before adopting a particular WTO-inconsistent measure. According to the European Communities, however, such evidence would be insufficient, on its own, to show that reasonable alternatives were exhausted.

104. With respect to the Panel's conclusions on the chapeau of Article XIV, the European Communities emphasizes that evidence of a limited number of cases of non-enforcement against domestic business operators in comparable situations would not *ipso facto* rebut a *prima facie* case of consistency of a measure with the chapeau. The European Communities contrasts that situation with one where a complaining party demonstrates a discernible pattern of application of a measure to the detriment of foreign operators in comparable situations. Although enforcement in all cases may not be practicable for a number of legitimate reasons, Members' authorities can and should be expected to intervene and correct enforcement that has occurred on a discriminatory basis against foreign operators.

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<sup>103</sup>European Communities' third participant's submission, para. 49.

<sup>104</sup>*Ibid.*, paras. 14 and 91.

2. Japan

105. Japan agrees with the Panel's conclusions relating to the commitments in the United States' Schedule and the interpretation of Article XVI:1 and XVI:2. Japan contends that the Panel erred, however, with respect to its interpretation and application of Article XIV.

106. Japan submits that W/120 and the 1993 Scheduling Guidelines are "context" or "preparatory work" for the interpretation of Members' GATS Schedules. In the absence of language in the United States' Schedule expressly indicating a departure from W/120 or providing an alternative definition, the Panel was correct to turn to W/120 and the corresponding CPC numbers in order to give meaning to the terms in the United States' Schedule. In doing so, however, the Panel should not have referred to French and Spanish translations of "sporting", because the United States' Schedule clearly indicates it to be "authentic in English only". Nevertheless, Japan supports the Panel's conclusion that the United States undertook in its Schedule a commitment regarding gambling and betting services.

107. Japan submits that the Panel properly understood the relationship between Article XVI:1 and XVI:2, namely, that the limitations specified in Article XVI:2 are exhaustive of the measures covered by Article XVI:1. In addition, Japan agrees with the Panel that measures having the *effect*—even if not the form—of a quota may also be prohibited by virtue of sub-paragraphs (a) and (c) of Article XVI:2, but that these provisions do not cover measures imposed on service *consumers* rather than on "service suppliers", "service operations", or "service output".

108. Japan argues that the Panel erred in its interpretation of Article XIV by imposing a requirement that a Member must "explore and exhaust"<sup>105</sup> less trade-restrictive alternatives to the measure at issue. Furthermore, the Panel erroneously concluded that a Member is obliged to engage in multilateral consultations, including with non-complaining Members, to identify less trade-restrictive alternatives prior to and during application of the challenged measure. Japan submits that these conclusions of the Panel, if upheld by the Appellate Body, would undermine Members' rights and obligations under the *WTO Agreement*.

109. According to Japan, the focus of GATT and WTO decisions regarding Article XX of the GATT 1994 has been whether, as a matter of the objective evidence before the panel, reasonably available alternative measures *existed* not the extent to which they have been *explored* before adopting the challenged measure. The Panel, however, disregarded this approach and added the "explore and exhaust" standard as a new "open-ended requirement".<sup>106</sup> According to Japan, this resulted from the Panel's misinterpretation of the Appellate Body's decision in *Korea – Various*

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<sup>105</sup> Japan's third participant's submission, para. 8 (quoting Panel Report, para. 6.496).

<sup>106</sup> *Ibid.*, para. 12.

*Measures on Beef* and the Panel's improper reliance on the unadopted report of the GATT panel in *US – Tuna (Mexico)*. Japan emphasizes that this new requirement would go well beyond the negotiated commitments of WTO Members.

110. Japan also disagrees with the Panel's findings that Members invoking the affirmative defence of Article XIV must enter into multilateral consultations to identify less trade-restrictive alternatives. According to Japan, the Panel's approach is a "substantial departure"<sup>107</sup> from the obligations contained in the covered agreements and from the relevant GATT and WTO decisions.

### 3. Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

111. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requests the Appellate Body to reverse the Panel's findings that the prohibitions of Article XVI:2(a) and XVI:2(c) include all measures that may have an "effect" on the Member's market access commitments. Furthermore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requests that the Appellate Body reverse the Panel's erroneous conclusion under Article XIV(a) and XIV(c) that Members are required to consult with other Members concerning possible alternative WTO-consistent measures.

112. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu supports the United States' reading of Article XVI:2(a) and XVI:2(c). The text of these provisions suggests that the treaty drafters did not intend to cover *all* measures that can have an effect on market access. Although the Panel appeared to recognize this understanding when it found that Article VI and Article XVI are mutually exclusive provisions, the Panel "contradict[ed]"<sup>108</sup> itself by subsequently concluding that a measure with *any* effect on market access falls within the scope of Article XVI:2. Furthermore, the Panel disregarded the fact that the United States' measures "*in totality* regulate the means of supply for a specific sector, rather than creating a quota system" for foreign service suppliers, as would be required in order to bring the measures within the text of Article XVI:2(a) and XVI:2(c).<sup>109</sup>

113. In addition, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu disagrees with the Panel's interpretation of the term "necessary" in Article XIV(a) and (c) as requiring Members to conduct consultations with other Members to identify alternative WTO-consistent measures. The Panel erroneously found that the standard for the "necessity" test in paragraphs (a) and (c) of Article XIV is whether a reasonably available WTO-consistent alternative has been "explored and

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<sup>107</sup>Japan's third participant's submission, para. 14.

<sup>108</sup>Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, para. 6.

<sup>109</sup>*Ibid.*, para. 9. (original emphasis)

exhausted"<sup>110</sup> by the Member in question. This interpretation contravenes the Appellate Body rulings in *EC – Asbestos* and *Korea – Various Measures on Beef*. Based on this erroneous understanding of the "necessity" requirement, the Panel constructed a similarly erroneous requirement of consultations. In addition, the Panel erred in basing its conclusion, in part, on the fact that a commitment has been undertaken in the United States' Schedule. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu asserts that Article XIV allows Members to deviate not only from their general obligations, but also from their specific commitments, in order to pursue legitimate national objectives through measures that would otherwise be inconsistent with the GATS.

### III. Issues Raised in This Appeal

114. The following issues are raised in this appeal:

- (A) with respect to the measures at issue,
- (i) whether the Panel erred in finding that the 'total prohibition on the cross-border supply of gambling and betting services' alleged by Antigua was neither capable of constituting an autonomous measure that can be challenged in and of itself, nor identified as a measure in Antigua's request for the establishment of a panel;
  - (ii) whether the Panel erred in examining the consistency of the following measures with the United States' obligations under Article XVI of the GATS:
    - (a) Federal laws:
      - (1) Section 1084 of Title 18 of the United States Code (the "Wire Act");
      - (2) Section 1952 of Title 18 of the United States Code (the "Travel Act"); and
      - (3) Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act", or "IGBA").

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<sup>110</sup>Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, para. 13.

- (b) State laws:
- (1) Colorado: Section 18-10-103 of the Colorado Revised Statutes;
  - (2) Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);
  - (3) Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;
  - (4) Minnesota: Section 609.755(1) and Subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated);
  - (5) New Jersey: Paragraph 2 of Section VII of Article 4 of the New Jersey Constitution, and Section 2A:40-1 of the New Jersey Code;
  - (6) New York: Section 9 of Article I of the New York Constitution and Section 5-401 of the New York General Obligations Law;
  - (7) South Dakota: Sections 22-25A-1 through 22-25A-15 of the South Dakota Codified Laws; and
  - (8) Utah: Section 76-10-1102 of the Utah Code (Annotated);

(iii) whether, by undertaking such an examination of the above measures, the Panel acted inconsistently with its obligations under Article 11 of the DSU;

(B) with respect to the United States' GATS Schedule,

(i) whether the Panel erred in finding that subsector 10.D of the United States' GATS Schedule includes specific commitments with respect to gambling and betting services;

(C) with respect to Article XVI of the GATS,

(i) whether the Panel erred in its interpretation of sub-paragraphs (a) and (c) of Article XVI:2 of the GATS and, in particular:

- (a) in finding that a prohibition on the remote supply of gambling and betting services constitutes a "zero quota" on the supply of such services by particular means, and that such a "zero quota" is a limitation that falls within sub-paragraphs (a) and (c) of Article XVI:2;
  - (b) in finding that measures imposing criminal liability on *consumers* of cross-border gambling and betting services are not inconsistent with sub-paragraphs (a) and (c) of Article XVI:2 and, in finding for that reason, that the relevant laws of the states of Colorado, Minnesota, New Jersey, and New York are not inconsistent with those provisions;
  - (ii) if the Appellate Body reverses the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2, then whether the Panel erred in finding that the restrictions on market access that are prohibited by Article XVI are limited to those listed in Article XVI:2; and
  - (iii) whether the Panel erred in applying its interpretation of Article XVI to relevant United States federal and state laws so as to find them inconsistent with the United States' obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2;
- (D) with respect to Article XIV of the GATS,
- (i) whether, in considering the United States' defence under Article XIV, and in its analysis under that provision, the Panel failed to satisfy its obligations under Article 11 of the DSU;
  - (ii) whether the Panel improperly allocated the burden of proof under Article XIV;
  - (iii) whether the Panel erred in finding that the United States did not demonstrate that the Wire Act, the Travel Act, and the IGBA are necessary to protect public morals or to maintain public order within the meaning of Article XIV(a);
  - (iv) whether the Panel erred in finding that the United States did not demonstrate that the Wire Act, the Travel Act, and the IGBA are necessary to secure

compliance with laws or regulations which are not inconsistent with the GATS, within the meaning of Article XIV(c); and

- (v) whether the Panel erred in finding that the United States did not demonstrate that the Wire Act, the Travel Act, and the IGBA satisfy the requirements of the chapeau of Article XIV.

#### IV. Measures at Issue

115. We begin with the participants' appeals relating to the measures at issue. First, we review the Panel's finding that the "'total prohibition' on the cross-border supply of gambling and betting services" (the "total prohibition"<sup>111</sup>) cannot constitute an autonomous measure that can be challenged *per se*.<sup>112</sup> Next, we consider whether the Panel erred in stating that "'practice' can be considered as an autonomous measure that can be challenged in and of itself".<sup>113</sup> Finally, we evaluate the United States' allegation that Antigua failed to make a *prima facie* case of inconsistency with Article XVI with respect to certain federal and state laws and that, therefore, the Panel should not have ruled on these claims.

##### A. "Total Prohibition" as a Measure

116. In its panel request, Antigua identified the "total prohibition" as the "effect" of various United States federal and state laws.<sup>114</sup> In its first written submission, Antigua claimed that it was not necessary to show that these laws produced the effect of a "total prohibition" because the United States Ambassador had acknowledged, during the DSB meeting considering Antigua's first panel request, the existence of such a prohibition.<sup>115</sup> Therefore, Antigua asserted, "[t]he subject of this dispute is the *total prohibition on the cross-border supply of gambling and betting services*—and the parties are in agreement as to the existence of that total prohibition."<sup>116</sup>

117. In the course of responding to a United States request for preliminary rulings, prompted by alleged deficiencies in Antigua's description of the measures it was challenging, the Panel stated:

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<sup>111</sup>The Panel refers throughout the Panel Report to the "'total prohibition' on the cross-border supply of gambling and betting services" as the "total prohibition". (See, for example, Panel Report, paras. 6.139 and 6.154) In this Report we use the term "total prohibition" in the same manner.

<sup>112</sup>Panel Report, para. 6.175.

<sup>113</sup>*Ibid.*, para. 6.197.

<sup>114</sup>Request for Establishment of a Panel by Antigua and Barbuda, WT/DS285/2, 13 June 2003, p. 1.

<sup>115</sup>Antigua's first written submission to the Panel, para. 136 (citing Minutes of the DSB Meeting held on 24 June 2003, WT/DSB/M/151, p. 11).

<sup>116</sup>*Ibid.*, para. 136. (original emphasis)

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.<sup>117</sup>

In its responses to the Panel's first set of questions, and in its second written submission to the Panel, Antigua asserted that it was challenging the "total prohibition" as a "measure in and of itself".<sup>118</sup> Antigua disputed the United States' contention that the "total prohibition" could not constitute a measure *per se* for purposes of WTO dispute settlement.<sup>119</sup>

118. In its report, the Panel found that, "in the circumstances of this case", a "total prohibition" could not constitute a "measure" *per se*.<sup>120</sup> The Panel based its conclusion on three factors. First, the Panel found that the "total prohibition" did not constitute an "instrument containing rules or norms".<sup>121</sup> Secondly, the Panel stated that Antigua had not sufficiently identified the "total prohibition" in its panel request as a measure at issue, including the precise relevant United States laws that give rise to this prohibition.<sup>122</sup> Thirdly, the Panel stated that it "fail[ed] to see how the United States could be requested to implement a DSB recommendation to bring a 'prohibition' into compliance with the GATS pursuant to Article 19.1 of the DSU when an imprecisely defined 'puzzle' of laws forms the basis of the 'total prohibition'".<sup>123</sup>

119. Antigua appeals the Panel's finding and emphasizes that Article XXVIII(a) of the GATS defines a "measure" broadly, as do the Appellate Body's decisions in *US – Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Reviews*. Antigua also relies on the alleged "concessions"<sup>124</sup> made by the United States Ambassador during DSB meetings in her statements responding to Antigua's panel requests. Antigua argues that, in the light of this statement, the Panel erred in not proceeding to evaluate Antigua's challenge on the basis of the "total prohibition". Antigua therefore requests the Appellate Body to reverse the Panel's finding that

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<sup>117</sup>Panel's decision on the United States' request for preliminary rulings, para. 17, Panel Report, p. B-4. The Panel did not grant the United States' request to invite Antigua to file another submission detailing with greater specificity the measures being challenged. The Panel also made no ruling relating to the "total prohibition" as a measure *per se*.

<sup>118</sup>Antigua's response to Question 10 posed by the Panel, Panel Report, p. C-34; Antigua's second written submission to the Panel, para. 8.

<sup>119</sup>Antigua's second written submission to the Panel, paras. 9-18.

<sup>120</sup>Panel Report, para. 6.175.

<sup>121</sup>*Ibid.*, 6.176 (citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-82 and 88).

<sup>122</sup>*Ibid.*, paras. 6.177-6.180.

<sup>123</sup>*Ibid.*, para. 6.182 (quoting Antigua's response to Question 32 posed by the Panel, Panel Report, p. C-58).

<sup>124</sup>Antigua's other appellant's submission, para. 48.

Antigua was not entitled to rely on the "total prohibition" as a measure *per se* in this dispute. Antigua further requests the Appellate Body to complete the analysis with respect to the consistency of the "total prohibition" with Article XVI.<sup>125</sup>

120. The question before us, therefore, is whether an alleged "total prohibition" on the cross-border supply of gambling and betting services constitutes a measure that may be challenged under the GATS.<sup>126</sup>

121. The DSU provides for the "prompt settlement" of situations where Members consider that their benefits under the covered agreements "are being impaired by *measures* taken by another Member".<sup>127</sup> Two elements of this reference to "measures" that may be the subject of dispute settlement are relevant. First, as the Appellate Body has stated, a "nexus" must exist between the responding Member and the "measure", such that the "measure"—whether an act or omission—must be "attributable" to that Member.<sup>128</sup> Secondly, the "measure" must be the *source* of the alleged impairment, which is in turn the *effect* resulting from the existence or operation of the "measure".

122. Similarly, consultations at the outset of a dispute are based on:

... measures affecting the operation of any covered agreement taken within the territory [of the responding Member].<sup>129</sup>

This provision contemplates that "measures" themselves will "affect" the operation of a covered agreement. Finally, we note that this distinction between measures and their effects is also evident in the scope of application of the GATS, namely, to "measures by Members affecting trade in services".<sup>130</sup>

123. We are therefore of the view that the DSU and the GATS focus on "measures" as the subject of challenge in WTO dispute settlement. To the extent that a Member's complaint centres on the effects of an action taken by another Member, that complaint must nevertheless be brought as a challenge to the *measure* that is the source of the alleged effects.

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<sup>125</sup> Antigua's other appellant's submission, para. 51.

<sup>126</sup> Panel Report, para. 6.175.

<sup>127</sup> Article 3.3 of the DSU. (emphasis added)

<sup>128</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

<sup>129</sup> Article 4.2 of the DSU.

<sup>130</sup> Article I:1 of the GATS.

124. Viewed in this light, the "total prohibition" described by Antigua does not, in itself, constitute a "measure". As Antigua acknowledged before the Panel<sup>131</sup> and on appeal<sup>132</sup>, the "total prohibition" is the *collective effect* of the operation of several state and federal laws of the United States. And it is the "total prohibition" itself—as the *effect* of the underlying laws—that constitutes the alleged impairment of Antigua's benefits under the GATS.

125. We note also that, if the "total prohibition" were a measure, a complaining party could fulfil its obligation to identify the "specific measure at issue", pursuant to Article 6.2 of the DSU, merely by explicitly mentioning the "prohibition". Yet, without knowing the precise source of the "prohibition", a responding party would not be in a position to prepare adequately its defence, particularly where, as here, it is alleged that numerous federal and state laws underlie the "total prohibition".

126. Therefore, we conclude that, without demonstrating the source of the prohibition, a complaining party may not challenge a "total prohibition" as a "measure", *per se*, in dispute settlement proceedings under the GATS. Accordingly, we *uphold* the Panel's finding, in paragraph 6.175 of the Panel Report, that "the alleged 'total prohibition' on the cross-border supply of gambling and betting services describes the alleged effect of an imprecisely defined list of legislative provisions and other instruments and cannot constitute a single and autonomous 'measure' that can be challenged in and of itself".

127. Antigua also contests the Panel's finding that Antigua could not rely on the "total prohibition" as a measure in this dispute because Antigua had failed to identify such a measure in its panel request.<sup>133</sup> Having found that, in any event, the "total prohibition", as posited by Antigua, is not a measure that can be challenged in itself, we *need not rule* on whether Antigua's panel request identifies the "total prohibition" as a specific measure at issue in this dispute, as would be required by Article 6.2 of the DSU.

128. Finally, Antigua challenges, under Article 11 of the DSU, the Panel's failure to accord sufficient weight to the alleged United States admission as to the existence of a "total prohibition". Antigua advances this contention in the context of its broader claim on appeal that the Panel erred in not considering the "total prohibition" as "measure". Because, however, we have upheld this finding

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<sup>131</sup>See page 1 of Antigua's Request for the Establishment of a Panel, *supra*, footnote 114; Antigua's response to Question 10 posed by the Panel, Panel Report, p. C-34; Antigua's first written submission to the Panel, paras. 140-143.

<sup>132</sup>Antigua's other appellant's submission, paras. 5, 43, and 45; Antigua's opening statement at the oral hearing.

<sup>133</sup>Panel Report, para. 6.171.

of the Panel, we *need not consider* whether the Panel satisfied its duties under Article 11 of the DSU, in its treatment of the alleged "admission" by the United States.

B. *"Practice" as a Measure*

129. In the course of examining what measures Antigua was challenging in this dispute, the Panel relied on certain Appellate Body decisions in support of its view that "'practice' can be considered as an autonomous measure that can be challenged in and of itself".<sup>134</sup> The Panel then observed that certain acts identified by Antigua could constitute "practices", as that term had been understood by the panel in *US – Corrosion-Resistant Steel Sunset Review*. However, based on Antigua's clarification in its comments to the United States' request for preliminary rulings, the Panel concluded that Antigua was "not challenging [any] practice[] 'as such'".<sup>135</sup>

130. The United States challenges the Panel's view that "practice" may be challenged in and of itself.<sup>136</sup> Antigua agrees with the Panel that "practice" can be challenged, as such, in WTO dispute settlement, but submits that in this case "this issue appeared to be without any real context" and, therefore, that the Appellate Body need not pronounce on it.<sup>137</sup>

131. We disagree with the participants' characterization of the Panel's statement on "practice", in paragraph 6.197 of the Panel Report, as a "finding" of the Panel.<sup>138</sup> The Panel itself acknowledged that, in any case, Antigua was not challenging a practice, as such. In this light, the Panel's statement on "practice", in our view, was a mere *obiter dictum*, and we need not rule on it.

132. We nevertheless express our disagreement with the Panel's understanding of previous Appellate Body decisions. The Appellate Body has *not*, to date, pronounced upon the issue of whether "practice" may be challenged, as such, as a "measure" in WTO dispute settlement.<sup>139</sup>

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<sup>134</sup>Panel Report, para. 6.197 (citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 97; Appellate Body Report, *US – Carbon Steel*, para. 157; and Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 162).

<sup>135</sup>*Ibid.*, para. 6.198.

<sup>136</sup>United States' appellant's submission, para. 205.

<sup>137</sup>Antigua's response to questioning at the oral hearing.

<sup>138</sup>See also Appellate Body Report, *US – Wool Shirts and Blouses*, p. 17, DSR 1997:I, 323, at 338.

<sup>139</sup>Indeed, this was said explicitly in paragraph 220 of the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*.

C. *Antigua's Prima Facie Case*

133. We examine next the United States' claim on appeal that Antigua failed to establish a *prima facie* case of inconsistency with Article XVI of the GATS, with respect to the eight state laws and the three federal laws that the Panel determined were the measures that it should examine.

134. Antigua's panel request listed nine federal laws and eighty-four other laws from all fifty states, as well as from the District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands.<sup>140</sup> In seeking to identify, from this list, the measures that were the subject of Antigua's claims, the Panel explained that it had:

... perused all of Antigua's submissions, including footnotes to those submissions and exhibits submitted by Antigua, with a view to identifying which of the 93 laws listed in its Panel request we should consider in determining whether or not the United States is in violation of its obligations under the GATS.<sup>141</sup>

135. The Panel found that certain state laws that had been mentioned by Antigua in its submissions, but which were *not* identified in the panel request, were not properly before the Panel.<sup>142</sup> The Panel also found that certain state and federal laws, although mentioned in the panel request, had been only briefly discussed in summaries attached to the texts of the laws submitted by Antigua.<sup>143</sup> In the Panel's view, these brief summaries were inadequate to explain how the laws allegedly resulted in a GATS-inconsistent prohibition on the cross-border supply of gambling services.<sup>144</sup>

136. The Panel then reviewed laws that had been mentioned in the panel request *and* that were discussed in Antigua's submissions. The Panel concluded that the Wire Act, the Travel Act, and the IGBA were identified sufficiently by Antigua because Antigua's "discussions indicate[d] according to which particular provisions and how the laws allegedly result in a prohibition on the cross-border supply of gambling and betting services."<sup>145</sup> On the same basis, the Panel determined that Antigua had identified as part of its case certain laws of Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota, and Utah.<sup>146</sup>

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<sup>140</sup>See pages 3 to 7 of Antigua's Request for Establishment of a Panel, *supra*, footnote 114.

<sup>141</sup>Panel Report, para. 6.209.

<sup>142</sup>*Ibid.*, para. 6.214.

<sup>143</sup>*Ibid.*, para. 6.216.

<sup>144</sup>*Ibid.*, para. 6.217.

<sup>145</sup>*Ibid.*, para. 6.223.

<sup>146</sup>*Ibid.*, paras. 6.226, 6.229, 6.232, 6.235, 6.239, 6.242, 6.245, and 6.248.

137. The United States contends that, in taking this approach, the Panel itself improperly made Antigua's *prima facie* case of inconsistency with Article XVI of the GATS. The United States claims that Antigua did not argue before the Panel how the laws eventually selected for review by the Panel constituted a "total prohibition" on the cross-border supply of gambling services. Finally, the United States argues, as Antigua's case throughout the panel proceedings was based on the existence of a "total prohibition", Antigua's arguments focused on allegations that the "total prohibition" is itself inconsistent with various provisions of the GATS. According to the United States, this meant that Antigua failed to allege that any of the *individual* measures discussed by the Panel is inconsistent with Article XVI of the GATS.

138. The complaining party bears the burden of proving an inconsistency with specific provisions of the covered agreements.<sup>147</sup> With respect to arguments and the production of evidence, we note the following statement of the Appellate Body 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.<sup>148</sup> (footnote omitted)

139. Where the complaining party has established its *prima facie* case, it is then for the responding party to rebut it.<sup>149</sup> A panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case.<sup>150</sup>

140. A *prima facie* case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim.<sup>151</sup> A complaining party may not

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<sup>147</sup> Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66.

<sup>148</sup> Appellate Body Report, *US – Carbon Steel*, para. 157 (citing Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335).

<sup>149</sup> Appellate Body Report, *EC – Hormones*, para. 98; Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335.

<sup>150</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

<sup>151</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, 323, at 336. (emphasis added) As not every claim of WTO-inconsistency will consist of the same elements, "the nature and scope of evidence required to establish a *prima facie* case 'will necessarily vary from measure to measure, provision to provision, and case to case'". (Appellate Body Report, *Japan – Apples*, para. 159 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335))

simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency.<sup>152</sup> Nor may a complaining party simply allege facts without relating them to its legal arguments.

141. In the context of the sufficiency of panel requests under Article 6.2 of the DSU, the Appellate Body has found that a panel request:

... must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits.<sup>153</sup>

Given that such a requirement applies to panel requests at the outset of a panel proceeding, we are of the view that a *prima facie* case—made in the course of submissions to the panel—demands no less of the complaining party. The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.

142. Antigua's case focused on Article XVI:2 of the GATS and, in particular, its sub-paragraphs (a) and (c). The relevant provisions provide:

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

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

...

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test  
... (footnotes omitted)

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<sup>152</sup>In *Canada – Wheat Exports and Grain Imports*, para. 191, the Appellate Body made a similar observation in the context of an appeal under Article 11 of the DSU:

... it is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation—the evidence—on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.

<sup>153</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

143. This text suggests that Antigua was required to make its *prima facie* case by first alleging that the United States had undertaken a market access commitment in its GATS Schedule; and, secondly, by identifying, with supporting evidence, how the challenged laws constitute impermissible "limitations" falling within Article XVI:2(a) or XVI:2(c).

144. In the present case, the Panel determined that Antigua could not pursue its claim on the basis of the "total prohibition" as the measure at issue.<sup>154</sup> In our view, the Panel was correct in so concluding.<sup>155</sup> In order for the Panel properly to continue with its analysis, then, Antigua was required to make its *prima facie* case with respect to *specific* federal and state laws identified in its panel request.

145. In its written submissions to the Panel, Antigua asserted that the United States had "made a full commitment [in its GATS Schedule] to the cross-border supply of gambling and betting services"<sup>156</sup> along with references to the relevant sector of that Schedule.<sup>157</sup> This assertion, in our view, satisfies the first requirement of Antigua's *prima facie* case under Article XVI:2.<sup>158</sup>

146. As to the second requirement of the *prima facie* case, Antigua's claims under sub-paragraphs (a) and (c) of Article XVI:2, as regards individual laws rather than the "total prohibition", are set out in the following paragraph from its second written submission to the Panel:

The individual legislative and regulatory provisions, applications thereof and related practices that make up the United States' total prohibition are also caught by both Article XVI:2(a) and XVI:2(c) as separate "measures" ....

- Federal laws specifically prohibiting "cross-border" supply function like an establishment requirement and are therefore the equivalent of a zero quota for cross-border supply
- State laws that prohibit all gambling, in combination with other state laws that exempt specifically authorised gambling without providing a possibility for Antiguan operators to obtain an authorisation to supply gambling services on a cross-border basis, are the equivalent of a zero quota for cross-border supply
- Several state laws or regulations explicitly establish numerical quotas

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<sup>154</sup>Panel Report, para. 6.171.

<sup>155</sup>*Supra*, paras. 120-126.

<sup>156</sup>Antigua's first written submission to the Panel, para. 181.

<sup>157</sup>*Ibid.*, paras. 160-163.

<sup>158</sup>*Supra*, para. 143.

