

**BEFORE THE
WORLD TRADE ORGANIZATION**

*United States - Measures Affecting the
Cross-Border Supply of Gambling and Betting Services*

WT/DS285

**COMMENTS OF THE UNITED STATES
ON ANTIGUA AND BARBUDA'S RESPONSES TO THE PANEL'S QUESTIONS
IN CONNECTION WITH THE SECOND SUBSTANTIVE MEETING**

February 11, 2004

1. Pursuant to the emails from the Secretary of the Panel dated February 2 and 5, 2004, the United States submits the following comments on the response of Antigua and Barbuda (“Antigua”) to question 40, as well as brief comments on Antigua’s responses to questions 33, 36, and 41. The United States considers that Antigua’s other responses have already been addressed through previous U.S. submissions and statements.

Comment on Antigua and Barbuda’s Response to Question 40 (“Does Antigua have any market-based/economic evidence to support its assertion in paragraph 36 of its second oral statement that ‘Internet-based’ and ‘land-based’ gambling and betting services compete and that consumers switch from one to the other?”)

2. In paragraph 36 of its second opening statement, Antigua asserted that “there is competition between” Internet-based and land-based gambling services “because consumers switch from one to the other – just like a gambler can switch from one land based casino to another.” The Panel asked for market-based/economic “evidence” to support this assertion. Antigua’s response provides none. Instead, Antigua offers a series of baseless assertions that assume, rather than prove, such competition.

Antigua’s “Considerable Overlap” Assertion

3. In the first paragraph of its response to question 40, Antigua asserts that there is “considerable overlap in the use of gambling services by regular gamblers.” In fact, Antigua has not provided any evidence approaching “considerable overlap” between the users of Internet-based remote gambling services and users of non-remote gambling services.

4. Antigua cites a summary of a River City Group “study,” but fails to provide the study itself.¹ Moreover, the summary cited by Antigua actually contradicts Antigua’s “overlap” argument. Specifically, it states that only 28 percent of all gamblers gamble online for real money. Another source, the Online Gambling Market Research Handbook, indicates that the overlap in customers is much smaller – possibly less than 5 percent.²

Antigua’s “High Degree of Substitutability” Assertion

5. In the second paragraph of its response to question 40, Antigua asserts that “academic studies in the United States and the United Kingdom have found a high degree of substitutability

¹ The summary cited by Antigua (and authored by the chairman of the Interactive Gaming Council, a group dedicated to promoting Internet gambling) provides neither a full data set nor an explanation of its methodology, so its validity, if any, is impossible to discern.

² Online Gambling Market Research Handbook, p. 8 (2003) (“Many industry analysts estimate less than [sic] 5% of the players on the Internet are ‘real gamblers.’ This is attributed to the following reasons:

- Online generation is younger
- Different experience
- From areas where land-based gaming is not legal
- Consist of non-core gamblers, but who like a little flutter.” Excerpt at Exhibit U.S.-44.

between different forms of gambling.” Based on such literature, Antigua and its economic consultants assert the existence of substitution between Internet gambling and land based gambling. This reasoning is seriously flawed.

6. First of all, Antigua overstates the limited conclusions of its own consultants regarding substitutability of Internet and land-based gambling. Antigua states that its consultants “conclude that ‘Internet based’ gambling is a strong substitute for ‘land-based’ gambling.” By contrast, the consultants themselves actually concluded that “there is strong substitutability *among gaming choices*” – a generalization that does not specifically compare Internet and land-based gambling. When trying to compare Internet and land-based gambling specifically, however, Antigua’s consultants could only draw the weaker conclusion that there was “substantial evidence to support the assertion that ‘land-based’ gambling and betting services compete and that consumers switch from one to the other.”³ Yet upon examination, the alleged “substantial evidence” for this “assertion” appears to consist only of literature related to non-remote gambling.⁴

7. Antigua and its consultants are making an unsupported leap of logic. They cite no empirical studies actually addressing the relationship between Internet gambling and land-based gambling. Instead, they merely allege, without foundation, that literature finding that the revenue of established land-based gambling options changed with the introduction of other new land-based gambling options somehow demonstrates that substitutability exists between Internet and land-based gambling.⁵

³ See Exhibit AB-210.

⁴ See sources cited in *id.* The United States has examined as many of these sources as could be located in the time available and found no empirical evidence comparing Internet and land-based gambling.

In addition, the separate statement by Professor Williams in Exhibit AB-211 reaches an even weaker conclusion. Professor Williams relies on studies “looking at other sectors of the gambling industry” and “gambling products which in some respects mimic the Internet gambling experience,” not Internet gambling itself, to support “a conclusion that Internet gambling is likely to substitute *in some degree* for land-based gambling” (emphasis added). One need hardly point out that Professor Williams is making an unsupported leap of logic from other sectors and products to Internet gambling, and that “some degree” is a carefully-chosen term that does not exclude a slight or minuscule degree.

⁵ Not surprisingly, Antigua ignores aspects of this literature that appear to contradict its own conclusions. For example, Paton, Siegel and Williams (2003a), cited in Exhibit AB-210, found “no evidence of substitution from machines or casino gambling to betting,” which would seem to disprove the hypothesis that all forms of gambling inherently display a high degree of substitutability. Also, the studies show contradictory results for “substitution” between lotteries and Native American casinos. Antigua’s consultants rely heavily on the results from Siegel and Anders, Exhibit AB-212, who found that increased numbers of slots at Native American casinos in Arizona reduced state lottery revenues. But they ignore