- Several laws or regulations expressly grant exclusive or special rights to operators of domestic origin
- Several state laws require the physical presence of the operator within the territory of the state and, in doing so, constitute a zero quota for cross-border supply.<sup>159</sup> (footnotes omitted)

147. We begin our examination of the challenged measures with the three federal laws, namely, the Wire Act, the Travel Act, and the IGBA. We observe that Antigua submitted the texts of these statutes and explained its understanding of them.<sup>160</sup> In support of its argument that the three federal statutes prohibited certain kinds of cross-border supply of gambling services, Antigua submitted to the Panel a report by the United States General Accounting Office<sup>161</sup> on internet gambling, and a letter from a Deputy Assistant Attorney General of the Department of Justice informing an industry association of broadcasters that internet gambling violates the three federal statutes.<sup>162</sup>

148. In addition, as we noted above<sup>163</sup>, Antigua, in its second written submission, alleged the "[f]ederal laws" prohibiting cross-border supply to be inconsistent with Article XVI. The United States argues that Antigua never "specifically alleged" the inconsistency of the three specific federal statutes with Article XVI.<sup>164</sup> Although, Antigua did not expressly mention these statutes by name when alleging inconsistency with Article XVI, we are of the view that, in the context of Antigua's

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<sup>159</sup>Antigua's second written submission to the Panel, para. 37. The footnotes omitted from this excerpt contain no reference to specific laws of the United States.

<sup>160</sup>Antigua's statement at the first substantive panel meeting, para. 21, 10 December 2003; Antigua's written submission in response to the United States' request for preliminary rulings, footnote 18 to para. 18, 22 October 2003. See also Antigua's response to Question 12 posed by the Panel, Panel Report, p. G-36 (discussing prosecutions under the Wire Act and the Travel Act); and Exhibit AB-82 submitted by Antigua to the Panel (containing texts of the Wire Act, the Travel Act, and the IGBA).

<sup>161</sup>United States General Accounting Office, *Internet Gambling: An Overview of the Issues*, p. 11 (December 2002), Exhibit AB-17 submitted by Antigua to the Panel (describing the Wire Act, the Travel Act, and the IGBA).

<sup>162</sup>Letter from John G. Malcolm to National Association of Broadcasters, 11 June 2003, Exhibit AB-73 submitted by Antigua to the Panel.

<sup>163</sup>*Supra*, para. 146.

<sup>164</sup>United States' appellant's submission, para. 9.

previous statement clearly identifying these three statutes<sup>165</sup> and the Panel's subsequent questioning on these particular measures<sup>166</sup>, the reference to "[f]ederal laws" clearly covered the Wire Act, the Travel Act, and the IGBA. As a result, in our view, Antigua's arguments and evidence were sufficient to identify the Wire Act, the Travel Act, and the IGBA, and to make a *prima facie* case of their inconsistency with sub-paragraphs (a) and (c) of Article XVI:2.

149. As to the eight state laws reviewed by the Panel, we note that Antigua made no mention of them in the course of its argument that the United States acts inconsistently with Article XVI of the GATS. In none of Antigua's submissions to the Panel was the way in which these measures operate explained in a manner that would have made it apparent to the Panel and to the United States that an inconsistency with Article XVI was being alleged with respect to these measures. Thus, we see no basis on which we can conclude that Antigua sufficiently connected the eight state laws with Article XVI and thereby established a *prima facie* case of inconsistency with that provision.

150. In Antigua's first written submission to the Panel and in its opening statement at the first substantive panel meeting, none of the eight state laws was named in the context of Antigua's substantive claims.<sup>167</sup> In its second written submission, Antigua alleged merely that "state laws"—

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<sup>165</sup>Antigua's statement at the first substantive panel meeting, para. 21, 10 December 2003. In its opening statement at the first substantive panel meeting, Antigua discussed "three federal statutes", which it identified as follows:

- The 'Wire Act' (18 U.S.C § 1084), which prohibits gambling businesses from knowingly receiving or sending certain types of bets or information that assist in placing bets over interstate and international wires;
- The 'Travel Act' (18 U.S.C § 1952), which imposes criminal penalties for those who utilize interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity, including gambling considered unlawful in the United States;
- The 'Illegal' Gambling Business Act' (18 U.S.C § 1955), which makes it a federal crime to operate a gambling business that violates the law of the state where the gambling takes place (provided that certain other criteria are fulfilled such as the involvement of at least five people and an operation during more than 30 days).

Each of these three laws separately prohibits the cross-border supply of gambling and betting services from Antigua.

<sup>166</sup>Question 32 posed by the Panel to Antigua, Panel Report, p. C-58, where the Panel noted: "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)."

<sup>167</sup>Two of the state measures considered by the Panel—Section 9 of Article 1 of the New York Constitution and Section 18-10-103 of the Colorado Revised Statutes—are mentioned by Antigua in its first written submission. (Antigua's first written submission, para. 149) However, they are mentioned solely for the purpose of supporting Antigua's assertion that the reason certain measures were identified in its panel request but not in its request for consultations was a typographical error. No description is given of the laws or how they might be inconsistent with Article XVI.

without further specification—are inconsistent with Article XVI:2(a) and/or (c).<sup>168</sup> Antigua did, however, make a cross-reference to a preceding section in its submission detailing the operation of various state laws.<sup>169</sup> Yet, *none* of the state laws considered by the Panel is mentioned in that section. Rather, the discussion relates primarily to other states' laws<sup>170</sup>, addresses laws that are not in Antigua's panel request<sup>171</sup>, or speaks only in general terms.<sup>172</sup>

151. In our view, certain general statements made by Antigua in its second written submission were insufficient to permit the Panel to proceed on the basis that Antigua had established a *prima facie* case regarding the eight state laws identified by the Panel. For example, Antigua's second written submission contains a general discussion of state gambling laws, with footnote citations to, *inter alia*, a report by the United States General Accounting Office and a law review article.<sup>173</sup> The law review article contains a discussion of state regulation of gambling, with reference, primarily in footnotes, to the laws of several states, including California, Hawaii, Illinois, Louisiana, and South Dakota. As we understand it, the Panel followed this trail of footnote references, and then compared the statutes cited in the footnotes of that law review article with Antigua's panel request to determine whether Antigua had identified provisions of those statutes and, thereby, to ascertain which state law Antigua intended to include as part of its claim.<sup>174</sup> This led the Panel to conclude that certain laws of Louisiana and South Dakota were challenged by Antigua under Article XVI.

152. The Panel engaged in a similar multi-step analysis in seeking to discern some connection between the laws of Massachusetts, New Jersey, New York, and Utah, and Antigua's references in its written submissions and various exhibits.<sup>175</sup> Yet we are unable to detect *any* connection, however tenuous, between the relevant laws of Colorado and Minnesota, on the one hand, and the allegation of inconsistency with Article XVI:2, on the other hand. Although Antigua did submit these laws in its

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<sup>168</sup>*Supra*, para. 146.

<sup>169</sup>Antigua's second written submission to the Panel, para. 37 and footnotes 46-47 and 49 thereto (citing paras. 22-24 and 28-29 of the same submission).

<sup>170</sup>See, for example, *ibid.*, paras. 27-29 (discussing laws of, *inter alia*, Illinois, Iowa, and Nevada).

<sup>171</sup>See, for example, *ibid.*, para. 27.

<sup>172</sup>See, for example, *ibid.*, paras. 22 ("All states have adopted the same basic legal approach ....") and 24 ("under the laws or the practice of every state").

<sup>173</sup>*Ibid.*, footnotes 22 and 23 to para. 22 (citing United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (December 2002), Exhibit AB-17 submitted by Antigua to the Panel; and Antonia Z. Cowan, "The Global Gaming Village: Interstate and Transnational Gambling", *Gambling Law Review*, Vol. 7, pp. 255-257, Exhibit AB-119 submitted by Antigua to the Panel).

<sup>174</sup>Panel Report, paras. 6.228 and 6.244.

<sup>175</sup>Antigua's second written submission to the Panel, footnotes 46, 47, and 49 to para. 37 (citing Antigua's second written submission, paras. 22-24 and 27-29); and Antigua's second written submission, footnotes 22 and 23 to para. 22 (citing, *inter alia*, Enclosure 1 to the Interim Report of the United States General Accounting Office on Internet Gambling, entitled "Gambling Law in Five States and Their Effect on Internet Gambling" (23 September 2002), Exhibit AB-84 submitted by Antigua to the Panel).

exhibits, we see no arguments in any submissions that would have clearly informed the Panel and the United States how those two laws would form part of Antigua's claims under Article XVI:2(a) and XVI:2(c). It follows that, without providing a stronger link between the particular state law being challenged and the obligation alleged to have been infringed, Antigua failed to make a *prima facie* case with respect to any of these eight state laws.

153. In our view, therefore, Antigua established its *prima facie* case of inconsistency with Article XVI, only as to the Wire Act, the Travel Act, and the IGBA. In contrast, with respect to the state laws—that is, certain laws of Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota, and Utah—we are of the view that Antigua failed to identify how these laws operated *and* how they were relevant to its claim of inconsistency with Article XVI:2.

154. Accordingly, we *find* that the Panel *did not err* in examining whether three federal laws—the Wire Act, the Travel Act, and the IGBA—are consistent with the United States' obligations under Article XVI of the GATS. We also *find* that the Panel *erred* in examining whether the following eight state laws are consistent with the United States' obligations under Article XVI of the GATS:

- Colorado: Section 18-10-103 of the Colorado Revised Statutes;
- Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);
- Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;
- Minnesota: Section 609.755(1) and Subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated);
- New Jersey: Paragraph 2 of Section VII of Article 4 of the New Jersey Constitution, and Section 2A:40-1 of the New Jersey Code;
- New York: Section 9 of Article I of the New York Constitution and Section 5-401 of the New York General Obligations Law;
- South Dakota: Sections 22-25A-1 through 22-25A-15 of the South Dakota Codified Laws; and
- Utah: Section 76-10-1102 of the Utah Code (Annotated).

155. Furthermore, because the Panel erred in ruling on claims relating to these state laws, where no *prima facie* case of inconsistency had been made out by Antigua, we *reverse* the Panel's finding, in paragraphs 6.421(b) and 7.2(b)(ii) of the Panel Report, that the following state laws are inconsistent with Article XVI:1 and with sub-paragraphs (a) and (c) of Article XVI:2:

- Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);
- Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;
- South Dakota: Section 22-25A-8 of the South Dakota Codified Laws; and
- Utah: Section 76-10-1102(b) of the Utah Code (Annotated).

156. We note that the United States also advances an appeal under Article 11 of the DSU in relation to the Panel's assessment of Antigua's *prima facie* case. The United States argues that the Panel failed to comply with its obligations under Article 11 of the DSU, not merely because it made an error in finding a *prima facie* case, but because of "the egregious nature of the departure by this Panel from its assigned role of objective arbitrator."<sup>176</sup> We have already found error in the Panel's examination of the aforementioned state laws<sup>177</sup> on the basis that Antigua had not made a *prima facie* case of inconsistency with Article XVI:2. Therefore, in order to resolve this dispute, we *need not determine* whether, in assessing Antigua's *prima facie* case, the Panel also failed to satisfy its obligations under Article 11 of the DSU.

157. Finally, we note that, when making findings as to the Travel Act and the IGBA, the Panel referred to "the Travel Act (when read together with the relevant state laws)" and "the Illegal Gambling Business Act (when read together with the relevant state laws)".<sup>178</sup> The Panel's reference to "the relevant state laws" in its findings on two *federal* laws simply reflects the fact that these two federal statutes explicitly incorporate certain criminal behaviour, defined under state law, as an element of the crimes under those federal statutes.<sup>179</sup> Thus, the Panel's findings as to the Travel Act and the IGBA are not affected by our finding that the Panel should not have examined the GATS-consistency of these eight state laws.

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<sup>176</sup>United States appellant's submission, para. 39.

<sup>177</sup>*Supra*, para. 154.

<sup>178</sup>Panel Report, paras. 6.421, 6.535, 6.565, 7.2(b)(i), and 7.2(d).

<sup>179</sup>*Ibid.*, paras. 6.367 and 6.375.

## V. Interpretation of the Specific Commitments Made by the United States in its GATS Schedule

158. The Panel found, at paragraph 7.2(a) of the Panel Report, that:

... the United States' Schedule under the GATS includes specific commitments on gambling and betting services under subsector 10.D.<sup>180</sup>

The United States appeals this finding. According to the United States, by excluding "sporting" services from the scope of subsector 10.D of its GATS Schedule, it excluded gambling and betting services from the scope of the specific commitments that it undertook therein. The United States argues that the Panel misinterpreted the ordinary meaning of the text of subsector 10.D, "Other recreational services (except sporting)", and erroneously found that the ordinary meaning of "sporting" does not include gambling. The United States also contends that the Panel erred in its identification and analysis of the context in which the terms of subsector 10.D must be interpreted. In particular, the Panel is alleged to have mistakenly elevated certain documents used in the preparation of GATS Schedules (W/120 and the 1993 Scheduling Guidelines) to the status of "context", when they are in fact "mere 'preparatory work'"<sup>181</sup>, and, as such, cannot be relied upon when they suggest a meaning at odds with the unambiguous ordinary meaning of the text. According to the United States, the Panel relied on an "erroneous presumption" that, unless the United States "expressly" departed from W/120, the United States could be "assumed to have relied on W/120 and the corresponding CPC references".<sup>182</sup> Finally, the United States argues, in the alternative, that the Panel should have found that gambling falls under subsector 10.E, "Other", where the United States made no commitment.

159. In the context of the GATT 1994, the Appellate Body has observed that, although each Member's Schedule represents the tariff commitments that bind *one* Member, Schedules also represent a common agreement among *all* Members.<sup>183</sup> Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the *Vienna Convention*.<sup>184</sup>

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<sup>180</sup>See also Panel Report, para. 6.134.

<sup>181</sup>United States' appellant's submission, para. 65.

<sup>182</sup>*Ibid.*, para. 75 (quoting Panel Report, paras. 6.104 and 6.106).

<sup>183</sup>Appellate Body Report, *EC – Computer Equipment*, para. 109.

<sup>184</sup>*Ibid.*, para. 84.

160. In the context of the GATS, Article XX:3 explicitly provides that Members' Schedules are an "integral part" of that agreement. Here, too, the task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members. Like the Panel<sup>185</sup>—and, indeed, both the participants<sup>186</sup>—we consider that the meaning of the United States' GATS Schedule must be determined according to the rules codified in Article 31 and, to the extent appropriate, Article 32 of the *Vienna Convention*.

161. The contentious issues in this appeal concern whether the Panel erred in the way that it *used* the *Vienna Convention* principles of interpretation in determining the scope of the specific commitments made by the United States in subsector 10.D of its GATS Schedule, and whether the Panel erred in the conclusions it drew on the basis of its approach.

A. *Interpretation of Subsector 10.D According to the General Rule of Interpretation: Article 31 of the Vienna Convention*

162. The United States' appeal focuses on the Panel's interpretation of the word "sporting" in subsector 10.D of the United States' GATS Schedule. According to the United States, the ordinary meaning of "sporting" includes gambling and betting and the Panel erred in finding otherwise. We observe first that the interpretative question addressed by the Panel was a broader one, namely "whether the US Schedule includes specific commitments on gambling and betting services notwithstanding the fact that the words 'gambling and betting services' do not appear in the US Schedule."<sup>187</sup> In tackling this question, the Panel turned to Sector 10 of the United States' Schedule to the GATS, which Antigua claimed included a specific commitment on gambling and betting services, and the United States claimed did not. The relevant part of the United States' Schedule provides:<sup>188</sup>

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<sup>185</sup>Panel Report, para. 6.45.

<sup>186</sup>Antigua's and the United States' responses to questioning at the oral hearing.

<sup>187</sup>Panel Report, para. 6.41.

<sup>188</sup>The United States of America – Schedule of Specific Commitments, GATS/SC/90, 15 April 1994 (the "United States' Schedule"). The "National Treatment" and "Additional Commitments" columns of the United States' Schedule are omitted from this excerpt. The relevant part of the United States' GATS Schedule is attached, in its entirety, as Annex III to this Report.

Sector or subsector	Limitations on market access
<p>10. RECREATIONAL, CULTURAL, &amp; SPORTING SERVICES</p> <p>A. ENTERTAINMENT SERVICES (INCLUDING THEATRE, LIVE BANDS AND CIRCUS SERVICES)</p> <p>B. NEWS AGENCY SERVICES</p> <p>C LIBRARIES, ARCHIVES, MUSEUMS AND OTHER CULTURAL SERVICES</p> <p>D. OTHER RECREATIONAL SERVICES (except sporting)</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound, except as indicated in the horizontal section</p> <p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound, except as indicated in the horizontal section</p> <p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound, except as indicated in the horizontal section</p> <p>1) None</p> <p>2) None</p> <p>3) The number of concessions available for commercial operations in federal, state and local facilities is limited</p> <p>4) Unbound, except as indicated in the horizontal section</p>

163. In considering this section of the United States' Schedule, the Panel stated that it would begin by "examining the ordinary meaning of various key terms used in the US Schedule."<sup>189</sup> The Panel examined the term "Other recreational services (except sporting)" in subsector 10.D, as well as the term "Entertainment services" in subsector 10.A. Having consulted the dictionary definitions of various words, the Panel found that "the *ordinary* meaning of 'sporting' does not include gambling".<sup>190</sup> The United States submits that the Panel could not have made this finding had it properly followed Article 31(1) of the *Vienna Convention*.

164. Article 31(1) of the *Vienna Convention* requires a treaty to 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." In order to identify the ordinary meaning, a Panel may start with the

<sup>189</sup>Panel Report, para. 6.47.

<sup>190</sup>*Ibid.*, para. 6.61. (original emphasis)

dictionary definitions of the terms to be interpreted.<sup>191</sup> But dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation<sup>192</sup>, as they typically aim to catalogue *all* meanings of words—be those meanings common or rare, universal or specialized.

165. In this case, in examining definitions of "sporting", the Panel surveyed a variety of dictionaries and found a variety of definitions of the word.<sup>193</sup> All of the dictionary definitions cited by the Panel define "sporting" as being connected to—in the sense of "related to", "suitable for", "engaged in" or "disposed to"—sports activities. Some dictionaries also define "sporting" as being connected to gambling or betting, but others do not. Of those that do, several note that the word is mainly used in this sense in the phrase "a sporting man", or in a pejorative sense, and some note that the word is used in this sense only when the gambling or betting activities pertain to sports. Based on this survey of dictionary definitions, as well as the fact that "gambling" does not fall within the meaning of the Spanish and French words that correspond to "sporting", namely "déportivos" and "sportifs"<sup>194</sup>, the Panel made its finding that "the *ordinary* meaning of 'sporting' does not include gambling".<sup>195</sup>

166. We have three reservations about the way in which the Panel determined the ordinary meaning of the word "sporting" in the United States' Schedule. First, to the extent that the Panel's reasoning simply equates the "ordinary meaning" with the meaning of words as defined in dictionaries, this is, in our view, too mechanical an approach. Secondly, the Panel failed to have due regard to the fact that its recourse to dictionaries revealed that gambling and betting can, at least in some contexts, be one of the meanings of the word "sporting". Thirdly, the Panel failed to explain the basis for its recourse to the meanings of the French and Spanish words "déportivos" and "sportifs" in

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<sup>191</sup>We note, in this regard, the words of the panel in *US – Section 301 Trade Act*:

For pragmatic reasons the normal usage ... is to start the interpretation from the ordinary meaning of the "raw" text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose.

(Panel Report, *US – Section 301 Trade Act*, para. 7.22)

<sup>192</sup>Appellate Body Report, *US – Softwood Lumber IV*, para. 59; Appellate Body Report, *Canada – Aircraft*, para. 153; and Appellate Body Report, *EC – Asbestos*, para. 92.

<sup>193</sup>The 13 different dictionary definitions consulted by the Panel are set out in paragraphs. 6.55-6.59 of the Panel Report. Some of the definitions appear to contradict one another. For instance, the *Shorter Oxford English Dictionary* definition quoted by the Panel defines "sporting" as both "characterized by sportsmanlike conduct"; and "[d]esignating an inferior sportsman or a person interested in sport from purely mercenary motives". (Panel Report, para. 6.55)

<sup>194</sup>Panel Report, paras. 6.59-6.60.

<sup>195</sup>*Ibid.*, para. 6.61. (original emphasis)

the light of the fact that the United States' Schedule explicitly states, in a cover note, that it "is authentic in English only."<sup>196</sup>

167. Overall, the Panel's finding concerning the word "sporting" was premature. In our view, the Panel should have taken note that, in the abstract, the range of possible meanings of the word "sporting" includes *both* the meaning claimed by Antigua and the meaning claimed by the United States, and then continued its inquiry into *which* of those meanings was to be attributed to the word as used in the United States' GATS Schedule.

168. Nevertheless, even accepting that the Panel erred in reaching a conclusion regarding the meaning of "sporting" at such an early stage of its analysis, this alone is not decisive of the United States' appeal. This is because the Panel did not end its analysis once it had considered the dictionary definitions of "sporting". Rather, having found that the word "sporting" did *not* include gambling and betting services, it examined whether other words in Sector 10 of the United States' Schedule *did* serve to make a specific commitment on gambling and betting services. To do so, the Panel turned to the terms "recreational services" and "entertainment services". Beginning again with dictionary definitions, the Panel observed that "words such as 'recreational' and 'entertainment' could cover virtually the same types of services activities".<sup>197</sup> The Panel expressed its view that "gambling and betting have, *a priori*, the characteristics of being entertaining or amusing, or of being used as a form of recreation."<sup>198</sup> Having thus consulted dictionaries for "the words 'Other recreational services (except sporting)' and 'entertainment services'", the Panel observed that these left "a number of questions open" and did not "allow it to reach a definitive conclusion on whether or not the US Schedule includes specific commitments on 'gambling and betting services' in sector 10".<sup>199</sup> The Panel then turned to consider the context in which the relevant terms from sector 10 of the United States' Schedule are situated.

169. The United States contests the Panel's identification and use of relevant context for the interpretation of the commitment made by the United States in its Schedule. In particular, the United States argues that the Panel erred in treating two documents from the Uruguay Round of trade negotiations, namely W/120 and the 1993 Scheduling Guidelines, as relevant context within the meaning of Article 31(2) of the *Vienna Convention*.

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<sup>196</sup>The cover note is included in the excerpt from the United States' Schedule attached as Annex III to this Report.

<sup>197</sup>Panel Report, para. 6.63.

<sup>198</sup>*Ibid.*, para. 6.66.

<sup>199</sup>*Ibid.*, para. 6.67.

170. The Panel found that:

... both W/120 and the 1993 Scheduling Guidelines were agreed upon by Members with a view to using such documents, not only in the negotiation of their specific commitments, but as interpretative tools in the interpretation and application of Members' scheduled commitments. As such, these documents comprise the "context" of GATS Schedules, within the meaning of Article 31 of the *Vienna Convention* and the Panel will use them for the purpose of interpreting the GATS, GATS schedules and thus the US Schedule.<sup>200</sup>

171. Before turning to the specifics of the United States' appeal, we observe that the second paragraph of Article 31 of the *Vienna Convention* defines "context" as follows:

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

172. We also consider it useful to set out, briefly, the nature of the two documents at issue. On 10 July 1991, the GATT Secretariat circulated document W/120, entitled "SERVICES SECTORAL CLASSIFICATION LIST". This followed the circulation of an informal note containing a draft services sectoral classification list in May 1991, as well as the circulation of an initial reference list of sectors (the "W/50") in April 1989.<sup>201</sup> A short cover note to W/120 explains that the document reflects, to the extent possible, comments made by negotiating parties on the May draft, and that W/120 itself might be subject to future modification. Otherwise, the document consists of a table in two columns. The left column is entitled "SECTORS AND SUBSECTORS" and consists of a list classifying services into 11 broad service sectors, each divided into several subsectors (more than 150 in total). The right column is entitled "CORRESPONDING CPC" and sets out, for nearly every subsector listed in the left-hand column, a CPC number to which that subsector corresponds. It is not disputed that the reference in W/120 to "CPC" is a reference to the United Nations' Provisional

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<sup>200</sup>Panel Report, para. 6.82.

<sup>201</sup>MTN.GNS/W/50, 13 April 1989.

Central Product Classification.<sup>202</sup> The CPC is a detailed, multi-level classification of goods and services.<sup>203</sup> The CPC is *exhaustive* (all goods and services are covered) and its categories are *mutually exclusive* (a given good or service may only be classified in *one* CPC category).<sup>204</sup> The CPC consists of "Sections" (10), "Divisions" (69), "Groups" (295), "Classes" (1,050) and "Subclasses" (1,811). Of the 10 "Sections" of the CPC, the first five primarily classify *products*. They are based on the Harmonised Commodity Description and Coding System, and are not referred to in W/120. The second five Sections of the CPC primarily classify *services*, and all of the references in W/120 are to sub-categories of these five Sections.

173. On 3 September 1993, the GATT Secretariat, in response to requests by the negotiating parties, circulated an "Explanatory Note" designed to "assist in the preparation of offers, requests, and national Schedules of commitments" and to ensure "comparable and unambiguous commitments" and achieve "precision and clarity".<sup>205</sup> This document, known as the "1993 Scheduling Guidelines", addresses two main questions: (i) *what* items should be put in a Schedule; and (ii) *how* they should be entered. In addressing these questions, the Guidelines provide examples as to the types of measures that should be scheduled or need not be scheduled, and cover a variety of issues, including the scope of coverage under each mode of supply, and the relationship between different modes when making commitments on market access. The document also instructs Members as to the language to use when making a specific commitment,<sup>206</sup> and includes a template indicating the overall structure, and columns and rows that should constitute a Member's Schedule.

174. Bearing the above in mind, we see two main difficulties with the Panel's characterization of these documents as context. First, we see no basis for the Panel's finding that they "constitute an agreement made between all the parties or an instrument[] made between some parties and accepted

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<sup>202</sup>Provisional Central Product Classification, Statistical Papers, Series M No. 77, United Nations (1991). The United Nations Central Product Classification has been revised on several occasions. The latest version is the Central Product Classification, Version 1.1, Statistical Papers, Series M No. 77, United Nations (2004).

<sup>203</sup>The main purposes of the CPC are to provide a framework for international comparison of statistics dealing with goods, services, and assets and to serve as a guide for developing and revising existing classification schemes of products. (Preface to the CPC, p. V)

<sup>204</sup>See *infra*, paras. 200 and 201 for further details on the CPC, and for the way in which the CPC classifies the services at issue in this dispute.

<sup>205</sup>Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993, at p. 1.

<sup>206</sup>For example, paragraphs 24 to 27 explain that: to indicate a full commitment, a Member should enter "NONE"; to make no commitment, it should enter "UNBOUND"; and to make a commitment with limitations, the Member should enter a concise description of each measure, "indicating the elements which make it inconsistent with Articles XVI or XVII".

by the others as such".<sup>207</sup> To reach this finding, the Panel reasoned that, although the documents were "technically" drafted by the GATT Secretariat:

... they can be considered "agreement[s] ... made between all [Members]" or ... "instrument[s] ... made by one or more [Members]" but accepted by all of them as such within the meaning of Article 31:2(a) and (b) of the Vienna Convention. In this regard, it may be recalled that the two documents were prepared by the – then – GATT Secretariat, at the behest of the Uruguay Round participants. The *participants* can thus be considered to be the "intellectual" authors of the documents. Besides, both documents were the object of a series of formal and informal consultations during which Members had the opportunity to amend them and to include changes. Both were circulated as formal "green band" documents with the agreement of the participants.<sup>208</sup> (footnotes omitted)

175. We note that Article 31(2) refers to the *agreement* or *acceptance* of the parties. In this case, both W/120 and the 1993 Scheduling Guidelines were drafted by the GATT Secretariat rather than the parties to the negotiations. It may be true that, on its own, authorship by a delegated body would not preclude specific documents<sup>209</sup> from falling within the scope of Article 31(2). However, we are not persuaded that in this case the Panel could find W/120 and the 1993 Scheduling Guidelines to be context. Such documents can be characterized as context only where there is sufficient evidence of their constituting an "agreement relating to the treaty" between the parties or of their "accept[ance by the parties] as an instrument related to the treaty".

176. We do not accept, as the Panel appears to have done, that, simply by requesting the preparation and circulation of these documents and using them in preparing their offers, the parties in the negotiations have accepted them as agreements or instruments related to the treaty. Indeed, there are indications to the contrary. As the United States pointed out before the Panel, the United States and several other parties to the negotiations clearly stated, at the time W/120 was proposed, that, although Members were encouraged to follow the broad structure of W/120, it was never meant to bind Members to the CPC definitions, nor to any other "specific nomenclature", and that "the

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<sup>207</sup>Panel Report, para. 6.77.

<sup>208</sup>*Ibid.*, para. 6.80.

<sup>209</sup>The Panel reasoned that assigning the task of drafting these documents to the Secretariat was simply "the most practical and efficient way to work on such a matter" and that such delegation did not deprive the parties to the negotiations of authorship. (Panel Report, para. 6.80)

composition of the list was not a matter for negotiations".<sup>210</sup> Similarly, the Explanatory Note that prefaces the Scheduling Guidelines itself appears to contradict the Panel in this regard, as it expressly provides that, although it is intended to assist "persons responsible for scheduling commitments", that assistance "should not be considered as an authoritative legal interpretation of the GATS."<sup>211</sup>

177. The Panel also reasoned that:

.... both W/120 and the 1993 Scheduling Guidelines were agreed upon by Members with a view to using such documents, *not only in the negotiation* of their specific commitments, but *as interpretative tools* in the interpretation and application of Members' scheduled commitments.<sup>212</sup> (emphasis added)

In our opinion, the Panel's description of how these documents were created and used may suggest that the parties agreed to use such documents in the negotiations of their specific commitments. The Panel cited no evidence, however, directly supporting its further conclusion, in the quotation above,

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<sup>210</sup>Note on the Meeting of 27 May to 6 June 1991, MTN.GNS/42, para. 19 (24 June 1991) (quoted in Panel Report, para. 3.41 and footnote 117 thereto). The paragraphs of this Note cited by the United States are taken from the minutes from a meeting that was held *after* the Secretariat had circulated its first draft classification list, but *before* the final version of W/120 had been circulated. The content of those paragraphs is as follows:

18. The representatives of the European Communities, Canada, Chile, the United States, Japan, Poland, Sweden on behalf of the Nordic countries and Mexico found that the proposed classification contained in the informal note by the secretariat constituted an improvement over the list contained in MTN.GNS/W/50. There was confirmation of the agreement to base the classification of services sectors and subsectors as much as possible on the Central Product Classification (CPC) list. There was some agreement that putting together a classification list of services was an on-going work which required coordination with efforts undertaken in other fora. The representative of Austria stressed the need to involve statistical experts in the work since the classification list resulting from the GNS would in the future serve as the basis for the compilation of statistics on services. The representative of Japan said not only statistical but also sectoral experts should take part in drawing up the list.

19. The representative of the United States did not wish to have extensive discussions on the matter and stressed that the composition of the list was not a matter for negotiations. This view was shared by the representative of the European Communities. The representatives of the United States, Poland, Malaysia and Austria said that the list should be illustrative or indicative and not bind parties to any specific nomenclature. The representative of Malaysia suggested that it would be important to have the definitions behind individual items in the list, especially where there was a high degree of aggregation.

<sup>211</sup>1993 Scheduling Guidelines, p. 1.

<sup>212</sup>Panel Report, para. 6.82.

that the agreement of the parties encompassed an agreement to use the documents "as interpretative tools in the interpretation and application of Members' scheduled commitments."

178. In our opinion, therefore, the Panel erred in categorizing W/120 and the 1993 Scheduling Guidelines as "context" for the interpretation of the United States' GATS Schedule. Accordingly, we set aside this part of the Panel's examination of "context". There is, however, additional context referred to by the Panel and the participants that we must consider, namely: (i) the remainder of the United States' Schedule of specific commitments; (ii) the substantive provisions of the GATS; (iii) the provisions of covered agreements other than the GATS; and (iv) the GATS Schedules of *other* Members.

179. We begin by examining the immediate context in which the relevant entry is found, that is, the United States' Schedule as a whole. The United States admits that it "generally followed the W/120 *structure* in its Schedule of specific commitments."<sup>213</sup> The Schedule makes no reference to CPC codes. The Schedule does, however, refer to W/120 in two instances<sup>214</sup>, apparently in order to make clear that the United States' commitment corresponds to only *part* of a subsector listed in W/120. This suggests that, at least for some of its entries, the United States also expressly referred to W/120 in order to define the *content* of a Schedule entry and, thereby, limit the *scope* of its specific commitment.<sup>215</sup> At the same time, the context provided by the United States' Schedule as a whole does not indicate clearly the scope of the commitment in subsector 10.D.

180. We move, therefore, to examine the context provided by the structure of the GATS itself. The agreement defines "services" very broadly, as including "*any* service in *any* sector except services supplied in the exercise of governmental authority".<sup>216</sup> In addition, the GATS definition of "sector" provides that any reference to a "sector" means—unless otherwise specified in a Member's Schedule—a reference to *all* of the subsectors contained within that sector.<sup>217</sup> Many of the obligations in the GATS apply only in sectors in which a Member has undertaken specific

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<sup>213</sup>United States' response to Question 5 posed by the Panel, Panel Report, p. C-26. (original emphasis)

<sup>214</sup>Sector B of the Schedule is as follows "COMPUTER AND RELATED SERVICES (MTN.GNS/W/120 a) - e), except airline computer reservation systems); and the entry in subsector F.r reads "Publishing (Only part of MTN.GNS/W/120 category: 'r) Printing, Publishing')".

<sup>215</sup>The Panel made a similar point in paragraph 6.104 of the Panel Report and footnote 665 thereto.

<sup>216</sup>GATS Article I:3(b). (emphasis added)

<sup>217</sup>Article XXVIII provides that:

- (e) "sector" of a service means,
  - (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,
  - (ii) otherwise, the whole of that service sector, including all of its subsectors;

commitments.<sup>218</sup> To us, the structure of the GATS necessarily implies two things. First, because the GATS covers *all* services except those supplied in the exercise of governmental authority, it follows that a Member may schedule a specific commitment in respect of *any* service. Secondly, because a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or subsector within which that service falls, a specific service cannot fall within two different sectors or subsectors. In other words, the sectors and subsectors in a Member's Schedule must be mutually exclusive.<sup>219</sup> In the context of the United States' Schedule, this means that, notwithstanding the broad language used in sector 10—for example, "recreational services", "sporting", and "entertainment services"—, gambling and betting services can *only* fall—if at all—within *one* of those service categories.

181. Looking beyond the GATS to other covered agreements, we observe that Article 22.3(f) of the DSU provides that, for purposes of suspending concessions, "'sector' means ...(ii) with respect to services, a principal sector as identified in the current 'Services Sectoral Classification List' which identifies such sectors". A footnote adds that "[t]he list in document MTN.GNS/W/120 identifies eleven sectors." This reference confirms the relevance of W/120 to the task of identifying service sectors in GATS Schedules, but does not appear to assist in the task of ascertaining within which *subsector* of a Member's Schedule a specific service falls.

182. Both participants<sup>220</sup>, as well as the Panel, accepted that other Members' Schedules constitute relevant context for the interpretation of subsector 10.D of the United States' Schedule.<sup>221</sup> As the Panel pointed out, this is the logical consequence of Article XX:3 of the GATS, which provides that Members' Schedules are "an integral part" of the GATS. We agree. At the same time, as the Panel rightly acknowledged, use of other Members' Schedules as context must be tempered by the recognition that "[e]ach Schedule has its own intrinsic logic, which is different from the US Schedule."<sup>222</sup>

183. The United States relies on the Schedules of other Members as context seeking to establish that: (i) because many Members refer to CPC codes in their Schedules but the United States does not,

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<sup>218</sup>See, for example, Articles VI:1, VIII:1, XVI, and XVII of the GATS.

<sup>219</sup>If this were not the case, and a Member scheduled the same service in two different sectors, then the scope of the Member's commitment would not be clear where, for example, it made a full commitment in one of those sectors and a limited, or no, commitment, in the other. At the oral hearing in this appeal, both the United States and Antigua agreed that the entries in a Member's Schedule must be mutually exclusive. See also Panel Report, paras. 6.63, 6.101, and 6.119.

<sup>220</sup>Antigua's and United States' responses to questioning at the oral hearing.

<sup>221</sup>In paragraph 6.97 of the Panel Report, the Panel stated that it agreed "with the United States that other Members' Schedules comprise the 'context' within the meaning of Article 31:2 of the Vienna Convention."

<sup>222</sup>Panel Report, para. 6.98. By referring to other Members' Schedules here, we are not interpreting such Schedules, but rather using them as "context" for the interpretation of the United States' Schedule.

the United States' Schedule cannot be "presumed" to follow the CPC; and (ii) scheduling gambling and betting services in subsector 10.E (rather than 10.D) was one of several accepted approaches used by Members.<sup>223</sup> We are not persuaded that the conclusions the United States argues must be drawn from this context necessarily follow. It is true that a large majority of Members used CPC codes in their Schedules. It is also true that the United States did not use them.<sup>224</sup> However, the United States' Schedule, like the Schedules of nearly all Members, generally follows the structure, and adopts the language, of W/120.<sup>225</sup> These structural and linguistic similarities lead us to conclude, contrary to the United States submission, that the absence of references to CPC codes does not mean that words used in the United States' Schedule *must* have a different meaning and scope than the same words used in the Schedules of other Members.

184. We also note that, unlike the United States, several Members specifically used the words "gambling and betting services", or some approximation thereof, in their Schedules.<sup>226</sup> The fact that the United States did not use any such specific language tends, if anything, to undercut its assertion that it intended to single out such services for exclusion from the scope of its commitment. Whether or not they used the term "gambling and betting services" in their Schedules, several Members also made clear, through reference to CPC codes, that they were making a commitment in respect of "sporting services" and that the services falling within the category "sporting services" did *not* include gambling and betting services.<sup>227</sup> Moreover, the United States did not point to any example in another Member's Schedule where the category of "sporting services" clearly *included* gambling and betting services.

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<sup>223</sup>Before the Panel, the United States referred to the Schedules of Iceland and Senegal. (See footnote 106 to para. 74 of the United States' first written submission to the Panel)

<sup>224</sup>The Panel observed, in an earlier discussion, that:

... most Members chose to refer to CPC numbers to define the scope of their commitments: (i) only 17 schedules adopted a non-CPC approach; (ii) a few schedules have a "mixed" approach, i.e. they include CPC numbers for some sectors only.

(Panel Report, footnote 651 to para. 6.81)

<sup>225</sup>As we observed *supra*, para. 179, the United States admits that it generally followed the W/120 structure, and its Schedule specifically refers to W/120 in two instances.

<sup>226</sup>In most instances, the words appear to be used to exclude these services from the scope of the commitment. See the Schedules of Austria (GATS/SC/7); Bulgaria (GATS/SC/122); Croatia (GATS/SC/130); the European Communities (GATS/SC/31); Finland (GATS/SC/33); Lithuania (GATS/SC/133); Slovenia (GATS/SC/99); and Sweden (GATS/SC/82). In two cases, however, the words appear to be used to make a limited specific commitment. See the Schedules of Peru (GATS/SC/69) and Senegal (GATS/SC/75).

<sup>227</sup>See the Schedules of Australia (GATS/SC/6); Japan (GATS/SC/46); Liechtenstein (GATS/SC/83-A); Switzerland (GATS/SC/83); and Thailand (GATS/SC/85).

185. We also find unpersuasive the arguments of the United States with respect to subsector 10.E, "Other".<sup>228</sup> Only one Member clearly scheduled gambling and betting services in subsector 10.E, and it used specific words to do so.<sup>229</sup> Another Member specifically excluded "gambling and gambling related services" from the scope of its commitment under subsector 10.A.<sup>230</sup> From these examples it appears that different Members have dealt with gambling and betting services in different subsectors of their Schedules. But the examples also suggest that Members have used specific language in order to make clear the location of their commitments within their own Schedules. Furthermore, as the Panel noted<sup>231</sup>, the United States' argument that gambling and betting services fall under subsector 10.E appears to contradict its argument that gambling and betting services are comprised in the ordinary meaning of "sporting services" under subsector 10.D. As we have observed above, the same service cannot be covered in two different subsectors within the *same* Schedule.<sup>232</sup>

186. Overall, we find it significant that the entries made by many Members in sector 10 of their Schedules contain text additional to the text found in the headings and sub-headings used by the United States (and used in W/120). Such Members disaggregated their entries beyond the five subsectors identified in W/120 as falling within sector 10. There is a broad range of ways in which this was accomplished. Some Members used CPC codes with more digits than the codes used in W/120, (that is, indicating a more disaggregated service category) and some used (either in addition to the CPC codes or alone) precise wording to indicate that gambling and betting services were somehow treated differently from other services in subsector 10.D. Several Members used CPC codes to distinguish commitments with respect to sporting services from commitments with respect to gambling and betting services. This context indicates that Members seeking to distinguish the commitments they were making regarding gambling and betting services from other commitments they were making in subsector 10.D used specific language and/or CPC codes to indicate this distinction. This context does not, however, provide a definitive answer to the question whether, in the United States' Schedule, gambling and betting services fall within the ordinary meaning of the word "sporting", within the ordinary meaning of the term "other recreational services", or elsewhere.

187. The above examination leads us to the view that an examination of the term "Other recreational services (except sporting)" in its context does not clearly reveal whether, in the United States' Schedule to the GATS, gambling and betting services fall within the category of "other

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<sup>228</sup>Although subsector 10.E, "Other", figures in W/120, no such entry is included in the United States' Schedule.

<sup>229</sup>Senegal listed "Gambling and betting services" under 10.E. However, Senegal also appears to have made a relatively narrow commitment under 10.D, with respect to "Recreational Fishing" only.

<sup>230</sup>See the Schedule of Bulgaria. (GATS/SC/122)

<sup>231</sup>Panel Report, para. 6.101.

<sup>232</sup>*Supra*, para. 180.

recreational services" or within the category of "sporting services". Accordingly, we turn to the object and purpose of the GATS to obtain further guidance for our interpretation.

188. The Panel referred to the requirement of "transparency" found in the preamble to the GATS, as supporting the need for precision and clarity in scheduling, and underlining the importance of having Schedules that are "readily understandable by all other WTO Members, as well as by services suppliers and consumers".<sup>233</sup> The Panel also referred to the Appellate Body Report in *EC – Computer Equipment* as follows:

The Appellate Body found that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of GATT 1994." This confirms the importance of the security and predictability of Members' specific commitments, which is equally an object and purpose of the GATS.<sup>234</sup> (footnote omitted)

189. We agree with the Panel's characterization of these objectives, along with its suggestion that they reinforce the importance of Members' making clear commitments. Yet these considerations do not provide specific assistance for determining where, in the United States' Schedule, "gambling and betting services" fall. Accordingly, it is necessary to continue our analysis by examining other elements to be taken into account in interpreting treaty provisions.

190. In addition to context, the third paragraph of Article 31 of the *Vienna Convention* directs a treaty interpreter to take into account, *inter alia*, subsequent practice establishing the agreement of the parties regarding the interpretation of the treaty. Antigua argues that the "subsequent practice" of Members demonstrates that W/120 and the Scheduling Guidelines must be used to interpret the United States' GATS Schedule.<sup>235</sup> Antigua asserts that such relevant subsequent practice is found in the 2001 Scheduling Guidelines<sup>236</sup>, in a submission made by the United States regarding the

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<sup>233</sup>Panel Report, para. 6.107.

<sup>234</sup>*Ibid.*, para. 6.108.

<sup>235</sup>Antigua's response to Question 1 posed by the Panel, Panel Report, pp. C-1 to C-3.

<sup>236</sup>Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services, S/L/92. The 2001 Scheduling Guidelines serve, in the current round of services negotiations, the same function as the 1993 Scheduling Guidelines served in the Uruguay Round negotiations. The former reproduce the 1993 Scheduling Guidelines almost in their entirety, and contain some additional provisions. The 2001 Scheduling Guidelines were adopted by the Council for Trade in Services on 23 March 2001.

classification of energy services<sup>237</sup>, as well as in a publication by the United States International Trade Commission ("USITC").<sup>238</sup> The Panel did not reach these arguments by Antigua as it had found W/120 and the 1993 Scheduling Guidelines to be context.

191. In *Japan – Alcoholic Beverages II* and *Chile – Price Band System*, respectively, the Appellate Body referred to "practice" within the meaning of Article 31(3)(b) as:

... a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation.<sup>239</sup>

... a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of [the relevant provision]<sup>240</sup>

192. Thus, in order for "practice" within the meaning of Article 31(3)(b) to be established: (i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply *agreement* on the interpretation of the relevant provision.

193. We have difficulty accepting Antigua's position that the 2001 Scheduling Guidelines constitute "subsequent practice" revealing a common understanding that Members' specific commitments are to be construed in accordance with W/120 and the 1993 Scheduling Guidelines. Although the 2001 Guidelines were explicitly adopted by the Council for Trade in Services, this was in the context of the negotiation of *future* commitments and in order to assist in the preparation of offers and requests in respect of such commitments. As such, they do not constitute evidence of

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<sup>237</sup>Antigua referred to document S/CSC/W/27, a proposal submitted by the United States concerning the classification of energy services. (Antigua's first written submission to the Panel, footnote 301 to para. 173) Paragraph 2 of this document states that:

These numerous energy-related activities are closely interrelated and, taken as a whole, can be said to comprise the "energy sector." Some of these activities cut horizontally across *existing GATS sectoral classifications* (W/120), such as business services, communications services, construction services, financial services, and transportation services, among others. Others may involve activities that are not yet specified in existing GATS classifications, are deeply embedded in existing GATS classifications, or are not within the scope of the GATS. (emphasis added)

<sup>238</sup>US *Schedule of Commitments under the General Agreement on Trade in Services*, United States International Trade Commission, May 1997, p. 25.

<sup>239</sup>Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:I, 97, at 106. The Appellate Body, in that case, found that panel reports adopted by the GATT contracting parties do *not* constitute subsequent practice within the meaning of Article 31(3)(b) of the *Vienna Convention*.

<sup>240</sup>Appellate Body Report, *Chile – Price Band System*, para. 214.

Members' understanding regarding the interpretation of *existing* commitments. Furthermore, as the United States emphasized before the Panel, in its Decision adopting the 2001 Guidelines, the Council for Trade in Services explicitly stated that they were to be "non-binding" and "shall not modify any rights or obligations of the Members under the GATS".<sup>241</sup> Accordingly, we do not consider that the 2001 Guidelines, in and of themselves, constitute "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*.

194. Nor do the two other documents relied on by Antigua constitute "subsequent practice". Although they may be relevant in identifying the United States' practice, they do not establish a common, consistent, discernible pattern of acts or pronouncements by Members as a whole. Nor do they demonstrate a common understanding *among Members* that specific commitments are to be interpreted by reference to W/120 and the 1993 Scheduling Guidelines. Accordingly, we do not find that Antigua has identified any relevant subsequent practice that can assist us in the interpretation of subsector 10.D of the United States' Schedule.

195. The above reasoning leads us to the conclusion—contrary to the Panel<sup>242</sup>—that application of the general rule of interpretation set out in Article 31 of the *Vienna Convention* leaves the meaning of "other recreational services (except sporting)" ambiguous and does not answer the question whether the commitment made by the United States in subsector 10.D of its Schedule includes a commitment in respect of gambling and betting services. Accordingly, we are required, in this case, to turn to the supplementary means of interpretation provided for in Article 32 of the *Vienna Convention*.<sup>243</sup>

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<sup>241</sup>United States' response to Question 39 posed by the Panel, Panel Report, pp. C-63 to C-64.

<sup>242</sup>The Panel concluded, at para. 6.110 of the Panel Report, that:

The US Schedule, read in the light of paragraph 16 of the Scheduling Guidelines, can be understood to include a specific commitment on gambling and betting services under subsector 10.D *Recreational services (except sporting)*. (original italics)

<sup>243</sup>The Panel also had recourse to such means in order to "confirm" the meaning that it had reached through application of Article 31. (Panel Report, para. 6.112)

B. *Interpretation of Subsector 10.D in Accordance with Supplementary Means of Interpretation: Article 32 of the Vienna Convention*

196. We observe, as a preliminary matter, that this appeal does *not* raise the question whether W/120 and the 1993 Scheduling Guidelines constitute "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion". Both participants agree that they do, and we see no reason to disagree.<sup>244</sup>

197. The United States argues, however, that, because the "ordinary meaning" of subsector 10.D of its Schedule is clear from an examination of the text, context (not including W/120 and the 1993 Scheduling Guidelines) and object and purpose, it is neither necessary nor appropriate to have recourse to Article 32 of the *Vienna Convention*. We disagree. As we have explained, the Panel erred in characterizing W/120 and the 1993 Scheduling Guidelines as "context". Yet, we have also seen that a proper interpretation pursuant to the principles codified in Article 31 of the *Vienna Convention* does not yield a clear meaning as to the scope of the commitment made by the United States in the entry "Other recreational services (except sporting)". Accordingly, it is appropriate to have recourse to the supplemental means of interpretation identified in Article 32 of the *Vienna Convention*. These means include W/120, the 1993 Scheduling Guidelines, and a cover note attached to drafts of the United States' Schedule.

198. Turning to the question of how the subsector 10.D entry "Other recreational services (except sporting)" is to be interpreted in the light of W/120 and the Scheduling Guidelines, we consider it useful to set out the relevant parts of both documents. The relevant section of W/120 is as follows:

SECTORS AND SUB-SECTORS	CORRESPONDING CPC
[...]	
10. RECREATIONAL, CULTURAL AND SPORTING SERVICES (other than audiovisual services)	
A. <u>Entertainment services</u> (including theatre, live bands and circus services)	9619

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<sup>244</sup>Some of the reasoning employed by the Panel in order to conclude (erroneously in our view) that these documents constituted "context" nevertheless confirms that they constitute "preparatory work", and are relevant "circumstances" relating to the conclusion of the GATS within the meaning of Article 32:

... both W/120 and the 1993 Scheduling Guidelines are "in connexion" with the GATS. Both documents were drafted in parallel with the GATS itself, with the stated purpose of being used as "guides" for scheduling specific commitments under the GATS ... In that sense, they can be considered to have been "drawn up on the occasion of the conclusion of the treaty".  
(footnote omitted)

(Panel Report, para. 6.81)

B.	<u>News agency services</u>	962
C.	<u>Libraries, archives, museums and other cultural services</u>	963
D.	<u>Sporting and other recreational services</u>	964
E.	<u>Other</u>	

199. Thus, W/120 clearly indicates that its entry 10.D—"Sporting and other recreational services"—corresponds to CPC Group 964. W/120 does not, however, contain any explicit indication of: (i) whether the reference to Group 964 necessarily incorporates a reference to *each and every sub-category* of Group 964 within the CPC; or (ii) how W/120 relates to the GATS Schedules of individual Members.

200. With respect to the first issue, we observe that W/120 sets out a much more aggregated classification list than the one found in the CPC. Whereas W/120 contains 12 sectors (11 and one "other") and more than 150 subsectors, the CPC classification scheme is comprised of 10 Sections, 69 Divisions, 295 Groups, 1,050 Classes and 1,811 Subclasses. The first draft classification list prepared by the GATT Secretariat, W/50, explained that one of the reasons for selecting the CPC as a basis for classification in the services negotiations was that such a product-based system "allows a *higher degree of disaggregation and precision* to be attained should it become necessary, at a later stage."<sup>245</sup> Thus, the CPC's level of disaggregation was one of the very reasons it was selected as a basis for a sectoral classification list. As the CPC is a decimal system<sup>246</sup>, a reference to an aggregate category must be understood as a reference to all of the constituent parts of that category. Put differently, a reference to a three-digit CPC Group should, in the absence of any indication to the contrary, be understood as a reference to all the four-digit Classes and five-digit Sub-classes that make up the group; and a reference to a four-digit Class should be understood as a reference to all of the five-digit Sub-classes that make up that Class.

201. In the CPC, Group 964, which corresponds to subsector 10.D of W/120 (Sporting and other recreational services), is broken down into the following Classes and Sub-classes:

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<sup>245</sup>MTN.GNS/W/50, para. 6. (emphasis added)

<sup>246</sup>The CPC hierarchy consists of Sections designated by one-digit codes, Divisions designated by two-digit codes, Groups designated by three-digit codes, Classes designated by four-digit codes, and Subclasses designated by five-digit codes.

## 964 Sporting and other recreational services

## 9641 Sporting services

- 96411 Sports event promotion services
- 96412 Sports event organization services
- 96413 Sports facility operation services
- 96419 Other sporting services

## 9649 Other recreational services

- 96491 Recreation park and beach services
- 96492 Gambling and betting services
- 96499 Other recreational services n.e.c.

Thus, the CPC Class that corresponds to "Sporting services" (9641) does *not* include gambling and betting services. Rather, the Sub-class for gambling and betting services (96492) falls under the Class "Other recreational services" (9649).

202. W/120 does not shed light on the issue of how it relates to individual Member's Schedules. That issue is, however, addressed in the 1993 Scheduling Guidelines:

**HOW SHOULD ITEMS BE SCHEDULED?**

15. Schedules record, for each sector, the legally enforceable commitments of each Member. It is therefore vital that schedules be clear, precise and based on a common format and terminology. This section describes how commitments should be entered in schedules.

...

**A. How to describe committed sectors and subsectors**

16. The legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector or subsector scheduled. In general the classification of sectors and subsectors should be based on the Secretariat's revised Services Sectoral Classification List. [W/120] Each sector contained in the Secretariat list is identified by the corresponding Central Product Classification (CPC) number. Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognised classification (e.g. Financial Services Annex). The most recent breakdown of the CPC, including explanatory notes for each subsector, is contained in the UN Provisional Central Product Classification.

Example: A Member wishes to indicate an offer or commitment in the subsector of map-making services. In the Secretariat list, this service would fall under the general heading "Other Business Services" under "Related scientific and technical consulting services" (see item I.F.m). By consulting the CPC, map-making can be found under the corresponding CPC classification number 86754. In its offer/schedule, the Member would then enter the subsector under the "Other Business Services" section of its schedule as follows:

Map-making services (86754)

*If a Member wishes to use its own subsectoral classification or definitions it should provide concordance with the CPC in the manner indicated in the above example. If this is not possible, it should give a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment. (emphasis added; footnote omitted)*

203. The Scheduling Guidelines thus underline the importance of using a common format and terminology in scheduling, and express a clear preference for parties to use W/120 and the CPC classifications in their Schedules. At the same time, the Guidelines make clear that parties wanting to use their own subsectoral classification or definitions—that is, to disaggregate in a way that diverges from W/120 and/or the CPC—were to do so in a "sufficiently detailed" way "to avoid any ambiguity as to the scope of the commitment." The example given in the Scheduling Guidelines illustrates how to make a positive commitment with respect to a discrete service that is more disaggregated than a service subsector identified in W/120. It is reasonable to assume that the parties to the negotiations expected the same technique to be applied to *exclude* a discrete service from the scope of a commitment, when the commitment is made in a subsector identified in W/120 and the excluded service is more disaggregated than that subsector.

204. In our view, the requisite clarity as to the scope of a commitment could not have been achieved through mere omission of CPC codes, particularly where a specific sector of a Member's Schedule, such as sector 10 of the United States' Schedule, follows the structure of W/120 in all other respects, and adopts *precisely* the same terminology as used in W/120. As discussed above, W/120 and the 1993 Scheduling Guidelines were prepared and circulated at the request of parties to the Uruguay Round negotiations for the express purpose of assisting those parties in the preparation of their offers. These documents undoubtedly served, too, to assist parties in reviewing and evaluating the offers made by others. They provided a common language and structure which, although not obligatory, was widely used and relied upon. In such circumstances, and in the light of the specific guidance provided in the 1993 Scheduling Guidelines, it is reasonable to assume that parties to the negotiations examining a sector of a Schedule that tracked so closely the language of the same sector

in W/120 would—absent a clear indication to the contrary—have expected the sector to have the same coverage as the corresponding W/120 sector. This is another way of stating that, as the Panel observed, "unless otherwise indicated in the Schedule, Members were assumed to have relied on W/120 and the corresponding CPC references."<sup>247</sup>

205. Accordingly, the above excerpt from the 1993 Scheduling Guidelines, together with the linguistic similarities between the two subsectors, provide strong support for interpreting subsector 10.D of the United States' Schedule as corresponding to subsector 10.D of W/120, notwithstanding the absence of CPC codes in the United States' Schedule. Subsector 10.D of W/120, in turn, corresponds to Class 964 of CPC, along with its sub-categories.

206. We observe that another element of the preparatory work of the GATS suggests that the United States itself understood the Scheduling Guidelines in this way and sought to comply with them in the drafting of its GATS Schedule. Several drafts of the United States' Schedule included the following cover note:

[E]xcept 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).<sup>248</sup>

207. These explanatory notes confirm that the United States used W/120 and sought to follow the 1993 Scheduling Guidelines. Although the United States emphasizes that this note did not form part of the final version of the United States' GATS Schedule, the reasons why the note was omitted are unclear<sup>249</sup> and, in any event, the commitment made by the United States in subsector 10.D remained the same in the drafts that had this cover note and in the final version of the Schedule. In other words, the other parties to the negotiations could not have been expected to understand that the mere omission of the cover note from the final version of the United States' Schedule somehow modified the scope of the commitment undertaken in Sector 10.

208. In our view, therefore, the relevant entry in the United States' Schedule, "Other recreational services (except sporting)", must be interpreted as *excluding* from the scope of its specific commitment services corresponding to CPC class 9641, "Sporting services". For the same reasons,

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<sup>247</sup>Panel Report, para. 6.106.

<sup>248</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. See also MTN.GNS/W/112/Rev.2, 1 October 1993.

<sup>249</sup>Before the Panel, and at the oral hearing in this appeal, the European Communities explained that such notes were removed as part of the process of "technical verification" of schedules and that the United States could not have unilaterally amended the scope of its commitments after 15 December 1993. See the parties' responses to Question 3 posed by the Panel, Panel Report, pp. C-22ff.

the entry must be read as *including* within the scope of its commitment services corresponding to CPC 9649, "Other recreational services", including Sub-class 96492, "Gambling and betting services".

209. Finally, we consider briefly the United States' challenge to the Panel's use, in interpreting the United States' Schedule, of a document published by the USITC. The United States submits that the Panel's reliance on this document "reflects a misguided and erroneous attempt to exaggerate the importance of a document that has no relevance under the customary rules *of interpretation of international law*".<sup>250</sup>

210. The Office of the United States Trade Representative delegated to the USITC responsibility for maintaining and updating, as necessary, the United States' Schedule. In 1997, the USITC published an explanatory text that, *inter alia*, explained the relationship between United States' Schedule entries and the CPC. One stated purpose of the document is to clarify '*how the service sectors referenced in the GATT Secretariat's list, the CPC System, and the U.S. Schedule correspond*'.<sup>251</sup> The table of concordance set out in that document clearly indicates that subsector 10.D of the United States' Schedule "corresponds" to CPC 964.<sup>252</sup>

211. The Panel did not explain clearly how it used this document in interpreting the United States' Schedule. The Panel considered that, although the USITC Document did not constitute a "binding interpretation", it nevertheless "has probative value as to how the US government views the structure and the scope of the US Schedule, and, hence, its GATS obligations."<sup>253</sup> The document was dealt with under the heading "Other supplementary means of interpretation". In this context, the Panel observed that "Article 32 of the *Vienna Convention* is not necessarily limited to preparatory material, but may allow treaty interpreters to take into consideration other relevant material".<sup>254</sup> Yet the Panel also referred to the principle of "acquiescence" and to a commentator's statement that "Article 31:3(b)

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<sup>250</sup>United States' appellant's submission, para. 83. (original emphasis)

<sup>251</sup>Panel Report, para. 6.132 (quoting from p.viii of the USITC document). (emphasis added by the Panel) The USITC document also explains, on the same page, that:

In preparing national schedules, countries were requested to identify and define sectors and subsectors in accordance with the GATT Secretariat's list, which lists sectors and their respective CPC numbers. Accordingly, foreign schedules frequently make explicit references to the CPC numbers. The U.S. Schedule makes no explicit references to CPC numbers, but it corresponds closely with the GATT Secretariat's list.

<sup>252</sup>*US Schedule of Commitments under the General Agreement on Trade in Services*, United States International Trade Commission, May 1997, p. 25.

<sup>253</sup>Panel Report, para. 6.133.

<sup>254</sup>*Ibid.*, para. 6.122.

[of the *Vienna Convention*] might also apply".<sup>255</sup> Notwithstanding these ambiguities, it is clear from the Panel's reasoning that it used the USITC publication to "confirm" its interpretation of subsector 10.D in the United States' Schedule.<sup>256</sup> In other words, the Panel's interpretation did not depend on its treatment of the USITC document.

212. We have already determined that the Panel committed certain errors in interpreting the United States' Schedule. Nevertheless, we have determined that a proper interpretation according to the principles codified in Articles 31 and 32 of the *Vienna Convention* leads to the same result that the Panel reached, namely, that subsector 10.D of the United States' GATS Schedule includes a specific commitment with respect to gambling and betting services. In the light of this finding, we need not decide whether the Panel erred in its treatment of the USITC Document.

### C. Summary

213. Based on our reasoning above, we reject the United States' argument that, by excluding "sporting" services from the scope of its commitment in subsector 10.D, the United States excluded gambling and betting services from the scope of that commitment. Accordingly, we *uphold*, albeit for different reasons, the Panel's finding, in paragraph 7.2(a) of the Panel Report, that:

... the United States' Schedule under the GATS includes specific commitments on gambling and betting services under subsector 10.D.

## VI. Article XVI of the GATS: Market Access

214. Article XVI of the GATS sets out specific obligations for Members that apply insofar as a Member has undertaken "specific market access commitments" in its Schedule. The first paragraph of Article XVI obliges Members to accord services and service suppliers of other Members "no less favourable treatment than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." The second paragraph of Article XVI defines, in six sub-paragraphs, measures that a Member, having undertaken a specific commitment, is not to adopt or maintain, "unless otherwise specified in its Schedule". The first four sub-paragraphs concern quantitative limitations on market access; the fifth sub-paragraph covers measures that restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and the sixth sub-paragraph identifies limitations on the participation of foreign capital.

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<sup>255</sup>Panel Report, para. 6.122 (referring in footnote to A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p. 200).

<sup>256</sup>*Ibid.*, para. 6.133.

215. The Panel found that the United States' Schedule includes specific commitments on gambling and betting services, and we have upheld this finding. The Panel then considered the consistency of the measures at issue with the United States' obligations under Article XVI of the GATS. The scope of those obligations depends on the scope of the specific commitment made in the United States' Schedule. In this case, the relevant entry for mode 1 supply in the market access column of subsector 10.D of the United States' Schedule reads "None".<sup>257</sup> In other words, the United States has undertaken to provide full market access, within the meaning of Article XVI, in respect of the services included within the scope of its subsector 10.D commitment. In so doing, it has committed not to maintain any of the types of measures listed in the six sub-paragraphs of Article XVI:2.

216. Before the Panel, Antigua claimed that, in maintaining measures that prohibit the cross-border supply of gambling and betting services, the United States is maintaining quantitative limitations that fall within the scope of sub-paragraphs (a) and (c) of Article XVI and that are, therefore, inconsistent with the market access commitment undertaken in subsector 10.D of the United States' Schedule. The Panel took the view that a prohibition on the supply of certain services effectively "limits to zero" the number of service suppliers and number of service operations relating to that service. The Panel reasoned that such a prohibition results in a "zero quota" and, therefore, constitutes a "limitation on the number of service suppliers in the form of numerical quotas' within the meaning of Article XVI:2(a)" and "a limitation 'on the total number of service operations or on the total quantity of service output ... in the form of quotas' within the meaning of Article XVI:2(c)".<sup>258</sup>

217. In consequence, the Panel found that, by maintaining the following measures, the United States acts inconsistently with its obligations under Article XVI of the GATS:

- (i) Federal laws
  - (1) the Wire Act;
  - (2) the Travel Act (when read together with the relevant state laws); and
  - (3) the Illegal Gambling Business Act (when read together with the relevant state laws).
- (ii) State laws:
  - (1) Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);
  - (2) Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;

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<sup>257</sup>This notation is the opposite of the notation "Unbound", which means that a Member undertakes *no* specific commitment.

<sup>258</sup>Panel Report, paras. 6.338 and 6.355.

- (3) South Dakota: Section 22-25A-8 of the South Dakota Codified Laws; and
- (4) Utah: Section 76-10-1102(b) of the Utah Code (Annotated).<sup>259</sup>

A. *Preliminary Matters*

218. The United States appeals both the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI, as well as its application of those provisions to the measures at issue. We have already determined that the Panel should not have made findings under Article XVI with respect to certain state laws because Antigua had not made out a *prima facie* case in respect of these measures. Having already reversed the Panel's findings regarding these state laws<sup>260</sup>, we need not consider them further in our assessment of this part of the United States' appeal. Accordingly, our analysis below is limited to a review of the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2, as well as to its application of that interpretation to the three *federal* statutes at issue in this case.

219. We also note that the Notice of Appeal filed by the United States appears to indicate a separate, independent challenge to:

The Panel's finding that a WTO Member does not respect its GATS market access obligations under Article XVI:2 if it limits market access to any part of a scheduled sector or subsector, or if it restricts any means of delivery under mode 1 with respect to a committed sector.<sup>261</sup>

220. The United States did not, however, adduce any arguments in support of such a challenge in its appellant's submission. Nor did the United States expressly refer to, or request us to reverse, any paragraph of the Panel Report in which the "finding" referred to in the above excerpt is found. Accordingly, we understand that the United States does *not* challenge separately the Panel's findings as regards restrictions on the supply of *part of a sector*, or as regards restrictions on *part of a mode of supply* (that is, on one or more means of supplying a given service).<sup>262</sup> In response to questioning at

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<sup>259</sup>See Panel Report, paras. 6.421 and 7.2(b). The Panel's findings that specific measures afforded treatment less favourable than that provided for in the United States' schedule are found in paragraphs 6.365, 6.373, 6.380, 6.389, 6.395, and 6.412.

<sup>260</sup>*Supra*, paras. 154 and 155.

<sup>261</sup>United States' Notice of Appeal, para. 3(c), *supra*, footnote 22.

<sup>262</sup>We understand the relevant findings to be those in paragraphs 6.287 and 6.290 of the Panel Report. The Panel found that: (i) as regards a particular service, a Member that has made an unlimited market access commitment under mode 1 commits itself not to maintain measures that prohibit the use of one, several or all means of delivery of that service; and (ii) a Member that has made a market access commitment in a sector or subsector has committed itself in respect of *all* services that fall within the relevant sector or subsector.

the oral hearing, the United States confirmed that its appeal focuses on the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2<sup>263</sup>, and we shall limit our examination accordingly.

B. *The Meaning of Sub-paragraphs (a) and (c) of Article XVI*

221. The chapeau to Article XVI:2, and sub-paragraphs (a) and (c), provide:

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

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

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;<sup>9</sup>

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<sup>9</sup> Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

222. In its appeal, the United States emphasizes that *none* of the measures at issue states any numerical units or is in the form of quotas and that, therefore, *none* of those measures falls within the scope of sub-paragraph (a) or (c) of Article XVI:2. The United States contends that the Panel erred in its interpretation of sub-paragraphs (a) and (c) of Article XVI:2 by failing to give effect to certain elements of the text of these provisions, notably to key terms such as "form" and "numerical quotas". According to the United States, the Panel appears to have been influenced by a "misguided"<sup>264</sup> concern that prohibitions on foreign service suppliers should not escape the application of Article XVI simply because they are not expressed in numerical terms. The United States asserts that the Panel ignored the fact that such prohibitions remain subject to other provisions of the Agreement, including Articles XVII and VI, and contends that, in its approach, the Panel improperly expanded the obligations in Article XVI. For the United States, Members that have made a specific commitment under Article XVI have committed themselves not to maintain the precisely defined limitations set out

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<sup>263</sup>In response to a question on this issue at the oral hearing, the United States stated that its arguments on these points are in the nature of "subsidiary" or "supporting" arguments. According to the United States, these arguments illustrate why the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI was "unreasonable".

<sup>264</sup>United States' appellant's submission, para. 98.

in Article XVI:2; Members have *not* committed themselves to eliminate all other limitations or restrictions that may impede the supply of the relevant services.

1. Sub-paragraph (a) of Article XVI:2

223. In interpreting sub-paragraph (a) of Article XVI:2, the Panel determined that:

[a prohibition on one, several or all means of delivery cross-border] is a "limitation on the number of service suppliers in the form of numerical quotas" within the meaning of Article XVI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in mode 1.<sup>265</sup>

224. The United States submits that this interpretation ignores the text of sub-paragraph (a), in particular the meaning of "form" and "numerical quotas", and erroneously includes within the scope of Article XVI:2(a) measures that have the *effect* of limiting the number of service suppliers or output to zero. Although the Panel opined that any other result would be "absurd", the United States stresses the opposite—that a contrary result would be consistent with the balance between liberalization and the right to regulate that is reflected in the GATS.

225. Article XVI:2(a) prohibits "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test." In interpreting this provision we observe, first, that it refers to restrictions "on the *number* of service suppliers", as well as to "*numerical* quotas". These words reflect that the focus of Article XVI:2(a) is on limitations relating to numbers or, put differently, to *quantitative* limitations.

226. The United States urges us to give proper effect to the terms "in the form of" in sub-paragraph (a) and, to that end, refers to dictionary definitions to establish the meaning of "form" in Article XIV(a). Yet even these definitions suggest a degree of ambiguity as to the scope of the word "form". For example, "form" covers both the mode in which a thing "exists", as well as the mode in which it "manifests itself". This suggests a broad meaning for the term "form".<sup>266</sup>

227. The words "in the form of" in sub-paragraph (a) relate to all four of the limitations identified in that provision. It follows, in our view, that the four types of limitations, themselves, impart meaning to "in the form of". Looking at these four types of limitations in Article XVI:2(a), we begin with "numerical quotas". These words are not defined in the GATS. According to the dictionary

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<sup>265</sup>Panel Report, para. 6.338.

<sup>266</sup>In footnote 166 to paragraph 105 of its appellant's submission, the United States refers to "*The New Shorter Oxford English Dictionary*, p. 1006, which defines 'form' *inter alia* as 'shape, arrangement of parts,' or '[t]he particular mode in which a thing exists or manifests itself,' or, in linguistics, 'the external characteristics of a word or other unit as distinct from its meaning'".

definitions provided by the United States, the meaning of the word "numerical" includes "characteristic of a number or numbers".<sup>267</sup> The word "quota" means, *inter alia*, "the maximum number or quantity belonging, due, given, or permitted to an individual or group"; and "numerical limitations on imports or exports".<sup>268</sup> Thus, a "numerical quota" within Article XVI:2(a) appears to mean a quantitative limit on the number of service suppliers. The fact that the word "numerical" encompasses things which "have the characteristics of a number" suggests that limitations "in the form of a numerical quota" would encompass limitations which, even if not in themselves a number, have the characteristics of a number. Because zero is *quantitative* in nature, it can, in our view, be deemed to have the "characteristics of" a number—that is, to be "numerical".

228. The second type of limitation mentioned in sub-paragraph (a) is "limitations on the number of service suppliers... in the form of ... monopolies". Although the word "monopolies", as such, is not defined, Article XXVIII(h) of the GATS defines a "monopoly supplier of a service" as:

... any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally *or in effect* by that Member as the sole supplier of that service. (emphasis added)

229. The term "exclusive service suppliers", which is used to identify the third limitation in Article XVI:2(a) ("limitations on the number of service suppliers...in the form of exclusive service suppliers"), is defined in Article VIII:5 of the GATS, as:

... where a Member, formally *or in effect*, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory. (emphasis added)

230. These two definitions suggest that the reference, in Article XVI:2(a), to limitations on the number of service suppliers "in the form of monopolies and exclusive service suppliers" should be read to include limitations that are in form *or in effect*, monopolies or exclusive service suppliers.

231. We further observe that it is not clear that "limitations on the number of service suppliers ... in the form of ... the requirements of an economic needs test" must take a particular "form."<sup>269</sup> Thus, this

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<sup>267</sup>The United States, at footnote 167 to paragraph 105 of its appellant's submission, observes that the *New Shorter Oxford English Dictionary*, at p. 1955, defines 'numerical' as '[o]f, pertaining to, or characteristic of a number or numbers; (of a figure, symbol, etc.) expressing a number.'

<sup>268</sup>The United States' appellant's submission, footnote 167 to para. 105 (referring to the *New Shorter Oxford English Dictionary*, p. 2454).

<sup>269</sup>See the WTO Secretariat Note on "Economic Needs Tests", S/CSS/W/118, 30 November 2001, para. 4.

fourth type of limitation, too, suggests that the words "in the form of" must not be interpreted as prescribing a rigid mechanical formula.

232. This is not to say that the words "in the form of" should be ignored or replaced by the words "that have the effect of". Yet, at the same time, they cannot be read in isolation. Rather, when viewed as a whole, the text of sub-paragraph (a) supports the view that the words "in the form of" must be read in conjunction with the words that precede them—"limitations on the *number* of service suppliers"—as well as the words that follow them, including the words "*numerical* quotas". (emphasis added) Read in this way, it is clear that the thrust of sub-paragraph (a) is not on the *form* of limitations, but on their *numerical*, or *quantitative*, nature.

233. Looking to the context of sub-paragraph (a), we observe that the chapeau to Article XVI:2, refers to the purpose of the sub-paragraphs that follow, namely, to define the measures which a Member shall not maintain or adopt for sectors *where market access commitments are made*. The chapeau thus contemplates circumstances in which a Member's Schedule *includes* a commitment to allow market access, and points out that the function of the sub-paragraphs in Article XVI:2 is to define certain limitations that are prohibited unless specifically entered in the Member's Schedule. Plainly, the drafters of sub-paragraph (a) had in mind limitations that would impose a maximum limit of *above* zero. Similarly, Article II:1(b) of the GATT 1994 prohibits Members from imposing duties "in excess of" the bound duty rate. Such bound duty rate will usually be *above* zero. Yet this does not mean that Article II:1(b) does not also refer to bound rates set at zero.

234. It follows from the above that we find the following reasoning of the Panel to be persuasive:

[t]he fact that the terminology [of Article XVI:2(a)] embraces lesser limitations, in the form of quotas greater than zero, cannot warrant the conclusion that it does not embrace a greater limitation amounting to zero. Paragraph (a) does not foresee a "zero quota" because paragraph (a) was not drafted to cover situations where a Member wants to maintain full limitations. If a Member wants to maintain a full prohibition, it is assumed that such a Member would not have scheduled such a sector or subsector and, therefore, would not need to schedule any limitation or measures pursuant to Article XVI:2.<sup>270</sup>

235. As for the first paragraph of Article XVI, we note that it does not refer expressly to any requirements as to form, but simply links a Member's market access obligations in respect of scheduled services to "the terms, limitations and conditions agreed and specified in its Schedule".

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<sup>270</sup>Panel Report, para. 6.331.

Neither this provision, nor the object and purpose of the GATS as stated in its preamble<sup>271</sup>, readily assists us in answering the question whether the reference in Article XVI:2(a) to "limitations on the number of service suppliers ... in the form of numerical quotas" encompasses the type of measure at issue here, namely, a prohibition on the supply of a service in respect of which a specific commitment has been made.

236. In our view, the above examination of the words of Article XVI:2(a) read in their context and in the light of the object and purpose of the GATS suggests that the words "in the form of" do not impose the type of precisely defined constraint that the United States suggests. Yet certain ambiguities about the meaning of the provision remain. The Panel, at this stage of its analysis, observed that any suggestion that the "form" requirement must be strictly interpreted to refer *only* to limitations "explicitly couched in numerical terms" leads to "absurdity".<sup>272</sup> In either circumstance, this is an appropriate case in which to have recourse to supplementary means of interpretation, such as preparatory work.

237. We have already determined that the 1993 Scheduling Guidelines constitute relevant preparatory work.<sup>273</sup> As the Panel observed, those Guidelines set out an example of the type of limitation that falls within the scope of sub-paragraph (a) of Article XVI:2, that is, of the type of measures that will be inconsistent with Article XVI if a relevant commitment has been made and unless the Member in question has listed it as a condition or limitation in its Schedule. That example is: "nationality requirements for suppliers of services (equivalent to zero quota)".<sup>274</sup> This example confirms the view that measures equivalent to a zero quota fall within the scope of Article XVI:2(a).

238. For the above reasons, we are of the view that limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI:2(a).

239. As we have not been asked to revisit the other elements of the Panel's reasoning on this issue—in particular its findings regarding limitations on market access in respect of part of a

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<sup>271</sup>We recall that the Panel identified, as forming part of the object and purpose of the GATS: transparency, the progressive liberalization of trade in services, and Members' right to regulate trade in services provided that they respect the rights of other Members under the GATS. (Panel Report, paras. 6.107-6.109, and 6.314-6.317)

<sup>272</sup>In paragraph 6.332 of the Panel Report, the Panel reasoned that:

To hold that only restrictions explicitly couched in numerical terms fall within Article XVI:2(a) would produce absurd results. It would, for example, allow a law that explicitly provides that "all foreign services are prohibited" to escape the application of Article XVI, because it is not expressed in numerical terms.

<sup>273</sup>*Supra*, para. 196.

<sup>274</sup>See 1993 Scheduling Guidelines, para. 6.

committed sector<sup>275</sup>, and limitations on one or more means of cross-border delivery for a committed service<sup>276</sup>—we therefore, *uphold* the Panel's finding that:

[a prohibition on one, several or all means of delivery cross-border] is a "limitation on the number of service suppliers in the form of numerical quotas" within the meaning of Article XVI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in mode 1.<sup>277</sup>

2. Sub-paragraph (c) of Article XVI:2

240. In interpreting sub-paragraph (c) of Article XVI:2, the Panel observed that the wording of the provision "might perhaps be taken to imply that any quota has to be expressed in terms of designated numerical units".<sup>278</sup> However, after further analysis and, in particular, after comparing the English version of the provision with its French and Spanish counterparts, the Panel found that sub-paragraph (c) does *not* mean that any quota must be expressed in terms of designated numerical units if it is to fall within the scope of that provision. Instead, according to the Panel, the "correct reading of Article XVI:2(c)" is that limitations referred to under that provision may be: (i) in the form of designated numerical units; (ii) in the form of quotas; *or* (iii) in the form of the requirement of an economic needs test.<sup>279</sup>

241. The Panel then found that, where a specific commitment has been undertaken in respect of a service, a measure prohibiting one or more means of delivery of that service is:

... a limitation "on the total number of service operations or on the total quantity of service output ... in the form of quotas" within the meaning of Article XVI:2(c) because it ... results in a "zero quota" on one or more or all means of delivery include[d] in mode 1.<sup>280</sup>

242. The United States asserts that, in so finding, the Panel used an incorrect reading of the French and Spanish texts to arrive at an interpretation that is inconsistent with the ordinary meaning of the English text. Specifically, the Panel relied upon the presence of commas in the French and Spanish versions of the text—but not in the English version—in order to find that sub-paragraph (c) identifies *three* types of limitations. The United States argues that, when properly interpreted, sub-paragraph (c) identifies only *two* types of limitations. The United States adds that the measures at issue in this case

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<sup>275</sup>Panel Report, para. 6.335.

<sup>276</sup>*Ibid.*, para. 6.338.

<sup>277</sup>*Ibid.*

<sup>278</sup>*Ibid.*, para. 6.343.

<sup>279</sup>*Ibid.*, para. 6.344.

<sup>280</sup>*Ibid.*, para. 6.355.

cannot in any way be construed as falling within the scope of either of the *two* limitations defined in sub-paragraph (c).

243. Sub-paragraph (c) refers to the following measures:

limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test.

244. The Panel essentially determined that, *notwithstanding* the absence of a comma between "terms of designated numerical units" and "in the form of quotas" in the *English* version, the phrase should, in order to be read in a manner consistent with the French and Spanish versions, be read *as if* such a comma existed—that is, as if expressed in "terms of designated numerical units" and "in the form of quotas" were disjunctive phrases, each of which modifies the word "limitations" at the beginning of the provision. The Panel relied on the fact that such a comma *does* exist in both the French and Spanish versions of the provision.<sup>281</sup> The United States argues, however, based on a detailed analysis of French grammar, that the existence of the comma in the French version is, in fact, consistent with the absence of a comma in the English version, and that both versions mean that Article XVI:2(c) identifies only *two* limitations.<sup>282</sup>

245. Ultimately, we are not persuaded that the key to the interpretation of this particular provision is to be found in a careful dissection of the use of commas within its grammatical structure. Regardless of which language version is analyzed, and of the implications of comma placement (or lack thereof), *all* three language versions are grammatically ambiguous. All three can arguably be read as identifying two limitations on the total number of service operations or on the total quantity of service output.<sup>283</sup> All three can also arguably be read as identifying *three* limitations on the total number of service operations or on the total quantity of service output.<sup>284</sup> The mere presence or absence of a comma in Article XVI:2(c) is not determinative of the issue before us.

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<sup>281</sup>The French version reads "limitations concernant le nombre total d'opérations de services ou la quantité totale de services produits, exprimées en unités numériques déterminées, sous forme de contingents ou de l'exigence d'un examen des besoins économiques"; and the Spanish version reads "limitaciones al número total de operaciones de servicios o a la cuantía total de la producción de servicios, expresadas en unidades numéricas designadas, en forma de contingentes o mediante la exigencia de una prueba de necesidades económicas".

<sup>282</sup>United States' appellant's submission, paras. 114-120.

<sup>283</sup>That is: (i) limitations ... expressed in terms of designated numerical units in the form of quotas; or (ii) limitations ... expressed in terms of the requirement of an economic needs test.

<sup>284</sup>That is: (i) limitations ... expressed in terms of designated numerical units; (ii) limitations ... expressed ... in the form of quotas; or (iii) limitations ... expressed in terms of the requirement of ... an economic needs test.

246. We find it more useful, and appropriate, to look to the language of the provision itself for its meaning. Looking at the provision generally, we see that the first clause of sub-paragraph (c) deals with the *target* of the limitations covered by that provision. There are two such types of limitations: on the number of service operations; and on the quantity of service output. Both are *quantitative* in nature. The second part of the provision provides more detail as to the *type* of limitations—relating to those service operations or output—that fall within sub-paragraph (c). These are: "designated numerical units in the form of quotas or the requirement of an economic needs test". The second part of the provision clearly modifies the first part of the provision (service operations, service output). Yet certain elements of the second part apply differently to the two elements of the first part. For example, in its ordinary sense, the term "numerical units" is more naturally used to refer to "output" than to "operations".

247. In our view, by combining, in sub-paragraph (c), the elements of the first clause of Article XVI:2(c) and the elements in the second part of the provision, the parties to the negotiations sought to ensure that their provision covered certain types of limitations, but did not feel the need to clearly demarcate the scope of each such element. On the contrary, there is scope for overlap between such elements: between limitations on the number of service operations and limitations on the quantity of service output, for example, or between limitations in the form of quotas and limitations in the form of an economic needs test. That sub-paragraph (c) applies in respect of all four modes of supply under the GATS also suggests the limitations covered thereunder cannot take a single form, nor be constrained in a formulaic manner. Nonetheless, all types of limitations in sub-paragraph (c) are quantitative in nature, and all restrict market access. For these reasons, we are of the view that, *even if* sub-paragraph (c) is read as referring to only *two* types of limitations, as contended by the United States, it does not follow that sub-paragraph (c) would not catch a measure equivalent to a zero quota.

248. To the extent that the above interpretation leaves a degree of ambiguity as to the proper meaning of Article XVI:2(c), we consider it useful to resort to supplementary means of interpretation. The market access obligations set forth in Article XVI were intended to be obligations in respect of *quantitative*, or "quantitative-type"<sup>285</sup>, measures. The difficulties faced by the negotiating parties concerned not *whether* Article XVI covered quantitative measures—for it was clear that it did—but rather how to "know where the line should be drawn between quantitative and qualitative measures".<sup>286</sup>

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<sup>285</sup>Statement by the Co-Chairman at the meeting of 17-27 September 1991, MTN.GNS/45, para. 16.

<sup>286</sup>*Ibid.*

249. We also consider it appropriate to refer to the 1993 Scheduling Guidelines as preparatory work. These Guidelines set out an example of the type of measure covered by sub-paragraph (c) of Article XVI:2. They refer to "[r]estrictions on broadcasting time available for foreign films"<sup>287</sup>, without mentioning numbers or units.

250. The strict interpretation of Article XVI:2(c) advanced by the United States would imply that only limitations that contain an express reference to numbered units could fall within the scope of that provision. Under such an interpretation, sub-paragraph (c) could not cover, for example, a limitation expressed as a percentage or described using words such as "a majority". It is neither necessary nor appropriate for us to draw, in the abstract, the line between quantitative and qualitative measures, and we do not do so here. Yet we are satisfied that a prohibition on the supply of services in respect of which a full market access commitment has been undertaken is a quantitative limitation on the supply of such services.

251. In this case, the measures at issue, by prohibiting the supply of services in respect of which a market access commitment has been taken, amount to a "zero quota" on service operations or output with respect to such services. As such, they fall within the scope of Article XVI:2(c).

252. For all of these reasons, we *uphold* the Panel's finding, in paragraph 6.355 of the Panel Report, that a measure prohibiting the supply of certain services where specific commitments have been undertaken is a limitation:

... within the meaning of Article XVI:2(c) because it totally prevents the services operations and/or service output through one or more or all means of delivery that are included in mode 1. In other words, such a ban results in a "zero quota" on one or more or all means of delivery include in mode 1.

3. Article XVI:2(a) and XVI:2(c) – Prohibitions Directed at Consumers

253. Antigua also appeals the Panel's findings that certain measures that prohibit *consumers* from purchasing cross-border gambling services are not caught by either sub-paragraph (a) or sub-paragraph (c) of Article XVI:2.<sup>288</sup> The Panel applied its analysis of these provisions to find that four state laws directed at persons who engage in gambling—that is, to *consumers* of gambling services

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<sup>287</sup>1993 Scheduling Guidelines, p. 3.

<sup>288</sup>Panel Report, paras. 6.321 and 6.348-6.349.

as opposed to *suppliers* of gambling services—had not been shown to be inconsistent with the United States' market access commitments.<sup>289</sup>

254. In paragraphs 149 to 155 of this Report, we expressed our view that, with respect to the eight state laws reviewed by the Panel, Antigua had failed to establish a *prima facie* case of inconsistency with sub-paragraphs (a) and (c) of Article XVI:2. For this reason, we reversed the Panel's findings that four of those state laws are inconsistent with Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2.<sup>290</sup> Having held that the Panel was not entitled to make findings on *any* of the eight state laws, including with respect to the four state laws directed at *consumers* rather than *suppliers* of gambling services, we need not, in resolving this appeal, consider the merits of Antigua's appeal of the Panel's findings with respect to restrictions on service *consumers* as opposed to service *suppliers*.

C. *Does the Second Paragraph of Article XVI Exhaust the Market Access Restrictions that are Prohibited by the First Paragraph?*

255. The Panel found that:

The ordinary meaning of the words, the context of Article XVI, as well as the object and purpose of the GATS confirm that the restrictions on market access that are covered by Article XVI are only those listed in paragraph 2 of this Article.<sup>291</sup>

256. Antigua conditionally appeals this finding. Its appeal is conditional upon the Appellate Body's reversing the finding of the Panel, in paragraph 7.2(b) of the Panel Report, that certain United States federal and state laws are contrary to Article XVI:1 and Article XVI:2 of the GATS. More specifically, the appeal is made "in the event the Appellate Body were to agree with the United States' argument that GATS Articles XVI:2(a) and (c) only apply to limitations that are in form specified exactly and expressly in terms of numerical quotas."<sup>292</sup> Having upheld the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2 and dismissed this ground of the United States' appeal, it follows that the condition on which this aspect of Antigua's appeal is made is not satisfied, and we *need not consider* it further. We thus leave the issue of the relationship between the first and second paragraphs of Article XVI to another day.

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<sup>289</sup>Panel Report, paras. 6.382-6.383 (Colorado), 6.397-6.398 (Minnesota), 6.401-6.402 (New Jersey), and 6.405-6.406 (New York).

<sup>290</sup>*Supra*, para. 155.

<sup>291</sup>Panel Report, para. 6.318. See also paras. 6.298-6.299.

<sup>292</sup>Antigua's other appellant's submission, footnote 3 to para. 3. See also Antigua's other appellant's submission, para. 55.

D. *Application of Article XVI to the Measures at Issue*

257. Having upheld the Panel's interpretation of Article XVI:2(a) and (c), we now consider its application of that interpretation to the measures at issue in this case. In so doing, we consider, for the reasons already explained, only that part of the Panel's analysis relating to the three *federal* laws, and not its analysis relating to state laws.

258. The Panel's explanation of the three federal laws is set out in paragraphs 6.360 to 6.380 of the Panel Report. It is, in our view, useful to set out briefly the relevant part of each statute, as well as the Panel's finding in respect of that statute. The relevant part of the Wire Act states:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers shall be fined under this title or imprisoned not more than two years, or both.<sup>293</sup>

259. With respect to this provision, the Panel found that "the Wire Act prohibits the use of at least one or potentially several means of delivery included in mode 1"<sup>294</sup>, and that, accordingly, the statute "constitutes a 'zero quota' for, respectively, one, several or all of those means of delivery."<sup>295</sup> The Panel reasoned that the Wire Act prohibits service suppliers from supplying gambling and betting services using remote means of delivery, as well as service operations and service output through such means. Accordingly, the Panel determined that "the Wire Act contains a limitation 'in the form of numerical quotas' within the meaning of Article XVI:2(a) and a limitation 'in the form of a quota' within the meaning of Article XVI:2(c)."<sup>296</sup>

260. As regards the Travel Act, the Panel quoted the following excerpt:

- (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –
- (1) distribute the proceeds of any unlawful activity; or

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<sup>293</sup>Section 1084(a) of Title 18 of the United States Code (quoted in Panel Report, para. 6.360).

<sup>294</sup>Panel Report, para. 6.362.

<sup>295</sup>*Ibid.*, para. 6.363.

<sup>296</sup>*Ibid.*

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform --

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling ... in violation of the laws of the State in which they are committed or of the United States.<sup>297</sup>

261. The Panel determined that "the Travel Act prohibits gambling activity that entails the supply of gambling and betting services by 'mail or any facility' to the extent that such supply is undertaken by a 'business enterprise involving gambling' that is prohibited under state law and provided that the other requirements in subparagraph (a) of the Travel Act have been met."<sup>298</sup> The Panel further opined that the Travel Act prohibits service suppliers from supplying gambling and betting services through the mail, (and potentially other means of delivery), as well as services operations and service output through the mail (and potentially other means of delivery), in such a way as to amount to a "zero" quota on one or several means of delivery included in mode 1.<sup>299</sup> For these reasons, the Panel found that "the Travel Act contains a limitation 'in the form of numerical quotas' within the meaning of Article XVI:2(a) and a limitation' in the form of a quota' within the meaning of Article XVI:2(c)."<sup>300</sup>

262. The Panel considered the relevant part of the Illegal Gambling Business Act to be the following:

(a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section --

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<sup>297</sup>Section 1952(a) and (b) of Title 18 of the United States Code (quoted in Panel Report, para. 6.366).

<sup>298</sup>Panel Report, para. 6.370. See also para. 6.367.

<sup>299</sup>*Ibid.*, paras. 6.368-6.370.

<sup>300</sup>*Ibid.*, para. 6.371.

- (1) 'illegal gambling business' means a gambling business which –
- (i) is a violation of the law of a State or political subdivision in which it is conducted;
  - (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
  - (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.
- (2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.<sup>301</sup>

263. The Panel then determined that because the IGBA "prohibits the conduct, finance, management, supervision, direction or ownership of all or part of a 'gambling business' that violates state law, it effectively prohibits the supply of gambling and betting services through at least one and potentially all means of delivery included in mode 1 by such businesses"; that this prohibition concerned service suppliers, service operations and service output; and that, accordingly, the IGBA "contains a limitation 'in the form of numerical quotas' within the meaning of Article XVI:2(a) and a limitation 'in the form of a quota' within the meaning of Article XVI:2(c)."<sup>302</sup>

264. The United States' appeal of the Panel's findings with respect to the consistency of its measures with sub-paragraphs (a) and (c) of Article XVI:2 rests on two pillars: (i) that the Panel erred in interpreting those provisions; and (ii) that the measures at issue do not contain any limitations that explicitly take the form of numerical quotas or designated numerical units. The United States does *not* appeal the Panel's findings as to the various activities that are prohibited under these statutes. We have upheld the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2 and, in particular, its determination that these provisions encompass measures equivalent to a zero quota. In these circumstances, the fact that the Wire Act, the Travel Act and the IGBA do not explicitly use numbers, or the word "quota", in imposing their respective prohibitions, does not mean, as the United States contends, that the measures are beyond the reach of Article XVI:2(a) and (c). As a result, there is no ground for disturbing the above findings made by the Panel.

265. We have upheld the Panel's finding that the United States' Schedule to the GATS includes a specific commitment in respect of gambling and betting services.<sup>303</sup> In that Schedule, the United

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<sup>301</sup>Section 1955(a) and (b) of Title 18 of the United States Code (quoted in Panel Report, para. 6.374).

<sup>302</sup>Panel Report, paras. 6.376-6.378.

<sup>303</sup>*Supra*, para. 213.

States has inscribed "None" in the first row of the market access column for subsector 10.D. In these circumstances, and for the reasons given in this section of our Report, we also *uphold* the Panel's ultimate finding, in paragraph 7.2(b)(i) of the Panel Report, that, by maintaining the Wire Act, the Travel Act, and the Illegal Gambling Business Act, the United States acts inconsistently with its obligations under Article XVI:1 and Article XVI:2(a) and (c) of the GATS.

## VII. Article XIV of the GATS: General Exceptions

266. Finally, we turn to the Panel's analysis of the United States' defence under Article XIV of the GATS. We found above that Antigua failed to make a *prima facie* case of inconsistency with Article XVI in relation to the eight state laws examined by the Panel.<sup>304</sup> The Panel found that no other state laws had been sufficiently identified by Antigua as part of its claims in this dispute.<sup>305</sup> We therefore limit our discussion to the Panel's treatment of the defence asserted by the United States with respect to the three federal laws—the Wire Act, the Travel Act, and the Illegal Gambling Business Act ("IGBA")—under Article XIV.

267. The United States and Antigua each raises multiple allegations of error with respect to the Panel's analysis under Article XIV. We begin with Antigua's claim that the Panel erred in examining the merits of the United States' defence, notwithstanding that the United States did not raise it until its second written submission to the Panel. Next, we consider the participants' allegations that the Panel erred by taking it upon itself to construct the defence or rebuttal for the other party. We then turn to the participants' claims of error in relation to the Panel's analysis under paragraphs (a) and (c) of Article XIV, and under the chapeau, or introductory paragraph, of Article XIV.

### A. *Did the Panel Err in Considering the United States' Defence Under Article XIV?*

268. Antigua argues that "the Panel erred in its decision to consider the United States' defence in this proceeding at all" and thereby failed to satisfy its obligations under Article 11 of the DSU.<sup>306</sup> Antigua points out that the United States did not raise its defence under Article XIV of the GATS until its second written submission to the Panel, which was filed on the same day as Antigua's second written submission. Antigua submits that this delayed invocation by the United States of its defence was a "simple litigation tactic"<sup>307</sup>, and that, because the United States did not invoke the defence at an

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<sup>304</sup>*Supra*, paras. 149-155.

<sup>305</sup>Panel Report, paras. 6.211-6.249.

<sup>306</sup>Antigua's other appellant's submission, para. 72.

<sup>307</sup>*Ibid.*

earlier stage of the panel proceeding, Antigua was "deprived of a full and fair opportunity to respond to the defence."<sup>308</sup>

269. Article 6.2 of the DSU requires that the legal basis for a dispute, that is, the *claims*, be identified in a panel request with specificity sufficient "to present the problem clearly," so that a responding party will be aware, at the time of the establishment of a panel, of the claims raised by the complaining party to which it might seek to respond in the course of the panel proceedings. In contrast, the DSU is silent about a deadline or a method by which a responding party must state the legal basis for its defence.<sup>309</sup> This does not mean that a responding party may put forward its defence whenever and in whatever manner it chooses. Article 3.10 of the DSU provides that "all Members will engage in these procedures in good faith in an effort to resolve the dispute", which implies the identification by each party of relevant legal and factual issues at the earliest opportunity, so as to provide other parties, including third parties, an opportunity to respond.

270. At the same time, the opportunity afforded to a Member to respond to claims and defences made against it is also a "fundamental tenet of due process".<sup>310</sup> A party must not merely be given an opportunity to respond, but that opportunity must be meaningful in terms of that party's ability to defend itself adequately. A party that considers it was not afforded such an opportunity will often raise a due process objection before the panel<sup>311</sup> The Appellate Body has recognized in numerous cases that a Member's right to raise a claim<sup>312</sup> or objection<sup>313</sup>, as well as a panel's exercise of discretion<sup>314</sup>, are circumscribed by the due process rights of other parties to a dispute. Those due process rights similarly serve to limit a responding party's right to set out its defence at *any* point during the panel proceedings.

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<sup>308</sup>Antigua's other appellant's submission, para. 73.

<sup>309</sup>The issue before us, therefore, is distinct from that addressed by the Appellate Body in *EC – Bananas III*, where a *responding party* challenged the panel's consideration of *claims* mentioned by certain complaining parties in the panel request, but not supported by any arguments until the second written submission before the panel. (Appellate Body Report, *EC – Bananas III*, paras. 145-147; see also Appellate Body Report, *Chile – Price Band System*, paras. 158-162) Here, we address a complaining party's challenge to a *defence* invoked by the responding party.

<sup>310</sup>Appellate Body Report, *Australia – Salmon*, para. 278. See also Appellate Body Report, *Chile – Price Band System*, para. 176.

<sup>311</sup>Appellate Body Report, *US – FSC*, paras. 165-166. See also Appellate Body Report, *Thailand – H-Beams*, para. 95.

<sup>312</sup>See, for example, Appellate Body Report, *EC – Tariff Preferences*, para. 113; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 161; and Appellate Body Report, *Thailand – H-Beams*, para. 88.

<sup>313</sup>Appellate Body Report, *US – Carbon Steel*, para. 123; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50; Appellate Body Report, *US – FSC*, para. 166; and Appellate Body Report, *US – 1916 Act*, para. 54.

<sup>314</sup>See, for example, Appellate Body Report, *US – 1916 Act*, para. 150; and Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 243.

271. Due process may be of particular concern in cases where a party raises *new facts* at a late stage of the panel proceedings. The Appellate Body has observed that, under the standard working procedures of panels<sup>315</sup>, complaining parties should put forward their cases—with "a full presentation of the facts on the basis of submission of supporting evidence"—during the *first* stage of panel proceedings.<sup>316</sup> We see no reason why this expectation would not apply equally to responding parties, which, once they have received the first written submission of a complaining party, are likely to be aware of the defences they might invoke and the evidence needed to support them.

272. It follows that the principles of good faith and due process oblige a responding party to articulate its defence promptly and clearly. This will enable the complaining party to understand that a specific defence has been made, "be aware of its dimensions, and have an adequate opportunity to address and respond to it."<sup>317</sup> Whether a defence has been made at a sufficiently early stage of the panel proceedings to provide adequate notice to the opposing party will depend on the particular circumstances of a given dispute.

273. Furthermore, as part of their duties, under Article 11 of the DSU, to "make an objective assessment of the matter" before them, panels must ensure that the due process rights of parties to a dispute are respected.<sup>318</sup> A panel may act inconsistently with this duty if it addresses a defence that a responding party raised at such a late stage of the panel proceedings that the complaining party had no meaningful opportunity to respond to it. To this end, panels are endowed with "sufficient flexibility" in their working procedures, by virtue of Article 12.2 of the DSU, to regulate panel proceedings and, in particular, to adjust their timetables to allow for additional time to respond or for additional submissions where necessary.<sup>319</sup>

274. In the present case, the United States made no mention of Article XIV of the GATS until its second written submission, filed on 9 January 2004.<sup>320</sup> Antigua did not refer to Article XIV in its second written submission, filed on the same day, although Antigua had, in its first written

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<sup>315</sup>Appendix 3 to the DSU. We note that the Panel in this dispute operated under Working Procedures, drawn up in consultation with the parties, that provided for "all factual evidence [to be submitted] 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." (Working Procedures of the Panel, Panel Report, p. A-2, para. 12)

<sup>316</sup>Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79. The first stage of panel proceedings continues through the first substantive panel meeting, whereas the second stage continues thereafter through the second substantive panel meeting.

<sup>317</sup>Appellate Body Report, *Chile – Price Band System*, para. 164. See also Appellate Body Report, *EC–Tariff Preferences*, para. 113.

<sup>318</sup>Appellate Body Report, *Chile – Price Band System*, paras. 174-177.

<sup>319</sup>See Appellate Body Report, *Australia – Salmon*, para. 272.

<sup>320</sup>In paragraph 87 of its second written submission to the Panel, the United States argued that the Wire Act, the Travel Act, and the IGBA "meet the requirements of Article XIV, over and above the fact that they are also consistent with the remainder of the GATS."

submission, referred to the possibility that the United States might seek to invoke Article XIV.<sup>321</sup> Both parties discussed issues relating to Article XIV in their opening statements at the second substantive panel meeting on 26 January 2004.<sup>322</sup>

275. At the hearing in this appeal, Antigua acknowledged that it "had the opportunity to respond" to the United States' defence, and had "responded sufficiently", during its opening statement at the second substantive panel meeting.<sup>323</sup> When asked whether it had informed the Panel of any prejudice resulting from the United States' allegedly late invocation of the defence, Antigua answered that it had not so informed the Panel. Nevertheless, Antigua maintained at the hearing that it was prejudiced on the grounds that the late invocation by the United States of its defence hampered the Panel's ability to assess that defence, resulting in the Panel's making the defence for the United States.<sup>324</sup>

276. In these circumstances, we are of the view that, although the United States could have raised its defence earlier, the Panel did not err in deciding to assess whether the United States' measures are justified under Article XIV. From the outset, Antigua was apparently aware that the United States might argue that its measures satisfy the requirements of Article XIV. Antigua admitted that it raised no objection to the timing of the United States' defence before the Panel. Antigua also acknowledged that it did have an opportunity to respond adequately to the United States' defence, albeit at a late stage of the proceeding. For these reasons, we consider that the Panel did not "deprive" Antigua of a "full and fair opportunity to respond to the defence".<sup>325</sup> We *find*, therefore, that the Panel did not fail to satisfy its obligations under Article 11 of the DSU by entering into the merits of the United States' defence under Article XIV.

B. *Did the Panel Err in its Treatment of the Burden of Proof Under Article XIV?*

277. In its analysis of issues arising under Article XIV of the GATS, the Panel drew extensively on arguments made and evidence submitted by the parties in connection with other issues in this case. This approach of the Panel to Article XIV is the subject of appeals by both Antigua and the United States. Each alleges that the Panel erred in its treatment of the burden of proof.

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<sup>321</sup> Antigua's first written submission to the Panel, para. 202 ("It is possible that the United States may try during the course of this proceeding to invoke one or more of the general exceptions of Article XIV of the GATS.").

<sup>322</sup> Antigua's statement at the second substantive panel meeting, paras. 68-83; United States' statement at the second substantive panel meeting, paras. 74-76.

<sup>323</sup> Antigua's response to questioning at the oral hearing.

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

<sup>325</sup> Antigua's other appellant's submission, para. 73.

278. Antigua argues that the Panel acted inconsistently with its obligations under Article 11 of the DSU because it "constructed the GATS Article XIV defence on behalf of the United States."<sup>326</sup> First, with respect to Article XIV(a), Antigua claims that the United States identified only *two* interests relating to "public morals" or "public order", namely: (i) organized crime; and (ii) underage gambling. Antigua argues that the Panel, however, identified an additional three concerns on its own initiative: (i) money laundering<sup>327</sup>, (ii) fraud<sup>328</sup>, and (iii) public health.<sup>329</sup> Secondly, Antigua contends that the Panel erred in its analysis of the United States' defence under the chapeau of Article XIV because the United States' arguments assessed by the Panel were not taken from the United States' submissions relating to Article XIV, but rather, from the United States' response to Antigua's national treatment claim under Article XVII of the GATS.

279. In its appeal, the United States submits that it established its case that the Wire Act, the Travel Act, and the IGBA are justified under Article XIV, but that the Panel improperly constructed a rebuttal under the chapeau to that provision when Antigua itself had failed to do so. The United States alleges, in particular, that the Panel did so "by recycling evidence and argumentation that Antigua had used to allege a national treatment violation under Article XVII as if those arguments had been made in the context of the Article XIV chapeau."<sup>330</sup>

280. We begin our analysis by referring to the Appellate Body's view that:

... nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties - or to develop its own legal reasoning - to support its own findings and conclusions on the matter under its consideration.<sup>331</sup>

281. However, a panel enjoys such discretion only with respect to specific claims that are properly before it, for otherwise it would be considering a matter not within its jurisdiction. Moreover, when a panel rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU.<sup>332</sup>

282. In the context of affirmative defences, then, a responding party must invoke a defence and put forward evidence and arguments in support of its assertion that the challenged measure satisfies the

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<sup>326</sup>Antigua's other appellant's submission, para. 80.

<sup>327</sup>Panel Report, paras. 6.499-6.505.

<sup>328</sup>*Ibid.*, paras. 6.506-6.509.

<sup>329</sup>*Ibid.*, paras. 6.510-6.514.

<sup>330</sup>United States' appellant's submission, para. 188.

<sup>331</sup>Appellate Body Report, *EC – Hormones*, para. 156. See also Appellate Body Report, *US – Certain EC Products*, para. 123.

<sup>332</sup>Appellate Body Report, *Chile – Price Band System*, para. 173.

requirements of the defence. When a responding party fulfils this obligation, a panel may rule on whether the challenged measure is justified under the relevant defence, relying on arguments advanced by the parties or developing its own reasoning. The same applies to rebuttals. A panel may not take upon itself to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so.

283. Turning to the issues on appeal, we begin with the three protected interests that the Panel allegedly identified on its own in examining the United States' defence under paragraph (a) of Article XIV, namely, health concerns, and combating money laundering and fraud. In both its first and second written submissions to the Panel, the United States, in responding to one of Antigua's claims under the GATS, identified five "concerns associated with the remote supply of gambling [services]."<sup>333</sup> These "concerns" relate to: (1) organized crime<sup>334</sup>; (2) money laundering<sup>335</sup>; (3) fraud<sup>336</sup>; (4) risks to youth, including underage gambling<sup>337</sup>; and (5) public health.<sup>338</sup> When subsequently arguing that the Wire Act, the Travel Act, and the IGBA are justified under Article XIV(a), the United States explicitly referred back to the discussion, earlier in its second written submission to the Panel, of all these interests *except* for that relating to public health.<sup>339</sup>

284. In other words, four of the five interests mentioned by the Panel were plainly discussed or referred to by the United States as part of its defence under Article XIV(a). The fifth interest—relating to public health—was prominently identified by the United States in a previous discussion of the protected interests relating to the remote supply of gambling services and, therefore, was not an invention of the Panel.<sup>340</sup> In our view, the fact that this fifth interest was not *explicitly* raised *again* in the context of the United States' Article XIV arguments should not have precluded the Panel from

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<sup>333</sup>United States' second written submission to the Panel, para. 45.

<sup>334</sup>United States' first written submission to the Panel, paras. 10-11; United States' second written submission to the Panel, paras. 46-49.

<sup>335</sup>United States' first written submission to the Panel, paras. 12-13; United States' second written submission to the Panel, para. 50.

<sup>336</sup>United States' first written submission to the Panel, paras. 14-15; United States' second written submission to the Panel, para. 51.

<sup>337</sup>United States' first written submission to the Panel, paras. 16-18; United States' second written submission to the Panel, paras. 54-56.

<sup>338</sup>United States' first written submission to the Panel, paras. 19-21; United States' second written submission to the Panel, paras. 52-53.

<sup>339</sup>See the United States' second written submission to the Panel, para. 111 and footnote 139 thereto (referring to the United States' second written submission, paras. 46-51); and para. 114 and footnote 143 thereto (referring to the United States' second written submission, paras. 54-55).

<sup>340</sup>United States' first written submission to the Panel, Section III.A.4 ("Supply of gambling into private homes, workplaces, and other environments creates additional health risks"); United States' second written submission to the Panel, Section III.B.1.b.iv ("Remote gambling poses a greater and broader threat to human health").

considering it as part of its analysis under Article XIV(a). We therefore dismiss this ground of Antigua's appeal.

285. We turn now to the participants' arguments relating to the Panel's treatment of the burden of proof in its analysis under the chapeau of Article XIV. Antigua had advanced a claim before the Panel under Article XVII of the GATS, alleging that the United States fails to accord to Antiguan services and service suppliers, treatment no less favourable than that accorded to like domestic services and service suppliers.<sup>341</sup> Throughout the panel proceedings, the United States disputed this assertion, consistently arguing that United States laws on gambling make no distinction between domestic and foreign services, or between domestic and foreign service suppliers.<sup>342</sup> The Panel exercised judicial economy with respect to Antigua's claim under Article XVII.<sup>343</sup> Nevertheless, in the course of considering whether the Wire Act, the Travel Act, and the IGBA satisfy the conditions of the chapeau of Article XIV, the Panel examined arguments put by the parties in relation to Antigua's Article XVII claim.<sup>344</sup>

286. On appeal, both participants contest the Panel's use of such arguments. Antigua contends that the Panel's reliance on the United States' arguments on Article XVII demonstrates that the Panel constructed a defence for the United States, whereas the United States points to the Panel's reliance on Antigua's arguments on Article XVII as proof that the Panel improperly assumed Antigua's responsibility to rebut the United States' defence.

287. In arguing its Article XIV defence before the Panel, the United States asserted that its measures satisfy the requirements of the chapeau of Article XIV because they do not discriminate *at all*. In particular, the United States contended:

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<sup>341</sup>Antigua's first written submission to the Panel, paras. 110-111, 117-118, 122-123, 125-128, and 188; Antigua's second written submission to the Panel, para. 39; Antigua's statement at the first substantive panel meeting, paras. 88-96; Antigua's statement at the second substantive panel meeting, paras. 61-67; Antigua's response to Question 19 posed by the Panel, Panel Report, pp. C-45 to C-49.

<sup>342</sup>See, for example, United States' first written submission to the Panel, para. 102 ("relevant restrictions on remote supply of gambling under U.S. law, whether by Internet or other means, are based on objective criteria that apply regardless of the national origin of the service or service supplier"); United States' second written submission to the Panel, para. 61 ("As the United States has repeatedly pointed out, U.S. restrictions on remote supply of gambling apply regardless of national origin"); United States' statement at the first substantive panel meeting, para. 52 ("The United States again points out, as we have throughout this dispute that U.S. restrictions applicable to Internet gambling and other forms of gambling services that Antiguan firms seek to supply on a cross-border basis apply equally to those remote supply activities within the United States."); United States' statement at the second substantive panel meeting, paras. 61-68; United States' responses to Questions 19 and 21-22 posed by the Panel, Panel Report, pp. C-45 to C-49 and C-50 to C-51.

<sup>343</sup>Panel Report, para. 6.426.

<sup>344</sup>*Ibid.*, para. 6.584. See also paras. 6.585-6.603.

The restrictions in [the Wire Act, the Travel Act, and the IGBA] meet the requirements of the chapeau. None of these measures introduces any discrimination on the basis of nationality. On the contrary, *as the United States has repeatedly observed*, they apply equally regardless of national origin.<sup>345</sup> (emphasis added)

In our view, this statement by the United States, particularly the adverb "repeatedly", reflects an intention to incorporate into its Article XIV defence its previous arguments relating to non-discrimination in general, which were made in response to Antigua's national treatment claim. We therefore consider that the Panel did not err in referring to these arguments—originally made in the context of Article XVII—in its Article XIV analysis.

288. With respect to Antigua's rebuttal of the arguments, we note that, contrary to the United States' assertions, Antigua did contend that the three federal statutes are applied in a discriminatory manner and therefore fail to meet the requirements of the chapeau of Article XIV. In its opening statement at the second substantive panel meeting, Antigua said:

Even were the United States to make out a provisional defence under Article XIV, it is required to demonstrate that the three federal statutes in question meet the additional requirements of the "chapeau" of Article XIV. This is *clearly* not the case. ... First, the United States *discriminates* against Antigua services because they cannot be supplied through distribution methods that are available for the distribution of domestic services. This is an *obvious* "unjustifiable discrimination".<sup>346</sup> (emphasis added; footnote omitted)

We consider that, in making this statement, Antigua effectively formulated an allegation of discrimination, describing it as "clear[]" and "obvious". This must be understood as a reference to the arguments that it had advanced in support of its national treatment claim. Accordingly, the Panel did not err in evaluating, as part of its analysis under the chapeau to Article XIV, the extent to which Antigua's arguments under Article XVII rebutted the defence advanced by the United States.

289. Therefore, we *find* that the Panel did not improperly assume the burden of constructing the defence under Article XIV(a) for the United States. We also *find* that the Panel did not improperly assume the burden of making a rebuttal to the United States' defence on behalf of Antigua.

290. Antigua also claims on appeal that the Panel improperly constructed the defence for the United States under paragraph (c) of Article XIV. Antigua argues that the United States "failed to

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<sup>345</sup>United States' second written submission to the Panel, para. 118.

<sup>346</sup>Antigua's statement at the second substantive panel meeting, para. 80.

sufficiently identify"<sup>347</sup> the Racketeer Influenced and Corrupt Organizations statute (the "RICO statute") as a law relevant to the Panel's examination of the challenged United States measures under Article XIV(c). Antigua submits that the Panel should therefore have refused to consider the RICO statute in its assessment of the United States' Article XIV(c) defence. In the light of our analysis in the next sub-section of this Report, it is not necessary for us to determine whether the Wire Act, the Travel Act, and the IGBA might also constitute measures falling under Article XIV(c).<sup>348</sup> In these circumstances, we *need not rule* on Antigua's appeal relating to the Panel's treatment of the burden of proof in its analysis under paragraph (c) of Article XIV.

C. *The Panel's Substantive Analysis Under Article XIV*

291. Article XIV of the GATS sets out the general exceptions from obligations under that Agreement in the same manner as does Article XX of the GATT 1994. Both of these provisions affirm the right of Members to pursue objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements, provided that all of the conditions set out therein are satisfied. Similar language is used in both provisions<sup>349</sup>, notably the term "necessary"<sup>350</sup> and the requirements set out in their respective chapeaux. Accordingly, like the Panel, we find previous decisions under Article XX of the GATT 1994 relevant for our analysis under Article XIV of the GATS.<sup>351</sup>

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<sup>347</sup>Antigua's other appellant's submission, para. 121.

<sup>348</sup>*Infra*, para. 337.

<sup>349</sup>Notwithstanding the general similarity in language between the two provisions, we note that Article XIV(a) of the GATS expressly enables Members to adopt measures "necessary to protect public morals or to maintain public order", whereas the corresponding exception in the GATT 1994, Article XX(a), speaks of measures "necessary to protect public morals". (emphasis added)

<sup>350</sup>See, for example, paragraphs (a), (b), and (d) of Article XX of the GATT 1994:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- ...
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

<sup>351</sup>In this respect, we observe that this case is not only the first where the Appellate Body is called upon to address the general exceptions provision of the GATS, but also the first under any of the covered agreements where the Appellate Body is requested to address exceptions relating to "public mo rals".

292. Article XIV of the GATS, like Article XX of the GATT 1994, contemplates a "two-tier analysis" of a measure that a Member seeks to justify under that provision.<sup>352</sup> A panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. This requires that the challenged measure address the particular interest specified in that paragraph and that there be a sufficient nexus between the measure and the interest protected. The required nexus—or "degree of connection"—between the measure and the interest is specified in the language of the paragraphs themselves, through the use of terms such as "relating to" and "necessary to".<sup>353</sup> Where the challenged measure has been found to fall within one of the paragraphs of Article XIV, a panel should then consider whether that measure satisfies the requirements of the chapeau of Article XIV.

1. Justification of the Measures Under Paragraph (a) of Article XIV

293. Paragraph (a) of Article XIV covers:

... measures ... necessary to protect public morals or to maintain public order. (footnote omitted)

294. In the first step of its analysis under this provision, the Panel examined whether the measures at issue—the Wire Act, the Travel Act, and the IGBA—are "designed" to protect public morals and to maintain public order.<sup>354</sup> As a second step, the Panel determined whether these measures are "necessary" to protect public morals or to maintain public order, within the meaning of Article XIV(a).<sup>355</sup> The Panel found that:

... the United States has not been able to provisionally justify, under Article XIV(a) of the GATS, that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) are necessary to protect public morals and/or public order within the meaning of Article XIV(a). We, nonetheless, acknowledge that such laws are designed so as to protect public morals or maintain public order.<sup>356</sup> (footnotes omitted)

295. Our review of this conclusion proceeds in two parts. We address first Antigua's challenge to the Panel's finding that the three federal statutes are "measures that are designed to 'protect public

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<sup>352</sup>Appellate Body Report, *US – Shrimp*, para. 147. See also Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20.

<sup>353</sup>Appellate Body Report, *US – Gasoline*, pp. 17-18, DSR 1996:I, 3, at 16.

<sup>354</sup>Panel Report, paras. 6.479-6.487.

<sup>355</sup>*Ibid.*, paras. 6.488-6.534.

<sup>356</sup>*Ibid.*, para. 6.535.

morals' and/or 'to maintain public order' in the United States within the meaning of Article XIV(a).<sup>357</sup> We then address the participants' respective challenges to the Panel's finding that the three federal statutes are not "necessary" to protect public morals and to maintain public order.

(a) "Measures ... to protect public morals or to maintain public order"

296. In its analysis under Article XIV(a), the Panel found that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation."<sup>358</sup> The Panel further found that the definition of the term "order", read in conjunction with footnote 5 of the GATS, "suggests that 'public order' refers to the preservation of the fundamental interests of a society, as reflected in public policy and law."<sup>359</sup> The Panel then referred to Congressional reports and testimony establishing that "the government of the United States consider[s] [that the Wire Act, the Travel Act, and the IGBA] were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling."<sup>360</sup> On this basis, the Panel found that the three federal statutes are "measures that are designed to 'protect public morals' and/or 'to maintain public order' within the meaning of Article XIV(a)."<sup>361</sup>

297. Antigua contests this finding on a rather limited ground, namely that the Panel failed to determine whether the concerns identified by the United States satisfy the standard set out in footnote 5 to Article XIV(a) of the GATS, which reads:

[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

298. We see no basis to conclude that the Panel failed to assess whether the standard set out in footnote 5 had been satisfied. As Antigua acknowledges<sup>362</sup>, the Panel expressly referred to footnote 5 in a way that demonstrated that it understood the requirement therein to be part of the meaning given to the term "public order".<sup>363</sup> Although "*no further mention*"<sup>364</sup> was made in the Panel Report of footnote 5 or of its text, this alone does not establish that the Panel failed to assess whether the interests served by the three federal statutes satisfy the footnote's criteria. Having defined "public

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<sup>357</sup> Panel Report, para. 6.487.

<sup>358</sup> *Ibid.*, para. 6.465.

<sup>359</sup> *Ibid.*, para. 6.467.

<sup>360</sup> *Ibid.*, para. 6.486.

<sup>361</sup> *Ibid.*, para. 6.487.

<sup>362</sup> Antigua's other appellant's submission, para. 89.

<sup>363</sup> Panel Report, para. 6.467.

<sup>364</sup> Antigua's other appellant's submission, para. 90. (original emphasis)

order" to include the standard in footnote 5, and then applied that definition to the facts before it to conclude that the measures "are designed to 'protect public morals' and/or 'to maintain public order'"<sup>365</sup>, the Panel was not required, in addition, to make a separate, explicit determination that the standard of footnote 5 had been met.

299. We therefore *uphold* the Panel's finding, in paragraph 6.487 of the Panel Report, that 'the concerns which the Wire Act, the Travel Act and the Illegal Gambling Business Act seek to address fall within the scope of 'public morals' and/or 'public order' under Article XIV(a)."

(b) The Requirement that a Measure be "Necessary" Under Article XIV(a)

300. In the second part of its analysis under Article XIV(a), the Panel considered whether the Wire Act, the Travel Act, and the IGBA are "necessary" within the meaning of that provision. The Panel found that the United States had not demonstrated the "necessity" of those measures.<sup>366</sup>

301. This finding rested on the Panel's determinations that: (i) "the interests and values protected by [the Wire Act, the Travel Act, and the IGBA] serve very important societal interests that can be characterized as 'vital and important in the highest degree'"<sup>367</sup>; (ii) the Wire Act, the Travel Act, and the IGBA "must contribute, at least to some extent", to addressing the United States' concerns "pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling"<sup>368</sup>; (iii) the measures in question "have a significant restrictive trade impact"<sup>369</sup>; and (iv) "[i]n rejecting Antigua's invitation to engage in bilateral or multilateral consultations and/or negotiations, the United States failed to pursue in good faith a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative."<sup>370</sup>

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<sup>365</sup>Panel Report, para. 6.487.

<sup>366</sup>*Ibid.*

<sup>367</sup>*Ibid.*, para. 6.492:

On the basis of the foregoing, it is clear to us that the interests and values protected by the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) serve very important societal interests that can be characterized as "vital and important in the highest degree" in a similar way to the characterization of the protection of human life and health against a life-threatening health risk by the Appellate Body in *EC – Asbestos*. (quoting Appellate Body Report, *EC – Asbestos*, para. 172)

<sup>368</sup>*Ibid.*, para. 6.494.

<sup>369</sup>*Ibid.*, para. 6.495.

<sup>370</sup>*Ibid.*, para. 6.531.

302. Each of the participants appeals different aspects of the analysis undertaken by the Panel in determining whether the "necessity" requirement in Article XIV(a) was satisfied. According to Antigua, the Panel failed to establish a sufficient "nexus" between gambling and the concerns raised by the United States.<sup>371</sup> In addition, Antigua claims that the Panel erroneously limited its discussion of "reasonably available alternatives". In its appeal, the United States argues that the Panel departed from the way in which "reasonably available alternative" measures have been examined in previous disputes and erroneously imposed "a procedural requirement on the United States to consult or negotiate with Antigua before the United States may take measures to protect public morals [or] protect public order".<sup>372</sup>

303. We begin our analysis of this issue by examining the legal standard of "necessity" in Article XIV(a) of the GATS. We then turn to the participants' appeals regarding the Panel's interpretation and application of this requirement.

(i) *Determining "necessity" under Article XIV(a)*

304. We note, at the outset, that the standard of "necessity" provided for in the general exceptions provision is an *objective* standard. To be sure, a Member's characterization of a measure's objectives and of the effectiveness of its regulatory approach—as evidenced, for example, by texts of statutes, legislative history, and pronouncements of government agencies or officials—will be relevant in determining whether the measure is, objectively, "necessary". A panel is not bound by these characterizations<sup>373</sup>, however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the "necessity" of the measure before it.

305. In *Korea – Various Measures on Beef*, the Appellate Body stated, in the context of Article XX(d) of the GATT 1994, that whether a measure is "necessary" should be determined through "a process of weighing and balancing a series of factors".<sup>374</sup> The Appellate Body characterized this process as one:

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<sup>371</sup> Antigua's other appellant's submission, para. 97.

<sup>372</sup> United States' appellant's submission, para. 139.

<sup>373</sup> Appellate Body Report, *India – Patents (US)*, para. 66.

<sup>374</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

... comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could "reasonably be expected to employ" is available, or whether a less WTO-inconsistent measure is "reasonably available".<sup>375</sup>

306. The process begins with an assessment of the "relative importance" of the interests or values furthered by the challenged measure.<sup>376</sup> Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be "weighed and balanced". The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel's determination of the "necessity" of a measure, although not necessarily exhaustive of factors that might be considered.<sup>377</sup> One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.

307. A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this "weighing and balancing" and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is "necessary" or, alternatively, whether another, WTO-consistent measure is "reasonably available".<sup>378</sup>

308. The requirement, under Article XIV(a), that a measure be "necessary"—that is, that there be no "reasonably available", WTO-consistent alternative—reflects the shared understanding of Members that substantive GATS obligations should not be deviated from lightly. An alternative measure may be found not to be "reasonably available", however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a "reasonably available" alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.<sup>379</sup>

309. It is well-established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the

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<sup>375</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 166.

<sup>376</sup> *Ibid.*, para. 162. See also Appellate Body Report, *EC – Asbestos*, para. 172.

<sup>377</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

<sup>378</sup> *Ibid.*, para. 166.

<sup>379</sup> Appellate Body Report, *EC – Asbestos*, paras. 172-174. See also Appellate Body Report, *Korea – Various Measures on Beef*, para. 180.

invoked defence.<sup>380</sup> In the context of Article XIV(a), this means that the responding party must show that its measure is "necessary" to achieve objectives relating to public morals or public order. In our view, however, it is not the responding party's burden to show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden.

310. Rather, it is for a responding party to make a *prima facie* case that its measure is "necessary" by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be "weighed and balanced" in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is "necessary". If the panel concludes that the respondent has made a *prima facie* case that the challenged measure is "necessary"—that is, "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'"<sup>381</sup>—then a panel should find that challenged measure "necessary" within the terms of Article XIV(a) of the GATS.

311. If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains "necessary" in the light of that alternative or, in other words, why the proposed alternative is not, in fact, "reasonably available". If a responding party demonstrates that the alternative is not "reasonably available", in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be "necessary" within the terms of Article XIV(a) of the GATS.

(ii) *Did the Panel err in its analysis of the "necessity" of the measures at issue?*

312. In considering whether the United States' measures are "necessary" under Article XIV(a) of the GATS, the Panel began by considering the factors set out by the Appellate Body in *Korea – Various Measures on Beef* as they apply to the Wire Act, the Travel Act, and the IGBA. Antigua claims that the Panel erred in concluding, in the course of its analysis of these factors, that the three federal statutes contribute to protecting the interests raised by the United States.

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<sup>380</sup> Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, 3, at 21; Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 15-16, DSR 1997:I, 323, at 337; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 133.

<sup>381</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

313. The Panel set out, in some detail, how the United States' evidence established a specific connection between the remote supply of gambling services and each of the interests identified by the United States<sup>382</sup>, except for organized crime.<sup>383</sup> In particular, the Panel found such a link in relation to money laundering<sup>384</sup>, fraud<sup>385</sup>, compulsive gambling<sup>386</sup>, and underage gambling.<sup>387</sup> Considering that the three federal statutes embody an outright prohibition on the remote supply of gambling services<sup>388</sup>, we see no error in the Panel's approach, nor in its finding, in paragraph 6.494 of the Panel Report, that the Wire Act, the Travel Act, and the IGBA "must contribute" to addressing those concerns.<sup>389</sup>

314. In addition, the United States and Antigua each appeals different aspects of the Panel's selection of alternative measures to compare with the Wire Act, the Travel Act, and the IGBA. The United States argues that the Panel erred in examining the one alternative measure that it did consider, and Antigua contends that the Panel erred in failing to consider additional alternative measures.

315. In its "necessity" analysis under Article XIV(a), the Panel appeared to understand that, in order for a measure to be accepted as "necessary" under Article XIV(a), the responding Member must have first "*explored and exhausted*" all reasonably available WTO-compatible alternatives before adopting its WTO-inconsistent measure.<sup>390</sup> This understanding led the Panel to conclude that, in this case, the United States had "an obligation to consult with Antigua before and while imposing its prohibition on the cross-border supply of gambling and betting services".<sup>391</sup> Because the Panel found that the United States had not engaged in such consultations with Antigua, the Panel also found that

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<sup>382</sup>Panel Report, paras. 6.498-6.520.

<sup>383</sup>The Panel found that the United States had not submitted "concrete evidence" showing the *particular* vulnerability of the remote supply of gambling services to involvement by organized crime. Therefore, the Panel concluded, the United States had not demonstrated why the means used to regulate *non*-remote supply of gambling services could not sufficiently guard against the risk of organized crime. (Panel Report, para. 6.520)

<sup>384</sup>Panel Report, paras. 6.500-6.504.

<sup>385</sup>*Ibid.*, paras. 6.507 and 6.508.

<sup>386</sup>*Ibid.*, paras. 6.511-6.513.

<sup>387</sup>*Ibid.*, paras. 6.516-6.518.

<sup>388</sup>*Supra*, paras. 258-263.

<sup>389</sup>The Appellate Body employed similar reasoning with respect to a prohibition on the import of products containing asbestos. See Appellate Body Report, *EC – Asbestos*, para. 168:

By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection.

<sup>390</sup>Panel Report, para. 6.528. (emphasis added) See also paras. 6.496, 6.522, and 6.534.

<sup>391</sup>*Ibid.*, para. 6.531. See also para. 6.534.

the United States had not established that its measures are "necessary" and, therefore, provisionally justified under Article XIV(a).<sup>392</sup>

316. In its appeal of this finding, the United States argues that "[t]he Panel relied on the 'necessity' test in Article XIV as the basis for imposing a procedural requirement on the United States to consult or negotiate with Antigua before the United States may take measures to protect public morals [or] protect public order".<sup>393</sup> The United States submits that the requirement in Article XIV(a) that a measure be "necessary" indicates that "necessity is a property of the measure itself" and, as such, "necessity" cannot be determined by reference to the efforts undertaken by a Member to negotiate an alternative measure.<sup>394</sup> The United States further argues that in previous disputes, the availability of alternative measures that were "merely theoretical" did not preclude the challenged measures from being deemed to be "necessary".<sup>395</sup> Similarly, the United States argues, the fact that measures might theoretically be available after engaging in consultations with Antigua does not preclude the "necessity" of the three federal statutes.

317. In our view, the Panel's "necessity" analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives regarding the protection of public morals or the maintenance of public order. Engaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case.

318. We note, in addition, that the Panel based its requirement of consultations, in part, on "the existence of [a] specific market access commitment [in the United States' GATS Schedule] with respect to cross-border trade of gambling and betting services".<sup>396</sup> We do not see how the existence of a specific commitment in a Member's Schedule affects the "necessity" of a measure in terms of the protection of public morals or the maintenance of public order. For this reason as well, the Panel erred in relying on consultations as an alternative measure reasonably available to the United States.

319. We turn now to Antigua's allegation that the Panel improperly limited its examination of possible alternative measures against which to compare the Wire Act, the Travel Act, and the IGBA. Antigua claims that the Panel "erred in limiting" its search for alternatives to the universe of *existing*

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<sup>392</sup>Panel Report, paras. 6.533-6.535.

<sup>393</sup>United States' appellant's submission, para. 139.

<sup>394</sup>*Ibid.*, para. 142.

<sup>395</sup>*Ibid.*, para. 152.

<sup>396</sup>Panel Report, para. 6.531.

United States regulatory measures.<sup>397</sup> Antigua also alleges that the Panel erred by examining only those measures that had been explicitly identified by Antigua even though "Antigua was never given the opportunity to properly rebut the Article XIV defence."<sup>398</sup>

320. We observe, first, that the Panel did not state that it was limiting its search for alternatives in the manner alleged by Antigua. Secondly, although the Panel *began* its analysis of alternative measures by considering whether the United States already employs measures less restrictive than a prohibition to achieve the same objectives as the three federal statutes<sup>399</sup>, its inquiry did not end there. The Panel obviously did consider alternatives *not* currently in place in the United States, as evidenced by its (ultimately erroneous) emphasis on the United States' alleged failure to pursue consultations with Antigua.<sup>400</sup> Finally, we do not see why the Panel should have been expected to continue its analysis into additional alternative measures, which Antigua itself failed to identify. As we said above<sup>401</sup>, it is not for the responding party to identify the universe of alternative measures against which its own measure should be compared. It is only if such an alternative is raised that this comparison is required.<sup>402</sup> We therefore dismiss this aspect of Antigua's appeal.

321. In our analysis above, we found that the Panel erred in assessing the necessity of the three United States statutes against the possibility of consultations with Antigua because such consultations, in our view, cannot qualify as a reasonably available alternative measure with which a challenged measure should be compared.<sup>403</sup> For this reason, we *reverse* the Panel's finding, in paragraph 6.535 of the Panel Report, that, because the United States did not enter into consultations with Antigua:

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<sup>397</sup>Antigua's other appellant's submission, para. 103.

<sup>398</sup>*Ibid.*, para. 104.

<sup>399</sup>See Panel Report, paras. 6.497-6.498. This type of approach was expressly encouraged by the Appellate Body in *Korea – Various Measures on Beef*, para. 172:

The application by a Member of WTO-compatible enforcement measures to the same kind of illegal behaviour – the passing off of one product for another – for like or at least similar products, provides a suggestive indication that an alternative measure which could "reasonably be expected" to be employed may well be available. The application of such measures for the control of the same illegal behaviour for like, or at least similar, products raises doubts with respect to the objective *necessity* of a different, much stricter, and WTO-inconsistent enforcement measure. (original emphasis)

<sup>400</sup>*Supra*, paras. 315-318.

<sup>401</sup>*Supra*, para. 309.

<sup>402</sup>*Supra*, paras. 310-311.

<sup>403</sup>*Supra*, para. 317.

... the United States has not been able to provisionally justify, under Article XIV(a) of the GATS, that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) are necessary to protect public morals and/or public order within the meaning of Article XIV(a).

322. Having reversed this finding, we must consider whether, as the United States contends<sup>404</sup>, the Wire Act, the Travel Act, and the IGBA are properly characterized as "necessary" to achieve the objectives identified by the United States and accepted by the Panel. The Panel's analysis, as well as the factual findings contained therein, are useful for our assessment of whether these measures satisfy the requirements of paragraph (a) of Article XIV.

323. As we stated above, a responding party must make a *prima facie* case that its challenged measure is "necessary". A Panel determines whether this case is made through the identification, and weighing and balancing, of relevant factors, such as those in *Korea – Various Measures on Beef*, with respect to the measure challenged. In this regard, we note that the Panel: (i) found that the three federal statutes protect "very important societal interests"<sup>405</sup>; (ii) observed that "strict controls may be needed to protect [such] interests"<sup>406</sup>; and (iii) found that the three federal statutes contribute to the realization of the ends that they pursue.<sup>407</sup> Although the Panel recognized the "significant restrictive trade impact"<sup>408</sup> of the three federal statutes, it expressly tempered this recognition with a detailed explanation of certain characteristics of, and concerns specific to, the remote supply of gambling and betting services. These included: (i) "the volume, speed and international reach of remote gambling transactions"<sup>409</sup>; (ii) the "virtual anonymity of such transactions"<sup>410</sup>; (iii) "low barriers to entry in the context of the remote supply of gambling and betting services"<sup>411</sup>; and the (iv) "isolated and anonymous environment in which such gambling takes place".<sup>412</sup> Thus, this analysis reveals that the Panel did not place much weight, in the circumstances of this case, on the restrictive trade impact of the three federal statutes. On the contrary, the Panel appears to have accepted virtually all of the

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<sup>404</sup>United States' appellant's submission, para. 176.

<sup>405</sup>Panel Report, paras. 6.492 and 6.533.

<sup>406</sup>*Ibid.*, para. 6.493.

<sup>407</sup>*Ibid.*, para. 6.494.

<sup>408</sup>*Ibid.*, para para. 6.495.

<sup>409</sup>*Ibid.*, para. 6.505.

<sup>410</sup>*Ibid.*

<sup>411</sup>*Ibid.*, para. 6.507.

<sup>412</sup>*Ibid.*, para. 6.514.

elements upon which the United States based its assertion that the three federal statutes are "indispensable".<sup>413</sup>

324. The Panel further, and in our view, tellingly, stated that

... the United States has legitimate specific concerns with respect to money laundering, fraud, health and underage gambling that are specific to the remote supply of gambling and betting services, *which suggests that the measures in question are "necessary" within the meaning of Article XIV(a)*.<sup>414</sup> (emphasis added)

325. From all of the above, and in particular from the summary of its analysis made in paragraphs 6.533 and 6.534 of the Panel Report, we understand the Panel to have acknowledged that, *but for* the United States' alleged refusal to accept Antigua's invitation to negotiate, the Panel would have found that the United States had made its *prima facie* case that the Wire Act, the Travel Act, and the IGBA are "necessary", within the meaning of Article XIV(a). We thus agree with the United States that the "sole basis" for the Panel's conclusion to the contrary was its finding relating to the requirement of consultations with Antigua.<sup>415</sup>

326. Turning to the Panel's analysis of alternative measures, we observe that the Panel dismissed, as irrelevant to its analysis, measures that did not take account of the specific concerns associated with *remote* gambling.<sup>416</sup> We found above that the Panel erred in finding that consultations with Antigua constitutes a measure reasonably available to the United States.<sup>417</sup> Antigua raised no other measure that, in the view of the Panel, could be considered an alternative to the prohibitions on remote gambling contained in the Wire Act, the Travel Act, and the IGBA. In our opinion, therefore, the record before us reveals no reasonably available alternative measure proposed by Antigua or examined by the Panel that would establish that the three federal statutes are not "necessary" within the meaning of Article XIV(a). Because the United States made its *prima facie* case of "necessity", and Antigua failed to identify a reasonably available alternative measure, we conclude that the United States demonstrated that its statutes are "necessary", and therefore justified, under paragraph (a) of Article XIV.

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<sup>413</sup>Panel Report, para. 6.534.

<sup>414</sup>*Ibid.*, para. 6.533.

<sup>415</sup>United States' appellant's submission, para. 137.

<sup>416</sup>Panel Report, paras. 6.497-6.498.

<sup>417</sup>*Supra*, para. 317.

327. For all these reasons, we *find* that the Wire Act, the Travel Act, and the IGBA are "measures ... necessary to protect public morals or to maintain public order", within the meaning of paragraph (a) of Article XIV of the GATS.<sup>418</sup>

(c) Allegations of Error Under Article 11 of the DSU

328. Antigua and the United States also challenge several aspects of the Panel's analysis under Article XIV(a) as inconsistent with a panel's duty, pursuant to Article 11 of the DSU, to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case".

329. In several instances, Antigua claims that the Panel failed to comply with Article 11 of the DSU because the Panel relied solely or primarily on evidence submitted by the United States, including statements of United States officials and the United States Congress, without taking into consideration contrary evidence submitted by Antigua.<sup>419</sup> Antigua's arguments in this respect rely on the fact that the Panel did not discuss or mention certain pieces of evidence submitted by Antigua. Although Antigua alleges an *unobjective* assessment of Antiguan evidence<sup>420</sup>, it provides no examples or arguments in support of this assertion to establish that the Panel somehow exceeded its discretion.

330. As the Appellate Body has pointed out on several occasions:

Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.<sup>421</sup>

As a result, unless a panel "has exceeded the bounds of its discretion ... in its appreciation of the evidence"<sup>422</sup>, the Appellate Body will not interfere with the findings of the panel.<sup>423</sup>

331. Antigua's arguments on this issue appear to us to amount to mere disagreement with the Panel's exercise of discretion in selecting which evidence to rely on when making its findings. This is

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<sup>418</sup>We address in the next sub-section of this Report the appeals raised by Antigua and the United States under Article 11 of the DSU, with respect to the Panel's analysis under Article XIV(a) of the GATS, and find them to be either without merit or not necessary to rule on in order to resolve this dispute.

<sup>419</sup>Antigua's other appellant's submission, paras. 107-110 and 113-118.

<sup>420</sup>*Ibid.*, para. 113. (emphasis added)

<sup>421</sup>Appellate Body Report, *EC – Hormones*, para. 132.

<sup>422</sup>Appellate Body Report, *US – Wheat Gluten*, para. 151. See also Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 181.

<sup>423</sup>Appellate Body Report, *Japan – Apples*, para. 221 (referring in footnote to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 170, and Appellate Body Report, *US – Carbon Steel*, para. 142).

not a basis on which we may conclude, on appeal, that the Panel failed to make an "objective assessment of the facts of the case".

332. Antigua additionally contends that the Panel acted inconsistently with Article 11 of the DSU because it undertook no assessment of factual evidence relating specifically to *Antiguan* gambling and betting services when evaluating whether the Wire Act, the Travel Act, and the IGBA are "necessary". To determine whether the statutes at issue are "necessary" under Article XIV(a), the Panel was called upon to assess the relationship between, on the one hand, the United States' restrictions on the remote supply of gambling, and, on the other hand, the "public moral"/"public order" interests identified by the United States as the reasons for the restrictions contained in the Wire Act, the Travel Act, and the IGBA. The United States did not explicitly identify either the *source of supply* or the *foreign nature* of the supply of gambling and betting services as a relevant concern. In other words, the evidence put before the Panel by the United States suggests that the nexus is with the remote supply of gambling services, regardless of its source or the national origin of the suppliers. Moreover, the statutes at issue make no distinction on their face as to gambling services from different origins; the Panel found simply that the statutes prohibit the remote supply of gambling and betting services.<sup>424</sup> As a result, there was no need for the Panel to have analyzed evidence relating to the supply of gambling services specifically *from Antigua*, and we see no error in the Panel's decision not to make an assessment of the Antiguan industry.

333. The United States appeals, under Article 11 of the DSU, the Panel's factual finding that the United States rejected Antigua's invitation to engage in consultations to explore means by which Antiguan gambling service suppliers might provide their services without contributing to the concerns identified by the United States.<sup>425</sup> We have already found that the Panel erred in concluding that consultations were required in order for the three federal statutes to be considered "necessary" under Article XIV(a). Therefore, in resolving this dispute, we *need not rule* on this claim on appeal.

334. Therefore, we *find* that the Panel did not fail to "make an objective assessment of the facts of the case", as required by Article 11 of the DSU, with respect to its analysis under Article XIV(a) of the GATS.

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<sup>424</sup>Panel Report, paras. 6.361-6.362, 6.367, and 6.375. See also *supra*, para. 258-263.

<sup>425</sup>United States' appellant's submission, paras. 171-175.

2. Justification of the Measures Under Paragraph (c) of Article XIV

335. The Panel found, in paragraph 6.565 of the Panel Report, that:

... the United States has not been able to provisionally justify that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) are necessary within the meaning of Article XIV(c) of GATS to secure compliance with the RICO statute ... . (footnotes omitted)

336. The United States appeals this finding on the same grounds that it appeals the Panel's finding that the United States had not established that the Wire Act, the Travel Act, and the IGBA are within the scope of Article XIV(a). The Panel's finding under Article XIV(c) rests on the same basis as its finding under Article XIV(a), namely that the measures are not "necessary" because, in failing to engage in consultations with Antigua, the United States failed to explore and exhaust all reasonably available alternative measures. Given that we have reversed this finding under Article XIV(a), we also *reverse* the Panel's finding in paragraph 6.565 of the Panel Report on the same ground.

337. The United States requests us to complete the analysis and find that the Wire Act, the Travel Act, and the IGBA are "necessary", within the meaning of Article XIV(c), to secure compliance with the RICO statute. We found in the previous section of this Report that the Wire Act, the Travel Act, and the IGBA fall under paragraph (a) of Article XIV. As a result, it is *not necessary for us to determine* whether these measures are also justified under paragraph (c) of Article XIV.

3. The Chapeau of Article XIV

338. Notwithstanding its finding that the measures at issue are *not* provisionally justified, the Panel examined whether those measures satisfy the requirements of the chapeau of Article XIV "so as to assist the parties in resolving the underlying dispute in this case."<sup>426</sup> This examination is the subject of appeals by both participants. Unlike the Panel, we have found the Wire Act, the Travel Act, and the IGBA to fall within the scope of Article XIV(a). Therefore, we must now review the Panel's examination under the chapeau.

339. The chapeau of Article XIV provides:

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<sup>426</sup>Panel Report, para. 6.566.

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures [of the type specified in the subsequent paragraphs of Article XIV]....

The focus of the chapeau, by its express terms, is on the *application* of a measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the paragraphs of Article XIV.<sup>427</sup> By requiring that the measure be *applied* in a manner that does not constitute "arbitrary" or "unjustifiable" discrimination, or a "disguised restriction on trade in services", the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded other Members by the substantive rules of the GATS.<sup>428</sup>

340. The Panel found that:

... the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.<sup>429</sup>

341. In reviewing the Panel's treatment of the chapeau to Article XIV, we begin with Antigua's allegations of error, and then turn to those raised by the United States, proceeding as follows: (a) first, we examine Antigua's claim that the Panel should not have analyzed the United States' defence under the chapeau; (b) secondly, we analyze Antigua's allegation that the Panel erred by focusing its discussion under the chapeau on the *remote supply* of gambling services rather than on the entire gambling industry; (c) thirdly, we address the United States' argument that the Panel articulated and applied a standard under the chapeau that is inconsistent with its terms; (d) fourthly, we review the Panel's finding on the alleged non-enforcement of certain laws against United States remote suppliers of gambling services; and (e) finally, we examine whether, in its analysis under the chapeau of Article XIV, the Panel fulfilled its obligations under Article 11 of the DSU.

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<sup>427</sup> Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20.

<sup>428</sup> *Ibid.*, p. 22, DSR 1996:I, 3, at 20-21.

<sup>429</sup> Panel Report, para. 6.608.

(a) Did the Panel Err in Making Findings Under the Chapeau of Article XIV?

342. In deciding to assess whether the measures satisfied the requirements of the chapeau, the Panel explained that, even though such an examination was "not necessary", it wanted "to assist the parties in resolving the underlying dispute in this case."<sup>430</sup> Antigua alleges that the Panel acted inconsistently with the Appellate Body's decision in *Korea – Various Measures on Beef* in determining whether the Wire Act, the Travel Act, and the IGBA meet the requirements of the chapeau after having found that they were not provisionally justified.

343. In *Korea – Various Measures on Beef*, the Appellate Body stated, with respect to Article XX of the GATT 1994, that:

Having found that the dual retail system did not fulfil the requirements of paragraph (d), the Panel correctly considered that it did not need to proceed to the second-tier analysis, that is, to examine the application in this case of the requirements of the introductory clause of Article XX.<sup>431</sup>

Contrary to Antigua's submission<sup>432</sup>, this statement does not impose a *requirement* on panels to stop evaluating a responding party's defence once they have determined that a challenged measure is not provisionally justified under one of the paragraphs of the general exception provision.

344. Provided that it complies with its duty to assess a matter objectively, a panel enjoys the freedom to decide *which legal issues* it must address in order to resolve a dispute.<sup>433</sup> Moreover, in some instances, a panel's decision to continue its legal analysis and to make factual findings beyond those that are strictly necessary to resolve the dispute may assist the Appellate Body should it later be called upon to complete the analysis<sup>434</sup>, as, for example, in this case.

345. Therefore, the Panel did not err in examining whether the Wire Act, the Travel Act, and the IGBA meet the requirements of the chapeau of Article XIV, even though the Panel had found these measures not to fall within the scope of Article XIV(a) or XIV(c).

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<sup>430</sup>Panel Report, para. 6.566.

<sup>431</sup>Appellate Body Report, *Korea – Various Measures on Beef*, para. 156.

<sup>432</sup>Antigua's other appellant's submission, para. 141.

<sup>433</sup>Appellate Body Report, *India – Patents (US)*, para. 87; Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at 340; Appellate Body Report, *Canada – Autos*, para. 114.

<sup>434</sup>Appellate Body Report, *US – Softwood Lumber IV*, para. 118.

(b) Did the Panel Improperly "Segment" the Gambling and Betting Industry in its Analysis?

346. In examining whether discrimination exists in the United States' application of the Wire Act, the Travel Act, and the IGBA, the Panel found that 'some of the concerns the United States has identified are specific only to the remote supply of gambling and betting services.'<sup>435</sup> As a result, the Panel determined that it would have been "inappropriate", in the context of determining whether WTO-consistent alternative measures are reasonably available, to compare the United States' treatment of concerns relating to the *remote* supply of gambling services, with its treatment of concerns relating to the *non-remote* supply of such services. Antigua characterizes this approach as an improper "segment[ation]" of the gambling industry, the result of which was to "exclude[] a substantial portion of gambling and betting services from any analysis at all."<sup>436</sup>

347. We have already observed that the Panel found, on the basis of evidence adduced by the United States, that the *remote* supply of gambling services gives rise to particular concerns.<sup>437</sup> We see no error in the Panel's maintaining such a distinction for purposes of analyzing any discrimination in the application of the three federal statutes. Such an approach merely reflects the view that the distinctive characteristics of the remote supply of gambling services may call for distinctive regulatory methods, and that this could render a comparison between the treatment of remote and non-remote supply of gambling services inappropriate.

(c) Did the Panel Fail to Take Account of the "Arbitrary" or "Unjustifiable" Nature of the Discrimination Referred to in the Chapeau?

348. We consider next whether, contrary to the United States' allegations, the Panel accurately described and applied the correct interpretation of the chapeau of Article XIV. On the basis of the arguments advanced by Antigua, the Panel examined certain instances of alleged discrimination in the application of the Wire Act, the Travel Act, and the IGBA.<sup>438</sup> In the course of this analysis, the Panel found that the United States had not prosecuted certain domestic remote suppliers of gambling services<sup>439</sup>, and that a United States statute (the Interstate Horseracing Act) could be understood, on its

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<sup>435</sup>Panel Report, para. 6.498.

<sup>436</sup>Antigua's other appellant's submission, para. 142.

<sup>437</sup>*Supra*, para. 313.

<sup>438</sup>Panel Report, para. 6.584.

<sup>439</sup>*Ibid.*, para. 6.588.

face, to permit certain types of remote betting on horseracing within the United States.<sup>440</sup> On the basis of these two findings, the Panel concluded that:

... the United States has not demonstrated that it applies its prohibition on the remote supply of these services in a *consistent manner* as between those supplied domestically and those that are supplied from other Members. Accordingly, we believe that the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.<sup>441</sup> (emphasis added)

349. The United States contends that the Panel's reasoning, in particular its standard of "consistency", reveals that the Panel, in fact, assessed only whether the United States treats domestic service suppliers differently from foreign service suppliers. Such an assessment is inadequate, the United States argues, because the chapeau also requires a determination of whether differential treatment, or discrimination, is "arbitrary" or "unjustifiable".

350. The United States based its defence under the chapeau of Article XIV on the assertion that the measures at issue prohibit the remote supply of gambling and betting services by *any supplier*, whether domestic or foreign. In other words, the United States sought to justify the Wire Act, the Travel Act, and the IGBA on the basis that there is *no discrimination* in the manner in which the three federal statutes are applied to the remote supply of gambling and betting services.<sup>442</sup> The United States could have, but did not, put forward an additional argument that *even if* such discrimination exists, it does not rise to the level of "arbitrary" or "unjustifiable" discrimination.

351. In the light of the arguments before it, we do not read the Panel to have ignored the requirement of "arbitrary" or "unjustifiable" discrimination by articulating the standard under the

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<sup>440</sup>Panel Report, para. 6.599:

... the text of the revised statute does appear, on its face, to permit interstate pari-mutuel wagering over the telephone or other modes of electronic communication, which presumably would include the Internet, as long as such wagering is legal in both states.

<sup>441</sup>*Ibid.*, para. 6.607.

<sup>442</sup>*Supra*, para. 287.

chapeau of Article XIV as one of "consistency".<sup>443</sup> Rather, the Panel determined that Antigua had rebutted the United States' claim of no discrimination *at all* by showing that domestic service suppliers are permitted to provide remote gambling services in situations where foreign service suppliers are not so permitted. We see no error in the Panel's approach.

- (d) Did the Panel Err in its Examination of the Alleged Non-Enforcement of the Measures at Issue Against Domestic Service Suppliers?

352. In the course of examining whether the Wire Act, the Travel Act, and the IGBA are applied consistently with the chapeau of Article XIV, the Panel considered whether these laws are enforced in a manner that discriminates between domestic and foreign service suppliers. Antigua identified four United States firms that it claimed engage in the remote supply of gambling services but have not been prosecuted under any of the three federal statutes: Youbet.com, TVG, Capital OTB, and Xpressbet.com.<sup>444</sup> Antigua contrasted this lack of enforcement with the case of an Antiguan service supplier that "had modelled [its] business on that of Capital OTB" but was nevertheless prosecuted and convicted under the Wire Act.<sup>445</sup> In support of its argument that it applies these statutes equally to domestic and foreign service suppliers, the United States submitted statistical evidence to show that most cases prosecuted under these statutes involved gambling and betting services solely within the United States.<sup>446</sup>

353. The Panel also "note[d] indications by the United States" that prosecution proceedings were pending against one domestic remote supplier of gambling services (Youbet.com), but stated that it had no evidence as to whether any enforcement action was being taken against the other three domestic remote suppliers of gambling services identified by Antigua.<sup>447</sup> As to foreign service suppliers, the Panel observed that it had evidence of the prosecution of one Antiguan operator for

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<sup>443</sup>See Panel Report, paras. 6.578-6.581, where the Panel discusses Appellate Body decisions relating to the chapeau of Article XX of the GATT 1994. In particular, we note the Panel's quotation of the relevant portion of paragraph 150 of the Appellate Body decision in *US – Shrimp*, which states:

[under the chapeau, first,] the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be *arbitrary* or *unjustifiable* in character. (original emphasis; footnote omitted)

(Panel Report, para. 6.578 (quoting Appellate Body Report, *US – Shrimp*, para. 150))

<sup>444</sup>*Ibid.*, para. 6.585.

<sup>445</sup>*Ibid.*, para. 6.585.

<sup>446</sup>*Ibid.*, para. 6.586.

<sup>447</sup>*Ibid.*, para. 6.588.

violations of the Wire Act.<sup>448</sup> The Panel found this evidence "inconclusive" and concluded that the United States had not shown that it enforces its prohibition against the remote supply of gambling services on the three domestic service suppliers in a manner consistent with the chapeau of Article XIV.<sup>449</sup>

354. We observe, first, that none of the three federal statutes distinguishes, on its face, between domestic and foreign service suppliers.<sup>450</sup> We agree with the Panel that, in the context of facially neutral measures, there may nevertheless be situations where the selective prosecution of persons rises to the level of discrimination. In our view, however, the evidence before the Panel could not justify finding that, notwithstanding the neutral language of the statute, the facts are "inconclusive" to establish "non-discrimination" in the United States' enforcement of the Wire Act. The Panel's conclusion rests, not only on an inadequate evidentiary foundation, but also on an incorrect understanding of the type of conduct that can, as a matter of law, be characterized as discrimination in the enforcement of measures.

355. In this case, the Panel came to its conclusion—that the United States failed to establish non-discrimination in the enforcement of its laws—on the basis of only five cases: one case of prosecution against a foreign service supplier; one case of "pending" prosecution against a domestic service supplier<sup>451</sup>; and three cases with no evidence of prosecution against domestic service suppliers. From these five cases, the Panel in effect concluded that the United States' defence had been sufficiently rebutted to warrant a finding of "inconclusiveness".

356. In our view, the proper significance to be attached to isolated instances of enforcement, or lack thereof, cannot be determined in the absence of evidence allowing such instances to be placed in their proper context. Such evidence might include evidence on the *overall* number of suppliers, and on *patterns* of enforcement, and on the reasons for particular instances of non-enforcement. Indeed, enforcement agencies may refrain from prosecution in many instances for reasons unrelated to discriminatory intent and without discriminatory effect.

357. Faced with the limited evidence the parties put before it with respect to enforcement, the Panel should rather have focused, as a matter of law, on the wording of the measures at issue. These measures, on their face, do *not* discriminate between United States and foreign suppliers of remote

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<sup>448</sup>Panel Report, para. 6.588.

<sup>449</sup>*Ibid.*, para. 6.589.

<sup>450</sup>*Supra*, paras. 258-263.

<sup>451</sup>Panel Report, para. 6.588.

gambling services.<sup>452</sup> We therefore *reverse* the Panel's finding, in paragraph 6.589 of the Panel Report, that

... the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau.

- (e) Did the Panel Fail to Comply with Article 11 of the DSU in its Analysis of Video Lottery Terminals, Nevada Bookmakers, and the Interstate Horseracing Act?

358. The United States and Antigua each alleges that the Panel did not comply with its obligations under Article 11 of the DSU in its analysis under the chapeau of Article XIV. We examine first Antigua's appeal relating to video lottery terminals and Nevada bookmakers, and then consider the United States' appeal concerning the Interstate Horseracing Act.

359. The Panel examined Antigua's allegations that several states in the United States permit video lottery terminals<sup>453</sup>, and that Nevada permits bookmakers to offer their services over the internet and telephone.<sup>454</sup> The Panel rejected both of these allegations. Antigua contends that the Panel made these findings notwithstanding that Antigua had submitted evidence and the United States had submitted none, and that, by so finding, the Panel effectively "reversed" the burden of proof.<sup>455</sup>

360. Antigua is correct that the burden of proof is on the United States, as the responding party invoking the Article XIV defence. Once the United States established its defence with sufficient evidence and arguments, however, it was for Antigua to rebut the United States' defence.<sup>456</sup> In rejecting Antigua's allegations relating to video lottery terminals and Nevada bookmakers, we understand the Panel to have determined that Antigua failed to rebut the United States' asserted defence under the chapeau, namely that its measures do not discriminate at all. Consequently, we do not read the Panel to have reversed the burden of proof in these two instances, and we dismiss this ground of Antigua's appeal.

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<sup>452</sup>*Supra*, paras. 258-263.

<sup>453</sup>Panel Report, paras. 6.590-6.594.

<sup>454</sup>*Ibid.*, paras. 6.601-6.603.

<sup>455</sup>Antigua's other appellant's submission, paras. 144-145.

<sup>456</sup>See *supra*, para. 282.

361. We now turn to the United States' Article 11 claim relating to the chapeau. The Panel examined the scope of application of the Interstate Horseracing Act ("IHA").<sup>457</sup> Before the Panel, Antigua relied on the text of the IHA, which provides that "[a]n interstate off-track wager *may be accepted* by an off-track betting system" where consent is obtained from certain organizations.<sup>458</sup> Antigua referred the Panel in particular to the definition given in the statute of "interstate off-track wager":

[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>459</sup> (emphasis added)

Thus, according to Antigua, the IHA, on its face, authorizes *domestic* service suppliers, but not *foreign* service suppliers, to offer remote betting services in relation to certain horse races.<sup>460</sup> To this extent, in Antigua's view, the IHA "exempts"<sup>461</sup> domestic service suppliers from the prohibitions of the Wire Act, the Travel Act, and the IGBA.<sup>462</sup>

362. The United States disagreed, claiming that the IHA—a civil statute—cannot "repeal"<sup>463</sup> the Wire Act, the Travel Act, or the IGBA—which are criminal statutes—*by implication*, that is, merely

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<sup>457</sup>We understand the Panel to have predicated its examination of the IHA on its view that the services under the IHA include services subject to the specific commitment undertaken by the United States in subsector 10.D of its Schedule.

<sup>458</sup>Section 3004 of Title 15 of the United States Code, Exhibit AB-82 submitted by Antigua to the Panel. (emphasis added)

<sup>459</sup>Section 3002 of Title 15 of the United States Code, Exhibit AB-82 submitted by Antigua to the Panel.

<sup>460</sup>Antigua submitted additional evidence in support of its reading of the IHA. See, for example, Panel Report, footnote 1061 to para. 6.599 and footnote 1062 to para. 6.600 (citing, *inter alia*, Congressional Record, House of Representatives Proceedings and Debates of the 106th Congress, Second Session (26 October 2000) 146 Cong. Rec. H 11230, 106th Cong. 2nd Sess. (2000), Exhibit AB-124 submitted by Antigua to the Panel); and United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (December 2002), Appendix II, Exhibit AB-17 submitted by Antigua to the Panel.

<sup>461</sup>Panel Report, para. 6.595 (quoting Antigua's statement at the first substantive panel meeting, para. 92).

<sup>462</sup>The Wire Act, the Travel Act, and the IGBA prohibit a broad range of gambling and betting activities when they involve foreign or interstate commerce. (Panel Report, paras. 6.362, 6.367, and 6.375)

<sup>463</sup>Panel Report, para. 6.597 (quoting United States' response to Question 21 posed by the Panel, Panel Report, p. C-50).

by virtue of the IHA's adoption *subsequent* to that of the Wire Act, the Travel Act, and the IGBA.<sup>464</sup> Rather, under principles of statutory interpretation in the United States, such a repeal could be effective only if done *explicitly*, which was not the case with the IHA.<sup>465</sup>

363. Thus, the Panel had before it conflicting evidence as to the relationship between the IHA, on the one hand, and the measures at issue, on the other. We have already referred to the discretion accorded to panels, as fact-finders, in the assessment of the evidence.<sup>466</sup> As the Appellate Body has observed on previous occasions, "not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts."<sup>467</sup>

364. In our view, this aspect of the United States' appeal essentially challenges the Panel's failure to accord sufficient weight to the evidence submitted by the United States with respect to the relationship under United States law between the IHA and the measures at issue. The Panel had limited evidence before it, as submitted by the parties, on which to base its conclusion. This limitation, however, could not absolve the Panel of its responsibility to arrive at a conclusion as to the relationship between the IHA and the prohibitions in the Wire Act, the Travel Act, and the IGBA. The Panel found that the evidence provided by the United States was not sufficiently persuasive to conclude that, as regards wagering on horseracing, the remote supply of such services by *domestic* firms continues to be prohibited notwithstanding the plain language of the IHA. In this light, we are not persuaded that the Panel failed to make an objective assessment of the facts.

365. With respect to the Panel's analysis under the chapeau of Article XIV, the United States also contends that the Panel failed to satisfy its obligations under Article 11 of the DSU in finding that "the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau."<sup>468</sup> Having reversed this finding under the chapeau

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<sup>464</sup>Panel Report, para. 6.595 (citing, *inter alia*, United States' first written submission to the Panel, paras. 33-35); United States' second written submission to the Panel, para. 63; and United States' response to Question 21 posed by the Panel, Panel Report, p. C-50. See also Panel Report, para. 6.597 (citing, *inter alia*, United States' response to Question 21 posed by the Panel, Panel Report, p. C-50); and Presidential Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriation Act, 21 December 2000, Exhibit US-17 submitted by the United States to the Panel, pp. 3155-3156.

<sup>465</sup>United States' response to Question 21 posed by the Panel, Panel Report, p. C-50; United States' second written submission to the Panel, paras. 63-64.

<sup>466</sup>*Supra*, para. 330.

<sup>467</sup>Appellate Body Report, *EC – Hormones*, para. 133. See also Appellate Body Report, *Japan – Apples*, para. 222.

<sup>468</sup>Panel Report, para. 6.589.

of Article XIV<sup>469</sup>, we *need not rule* on the United States' additional ground of appeal, namely that, in arriving at this finding, the Panel acted inconsistently with its duty under Article 11 of the DSU.

366. In sum, we *find* that none of the challenges under Article 11 of the DSU relating to the chapeau of Article XIV of the GATS has succeeded.

(f) Conclusion under the Chapeau

367. In paragraph 6.607 of the Panel Report, the Panel expressed its overall conclusion under the chapeau of Article XIV as follows:

... the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.

368. This conclusion rested on the Panel's findings relating to two instances allegedly revealing that the measures at issue discriminate between domestic and foreign service suppliers, contrary to the defence asserted by the United States under the chapeau. The first instance found by the Panel was based on "inconclusive" evidence of the alleged non-enforcement of the three federal statutes.<sup>470</sup> We have reversed this finding.<sup>471</sup> The second instance found by the Panel was based on "the ambiguity relating to" the scope of application of the IHA and its relationship to the measures at issue.<sup>472</sup> We have upheld this finding.<sup>473</sup>

369. Thus, *our* conclusion—that the Panel did not err in finding that the United States has not shown that its measures satisfy the requirements of the chapeau—relates solely to the possibility that the IHA exempts only *domestic* suppliers of remote betting services for horse racing from the prohibitions in the Wire Act, the Travel Act, and the IGBA. In contrast, the *Panel's* overall conclusion under the chapeau was broader in scope. As a result of our reversal of one of the two findings on which the Panel relied for its conclusion in paragraph 6.607 of the Panel Report, we must *modify* that conclusion. We *find*, rather, that the United States has not demonstrated that—in the

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<sup>469</sup>*Supra*, para. 357.

<sup>470</sup>Panel Report, paras. 6.589 and 6.607.

<sup>471</sup>*Supra*, para. 357.

<sup>472</sup>Panel Report, para. 6.607.

<sup>473</sup>*Supra*, paras. 364 and 366.

light of the existence of the IHA—the Wire Act, the Travel Act, and the IGBA are applied consistently with the requirements of the chapeau. Put another way, we uphold the Panel, but only in part.

4. Overall Conclusion on Article XIV

370. Our findings under Article XIV lead us to modify the overall conclusions of the Panel in paragraph 7.2(d) of the Panel Report.<sup>474</sup> The Panel found that the United States failed to justify its measures as "necessary" under paragraph (a) of Article XIV, and that it also failed to establish that those measures satisfy the requirements of the chapeau.

371. We have found instead that those measures satisfy the "necessity" requirement. We have also upheld, but only in part, the Panel's finding under the chapeau. We explained that the only inconsistency that the Panel could have found with the requirements of the chapeau stems from the fact that the United States did not demonstrate that the prohibition embodied in the measures at issue applies to both foreign *and* domestic suppliers of remote gambling services, notwithstanding the IHA—which, according to the Panel, "does appear, on its face, to permit"<sup>475</sup> *domestic* service suppliers to supply remote betting services for horse racing. In other words, the United States did not establish that the IHA does not alter the scope of application of the challenged measures, particularly vis-à-vis domestic suppliers of a specific type of remote gambling services. In this respect, we wish to clarify that the Panel did not, and we do not, make a finding as to whether the IHA does, in fact, permit domestic suppliers to provide certain remote betting services that would otherwise be prohibited by the Wire Act, the Travel Act, and/or the IGBA.

372. Therefore, we *modify* the Panel's conclusion in paragraph 7.2(d) of the Panel Report. We *find*, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the IGBA fall within the scope of paragraph (a) of Article XIV, but that it has not shown, in the light of the IHA, that the prohibitions embodied in these measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing. For this reason alone, we *find* that the United States has not established that these measures satisfy the requirements of the chapeau. Here, too, we uphold the Panel, but only in part.

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<sup>474</sup>See also Panel Report, para. 6.608.

<sup>475</sup>*Ibid.*, para. 6.599.

## VIII. Findings and Conclusions

373. For the reasons set out in this Report, the Appellate Body:

- (A) with respect to the measures at issue,
- (i) *upholds* the Panel's finding, in paragraph 6.175 of the Panel Report, that "the alleged 'total prohibition' on the cross-border supply of gambling and betting services ... cannot constitute a single and autonomous 'measure' that can be challenged in and of itself";
  - (ii) *finds* that the Panel *did not err* in examining whether the following three federal laws are consistent with the United States' obligations under Article XVI of the GATS:
    - (a) Section 1084 of Title 18 of the United States Code (the "Wire Act");
    - (b) Section 1952 of Title 18 of the United States Code (the "Travel Act"); and
    - (c) Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act");
  - (iii) *finds* that the Panel *erred* in examining whether eight state laws, namely, those of Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota and Utah, are consistent with the United States' obligations under Article XVI of the GATS;
- (B) with respect to the United States' GATS Schedule,
- (i) *upholds*, albeit for different reasons, the Panel's finding that subsector 10.D of the United States' Schedule to the GATS includes specific commitments on gambling and betting services;
- (C) with respect to Article XVI of the GATS,
- (i) *upholds* the Panel's findings that a prohibition on the remote supply of gambling and betting services is a "limitation on the number of service suppliers" within the meaning of Article XVI:2(a), and that such a prohibition is also a "limitation on the total number of service operations or on the total quantity of service output" within the meaning of Article XVI:2(c);

- (ii) *upholds* the Panel's finding, in paragraph 7.2(b)(i) of the Panel Report, that, by maintaining the Wire Act, the Travel Act, and the Illegal Gambling Business Act, the United States acts inconsistently with its obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2;
  - (iii) *reverses* the Panel's finding, in paragraph 7.2(b)(ii) of the Panel Report, that four state laws, namely, those of Louisiana, Massachusetts, South Dakota and Utah, are inconsistent with the United States' obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2; and
  - (iv) *need not rule* on the Panel's findings that restrictions on service *consumers* as opposed to service *suppliers* are neither limitations on "service suppliers" for the purposes of Article XVI:2(a), nor limitations on "service operations" or "service output" for the purposes of Article XVI:2(c);
- (D) with respect to Article XIV of the GATS,
- (i) *finds* that the Panel *did not fail* to satisfy its obligations under Article 11 of the DSU by deciding to examine the United States' defence under Article XIV;
  - (ii) as regards the burden of proof,
    - (a) *finds* that the Panel *did not improperly assume* either the burden of establishing the defence under Article XIV(a) on behalf of the United States or the burden of rebutting the United States' defence on behalf of Antigua;
    - (b) *need not rule* on Antigua's appeal relating to the Panel's treatment of the burden of proof in its analysis under paragraph (c) of Article XIV;
  - (iii) as regards paragraph (a) of Article XIV,
    - (a) *upholds* the Panel's finding, in paragraph 6.487 of the Panel Report, that "the concerns which the Wire Act, the Travel Act and the Illegal Gambling Business Act seek to address fall within the scope of 'public morals' and/or 'public order'";

- (b) *reverses* the Panel's finding that, because the United States did not enter into consultations with Antigua, the United States was not able to justify the Wire Act, the Travel Act and the Illegal Gambling Business Act as "necessary" to protect public morals or to maintain public order;
  - (c) *finds* that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are "measures ... necessary to protect public morals or to maintain public order"; and
  - (d) *finds* that the Panel *did not fail* to "make an objective assessment of the facts of the case", as required by Article 11 of the DSU;
- (iv) as regards paragraph (c) of Article XIV,
- (a) *reverses* the Panel's finding that, because the United States did not enter into consultations with Antigua, the United States was not able to justify the Wire Act, the Travel Act and the Illegal Gambling Business Act as "necessary" to secure compliance with the Racketeer Influenced and Corrupt Organizations statute; and
  - (b) *need not determine* whether the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures justified under paragraph (c) of Article XIV;
- (v) as regards the chapeau of Article XIV,
- (a) *reverses* the Panel's finding, in paragraph 6.589 of the Panel Report, that "the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau";
  - (b) *finds* that the Panel *did not fail* to "make an objective assessment of the facts of the case", as required by Article 11 of the DSU; and
  - (c) *modifies* the Panel's conclusion in paragraph 6.607 of the Panel Report and *finds*, rather, that the United States has not demonstrated that—in the light of the existence of the Interstate Horseracing Act—

the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the chapeau;

- (vi) as regards Article XIV in its entirety,
  - (a) *modifies* the Panel's conclusion in paragraph 7.2(d) of the Panel Report and *finds*, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures "necessary to protect public morals or maintain public order", in accordance with paragraph (a) of Article XIV, but that the United States has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, has not established that these measures satisfy the requirements of the chapeau; and

(E) with respect to the remaining allegations of error.

- (i) *need not*, in the light of the above findings, *rule* on the claim relating to Article 6.2 of the DSU<sup>476</sup>, on the additional claims raised under Article 11 of the DSU<sup>477</sup>, or on Antigua's conditional appeal of the Panel's finding that "the restrictions on market access that are covered by Article XVI are only those listed in paragraph 2 of this Article".<sup>478</sup>

374. The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *General Agreement on Trade in Services*, into conformity with its obligations under that Agreement.

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<sup>476</sup>*Supra*, para. 127.

<sup>477</sup>*Supra*, paras. 128, 156, 333 and 365.

<sup>478</sup>*Supra*, para. 256.

Signed in the original in Geneva this 23rd day of March 2005 by:

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Giorgio Sacerdoti  
Presiding Member

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Georges Abi-Saab  
Member

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John Lockhart  
Member

ANNEX I

**WORLD TRADE  
ORGANIZATION**

WT/DS285/6  
13 January 2005

(05-0113)

Original: English

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

Notification of an Appeal by the United States  
under paragraph 4 of Article 16 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 7 January 2005, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/R) ("Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that it "should consider" the following laws "in determining whether or not the United States is in violation of its obligations" under the *General Agreement on Trade in Services* ("GATS"),<sup>1</sup> including the conclusion that Antigua and Barbuda ("Antigua") had met its burden of proof that these laws "result in a prohibition on the cross-border supply of gambling and betting services"<sup>2</sup>: (1) the Wire Act (18 U.S.C. § 1084); (2) the Travel Act (18 U.S.C. § 1952); (3) the Illegal Gambling Business statute (18 U.S.C. § 1955); (4) Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.; (5) Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws; (6) South Dakota: § 22-25A-8 of the S.D. Codified Laws; (7) Utah: § 76-10-1102(b) of the Utah Code; (8) Colorado: § 18-10-103 of the Colorado Revised Statutes; (9) Minnesota: §§ 609.75, Subdivisions 2-3 and 609.755(1) of Minn. Stat. Ann; (10) New Jersey: paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of the N.J. Code; and (11) New York: § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L. These conclusions are in error and are based on erroneous findings on issues of law and related legal interpretations regarding a complaining party's initial burden of proving an alleged breach of Article XVI of the GATS, and on the Panel's failure to carry out its obligations under Article 11 of the DSU to make an objective assessment of the matter before it. These errors are contained in, *inter alia*, paragraphs 6.160-6.165, 6.199-6.249, 6.357-6.421, and 7.1-7.2 of the Panel Report.

<sup>1</sup>Panel Report, para. 6.209.

<sup>2</sup>*Id.*, para. 6.249.

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the U.S. schedule to the GATS includes specific commitments on gambling and betting services under subsector 10.D, "other recreational services (except sporting)." This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations with respect to the provisions of the U.S. schedule to the GATS. These errors are contained in, *inter alia*, paragraphs 6.49-6.138, 6.356, 6.527, and 7.2-7.4 of the Panel Report.

3. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the United States fails to accord services and service suppliers of Antigua treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in the U.S. schedule, contrary to Article XVI:1 and Article XVI:2 of the GATS. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations with respect to Article XVI of the GATS. These erroneous findings include, for example, the following:

- (a) The Panel's findings that any limitation that has the *effect* of limiting the number of service suppliers in a sector or subsector is a limitation in the *form* of numerical quotas within the meaning of Article XVI:2(a), and that "a measure that is not expressed in the form of a numerical quota or economic needs test may still fall within the scope of Article XVI:2(a)"<sup>3</sup>;
- (b) The Panel's findings that any limitation that has the *effect* of limiting the number of service operations in a sector or subsector is a limitation expressed in the *form* of quotas within the meaning of Article XVI:2(c) of the GATS, and that a limitation that is not "expressed in terms of designated numerical units" may nonetheless fall within the scope of Article XVI:2(c);
- (c) The Panel's finding that a WTO Member does not respect its GATS market access obligations under Article XVI:2 if it limits market access to any part of a scheduled sector or subsector, or if it restricts any means of delivery under mode 1 with respect to a committed sector; and
- (d) The Panel's findings that the United States maintains such limitations.

These errors are contained in, *inter alia*, paragraphs 6.262-6.421 and 7.2-7.4 of the Panel Report.

4. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the Wire Act, the Travel Act (together with the relevant state laws) and the Illegal Gambling Business statute (together with the relevant state laws) are not justified under Articles XIV(a) and XIV(c) of the GATS and are inconsistent with the requirements of the chapeau of Article XIV of the GATS. These conclusions are in error and are based on erroneous findings on issues of law and related legal interpretations with respect to Article XIV of the GATS, and on the Panel's failure to ensure that consultations shall be without prejudice to the rights of the United States in dispute settlement proceedings pursuant to Article 4.6 of the DSU. These errors are contained in, *inter alia*, paragraphs 6.475-6.477, 6.488-6.535, 6.541-6.608, and 7.2 of the Panel Report.

5. The United States seeks review by the Appellate Body, pursuant to Article 11 of the DSU, of the Panel's finding that "the United States has declined Antigua's invitation to engage in bilateral and/or multilateral consultations and/or negotiations."<sup>4</sup> The Panel's disregard for uncontroverted evidence in the record, such as the fact that the United States engaged in bilateral consultations with Antigua regarding Antigua's concerns relating to U.S. gambling laws pursuant to Article 4 of the

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<sup>3</sup>*Id.*, para. 6.332.

<sup>4</sup>*Id.*, para. 6.533.

DSU, is inconsistent with the Panel's duty to make an objective assessment of the matter before it. These errors are contained in, *inter alia*, paragraphs 6.525-6.533 of the Panel Report.

6. The United States seeks review by the Appellate Body, pursuant to Article 11 of the DSU, of the Panel's finding that "the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau" of Article XIV of the GATS.<sup>5</sup> The Panel's disregard for uncontroverted evidence in the record, such as statistical evidence as to the overall treatment of domestic suppliers of remote gambling services as compared to that of foreign suppliers, is inconsistent with the Panel's duty to make an objective assessment of the matter before it. These errors are contained in, *inter alia*, paragraphs 6.585- 6.589 of the Panel Report.

7. The United States seeks review by the Appellate Body, pursuant to Article 11 of the DSU, of the Panel's finding that "the evidence presented to the Panel is inconclusive and that the United States has not demonstrated that the [Interstate Horseracing Act], as amended, does not permit interstate pari-mutuel wagering for horse racing over the telephone or using other modes of electronic communication, including the Internet."<sup>6</sup> The Panel's disregard for uncontroverted evidence in the record, such as the consistent position of the U.S. Government that the IHA does not provide legal authority or protection for remote supply of gambling services and settled U.S. law regarding statutory construction, is inconsistent with the Panel's duty to make an objective assessment of the matter before it. These errors are contained in, *inter alia*, paragraphs 6.595-6.600 of the Panel Report.

8. The United States seeks review by the Appellate Body of the Panel's legal conclusion that "practice," which the Panel defines as "a repeated pattern of similar responses to a set of circumstances," can "be considered as an autonomous measure that can be challenged in and of itself."<sup>7</sup> This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations with respect to what constitutes a "measure" under Article 6.2 of the DSU. These errors are contained in, *inter alia*, paragraphs 6.196-6.198 of the Panel Report.

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<sup>5</sup>*Id.*, para. 6.589.

<sup>6</sup>*Id.*, para. 6.600.

<sup>7</sup>Panel Report, paras. 6.196-6.197.

ANNEX II

**WORLD TRADE  
ORGANIZATION**

**WT/DS285/7**  
16 February 2005

(05-0613)

Original: English

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

Notification of Other Appeal by Antigua and Barbuda  
under Article 16.4 and Article 17 of DSU, and under Rule 23(1) of the Working Procedures for  
Appellate Review

The following notification, dated 19 January 2005, from the Delegation of Antigua and Barbuda, is being circulated to Members.

Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, Antigua and Barbuda ("Antigua") hereby notifies the Dispute Settlement Body (the "DSB") of the World Trade Organisation (the "WTO") of its decision to appeal to the Appellate Body as an Other Appellant certain issues of law covered in the Report of the Panel in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/R) (the "Final Report").

1. Antigua seeks review of the Panel's legal conclusion that Antigua was not entitled to rely on what was referred to in the Final Report as the "total prohibition" as a "measure" under Article XXVIII(a) of the General Agreement on Trade in Services (the "GATS") and Article 6.2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").<sup>8</sup> The Panel erred when it concluded that Antigua had not identified the "total prohibition" in its Panel request. In making this finding, the Panel misinterpreted Antigua's Panel request and incorrectly interpreted and applied DSU Article 6.2 and GATS Articles I:1, I:3(a), XXIII and XVIII(a).

2. Antigua seeks review of the Panel's legal conclusion that, even if Antigua had identified the "total prohibition" as a "measure" in its Panel request, Antigua was not entitled to rely upon the "total prohibition" as a measure.<sup>9</sup> In coming to this conclusion, the Panel developed and applied a three-part test that is both unsupported by and inconsistent with DSU Article 6.2 and GATS Articles I:1, I:3(a) and XXVIII(a). The Panel also erred by failing to objectively assess and ascribe any significance to the United States' admission that it maintained a "total prohibition" on the cross-border provision of gambling and betting services, contrary to DSU Article 11.

<sup>8</sup>See Final Report, paras. 6.171, 6.169, 6.170 and 6.177. See also *id.*, paras. 6.156 and 6.157.

<sup>9</sup>See *id.*, paras. 6.171, 6.175–6.185. See also *id.*, para. 197.

3. In the event the Appellate Body were find in favour of the United States in the review sought by the United States pursuant to the third numbered paragraph of the United States' Notice of Appeal dated 7 January 2005 and reverse the conclusion of the Panel in paragraph 7.2(b) of the Final Report, Antigua seeks review of the Panel's legal conclusion that GATS Article XVI:1 is limited by GATS Article XVI:2.<sup>10</sup> In making this determination, the Panel adopted a legally incorrect interpretation of GATS Article XVI.

4. Antigua seeks review of the Panel's legal conclusion that measures that prohibit consumers from using the gambling services offered by Antiguan operators through cross-border supply do not violate GATS Articles XVI:2(a) and XVI:2(c).<sup>11</sup> In making this determination, the Panel adopted a legally incorrect interpretation of GATS Articles XVI:2(a) and XVI:2(c).

5. Antigua seeks review of the Panel's decision to consider the claimed defence of the United States under GATS Article XIV, which was affirmatively raised by the United States only at the last session of the second substantive meeting of the Panel with the parties—too late in the proceeding to allow for a fair opportunity by Antigua to rebut the defence and for proper assessment and adjudication of the claim by the Panel.<sup>12</sup> Additionally, the Panel in essence constructed and completed the GATS Article XIV on behalf of the United States, thus relieving the United States of its burden of proof. The consideration by the Panel of the Article XIV defence submitted by the United States at such a late date in the proceeding, as well as the construction and completion of such defence by the Panel on behalf of the United States, is contrary to the requirements of due process, the principle of equality of arms and the terms of DSU Articles 3.10 and 11.

6. In the event the Appellate Body determines that the United States' GATS Article XIV defence was properly before the Panel, Antigua seeks review of the Panel's application and assessment of GATS Article XIV(a) to the defence, which was erroneous in a number of respects,<sup>13</sup> including without limitation (i) failure to properly consider the text of GATS Article XIV; (ii) improper analysis and application of the test developed by the Appellate Body in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R ("*Korea – Beef*"); and (iii) failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

These errors are illustrated, for example, by:

(A) The failure of the Panel to take into consideration footnote 5 of GATS Article XIV(a), which was mentioned in paragraphs 6.467 and 6.468 of the Final Report, but never applied to the facts of the case nor mentioned again in the Final Report.

(B) The Panel giving total deference to the findings of United States authorities in making its assessment of (i) whether the applicable measures are measures designed to protect public morals or to maintain public order and (ii) the "necessary" test set out in *Korea – Beef*, and in each case not examining the actual facts before it in making the assessments. With respect to (i), in its assessment of the point, contained in paragraphs 6.479 through 6.487 of the Final Report, the Panel cites no evidence to support its conclusions other than findings or statements of the United States or its authorities. With respect to (ii), *first*, in its assessment of the "importance of the interests or values that the measures were designed to protect" aspect of the *Korea – Beef* test, contained in paragraphs 6.489 through 6.492 of the Final Report, the Panel cites no evidence to support its conclusions other than findings or statements of the United States or its authorities and *second*, in its

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<sup>10</sup>See *id.*, paras. 6.298, 6.299 and 6.318.

<sup>11</sup>See *id.*, paras. 6.382, 6.383, 6.397, 6.398, 6.401, 6.402, 6.405 and 6.406.

<sup>12</sup>See *id.*, paras. 6.444, 6.583 and 6.584.

<sup>13</sup>See *id.*, paras. 6.467–6.469, 6.474, 6.479–6.521, 6.533 and 6.535.

apparent differentiation of "remote" gambling services from "non-remote" gambling services, contained in paragraphs 6.498 through 6.521 of the Final Report, substantially all of the evidence cited by the Panel in support of its conclusions are findings or statements of the United States or its authorities<sup>14</sup> and a number of the findings are not supported by any evidence at all.

(C) The Panel, in its assessment of the "necessary" test set out in *Korea – Beef*, reaching its conclusions regarding the "importance of the interests or values" and the differentiation of "remote" gambling services based solely upon apparent "concerns" of the United States without requiring evidence—and without making any finding—that the "concerns" were justified under the circumstances of this case. The United States submitted *no* evidence associated with Antigua<sup>15</sup> cross-border supply of gambling and betting services of, *inter alia* (i) money laundering; (ii) fraud; (iii) health concerns; (iv) underage gambling; or (v) organised crime (collectively, the "Five Concerns").

(D) The failure of the Panel to make an objective assessment of the extent to which the measures at issue actually contributed to the ends ostensibly pursued by the measures. In paragraph 6.494 of the Final Report, the Panel dismissed this prong of the *Korea – Beef* test by concluding that because the United States measures prohibited the cross-border supply of gambling services, the measures "must contribute, at least to some extent, to addressing those concerns." However, the Panel failed to make any factual inquiry at all as to whether the measures actually contribute to addressing the Five Concerns.

(E) The Panel ignoring or misapplying factual evidence presented by Antigua. Antigua submitted substantial third-party evidence regarding the existence of the Five Concerns in the United States domestic gambling market, regulatory schemes and other contexts in which goods or services are provided on a cross-border or Internet-delivered basis.<sup>16</sup> Very little of this evidence was taken into consideration by the Panel. The Panel erred by failing to consider this evidence (i) in the context of determining exactly how material the "concerns" of the United States are regarding problems associated with the Five Concerns; (ii) to assess the United States' tolerance of problems associated with the Five Concerns in its regulated domestic industry; (iii) to determine whether any basis exists for the differentiation of "remote" gambling services from "non-remote" gambling services in respect of the Five Concerns; (v) whether reasonable alternatives to prohibition were available to the United States; or (vi) in contrast to the complete lack of similar evidence adduced by the United States in the context of the provision of cross-border gambling services.

7. In the event the Appellate Body determines that the United States' GATS Article XIV defence was properly before the Panel, and further in the event the Appellate Body upholds the "three-part" measure identification test developed by the Panel in paragraphs 6.215 through 6.249 of the Final Report, Antigua seeks review of the Panel's finding that the United States had sufficiently identified the United States' "RICO" statute<sup>17</sup> for consideration under GATS Article XIV(c).<sup>18</sup> The Panel's finding is not supported by analysis under the "three-part" test, is not supported by any evidence and is contrary to DSU Article 11.

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<sup>14</sup>The only other evidence considered by the Panel in this discussion is an out-of-context reference to some language in a report prepared for Antigua by certain experts (Final Report, para. 6.513) and extracts from a statement made by a credit card company executive before the United States Congress (*id.*, para. 6.518).

<sup>15</sup>Nor was any evidence submitted by the United States pertaining to any other jurisdiction.

<sup>16</sup>Note that this evidence was not presented in the context of GATS Article XIV due to the failure of the United States to raise its GATS Article XIV defence until after all written submissions had been made, and was extrapolated by the Panel from Antigua's discussion of GATS Article XVII. *See* Final Report, para. 6.584. *See also* paragraph 5 above.

<sup>17</sup>18 U.S.C. §§ 1961–1968.

<sup>18</sup>*See* Final Report, paras. 6.548-6.551.

8. In the event the Appellate Body determines that the United States' GATS Article XIV defence was properly before the Panel, Antigua seeks review of the Panel's application and assessment of GATS Article XIV(c) to the defence, which was legally erroneous in a number of respects,<sup>19</sup> including without limitation (i) in assessing the RICO statute, the Panel failed to properly apply GATS Article XIV(c) as the Panel had already determined that the state statutes upon which the RICO statute itself relies were not properly before the Panel;<sup>20</sup> (ii) in assessing the RICO statute, the Panel failed to properly apply GATS Article XIV(c) as the Panel had already determined that with respect to the one "concern" addressed by the RICO statute, organised crime, the United States had not been able to demonstrate it was a specific concern related to "remote" gambling;<sup>21</sup> (iii) in application of the "necessary" test under *Korea – Beef*, the Panel failed to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

These errors are illustrated, for example, by:

(A) The Panel giving total deference to the findings of United States authorities in making its assessment of (i) whether the applicable measures secure compliance with the RICO statute and (ii) the "necessary" test set out in *Korea – Beef*, and in each case not examining the actual facts before it in making the assessments. With respect to (i), in its assessment of the point, contained in paragraphs 6.552 through 6.556 of the Final Report, the Panel cited no evidence to support its conclusions other than findings or statements of the United States or its authorities. With respect to (ii), in its assessment of the "importance of the interests or values that the measures were designed to protect" aspect of the *Korea – Beef* test, contained in paragraph 6.558 of the Final Report, the Panel cited no evidence to support its conclusions other than findings or statements of the United States or its authorities.

(B) The failure of the Panel to make an objective assessment of the extent to which the measures at issue actually contributed to the ends pursued by the RICO statute. In paragraphs 6.559 and 6.560 of the Final Report, the Panel not only relied solely on findings or statements of the United States or its authorities in reaching its conclusions, but also failed to require or consider any evidence that organised crime is a legitimate concern in the context of cross-border gambling services provided from Antigua or that the measures actually contribute to the suppression of organised crime and to what extent they do so.

9. In the event the Appellate Body determines that the United States' GATS Article XIV defence was properly before the Panel, Antigua seeks review of the Panel's application and assessment of the "chapeau" of GATS Article XIV, which was erroneous in a number of respects,<sup>22</sup> including without limitation (i) the Panel's determination to apply the chapeau in the absence of a finding of a "preliminary justification" in favour of the United States under GATS Article XIV; (ii) the Panel's determination to examine only certain narrow segments of the gambling industry in its assessment of the "discrimination" prong of the chapeau test set forth in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R ("*US – Shrimp*"); and (iii) the Panel's failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

These errors are illustrated, for example, by:

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<sup>19</sup> See *id.*, paras. 6.550, 6.553–6.557, 6.560, 6.562 and 6.564.

<sup>20</sup> *Id.*, para. 6.547.

<sup>21</sup> *Id.*, para. 6.520.

<sup>22</sup> *Id.*, paras. 6.567, 6.585–6.607.

(A) In the discussion regarding video lottery terminals in paragraphs 6.590 through 6.594 of the Final Report, the Panel (i) made a conclusion regarding "identification and age verification" in connection with purchases at video lottery terminals that is not supported by any evidence; (ii) ignored significant Antiguan evidence to the contrary; and (iii) shifted the burden of proof to Antigua to "refute" the unproven claim of the United States as to "identification and age verification."

(B) In the discussion regarding Nevada bookmakers in paragraphs 6.601 through 6.603 of the Final Report, the Panel (i) made a conclusion regarding the provision of gambling and betting services through the Internet in Nevada that is not supported by any evidence; (ii) ignored Antiguan evidence to the contrary; and (iii) shifted the burden of proof to Antigua to refute the unproven claim of the United States that Nevada bookmakers do not provide services via the Internet.

(C) The discussion regarding the letters from a state lottery association is without any context at all.

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ANNEX II(a)

# WORLD TRADE ORGANIZATION

WT/DS285/7/Corr.1  
17 February 2005

(05-0677)

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

Notification of Other Appeal by Antigua and Barbuda  
under Article 16.4 and Article 17 of DSU, and under Rule 23(1) of the  
Working Procedures for Appellate Review

### Corrigendum

In numbered paragraph 1, the final reference in the last sentence of the paragraph should be to "GATS Article XXVIII(a)", and not to "GATS Article XVIII(a)", so as to read:

"In making this finding, the Panel misinterpreted Antigua's Panel request and incorrectly interpreted and applied DSU Article 6.2 and GATS Articles I:1, I:3(a), XXIII and XXVIII(a)."

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ANNEX III

**GENERAL AGREEMENT  
ON TRADE IN SERVICES**

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GATS/SC/90  
15 April 1994  
(94-1088)

**THE UNITED STATES OF AMERICA**

**Schedule of Specific Commitments**

(This is authentic in English only)

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**THE UNITED STATES OF AMERICA - SCHEDULE OF SPECIFIC COMMITMENTS**

Modes of supply:      1) Cross-border supply      2) Consumption abroad      3) Commercial presence      4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
<b>II. SECTOR-SPECIFIC COMMITMENTS</b>			
...			
10. RECREATIONAL, CULTURAL, & SPORTING SERVICES			
A. ENTERTAINMENT SERVICES (INCLUDING THEATRE, LIVE BANDS AND CIRCUS SERVICES)	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None	
B. NEWS AGENCY SERVICES	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None	
C. LIBRARIES, ARCHIVES, MUSEUMS AND OTHER CULTURAL SERVICES	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None	
D. OTHER RECREATIONAL SERVICES (except sporting)	1) None 2) None 3) The number of concessions available for commercial operations in federal, state and local facilities is limited 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None	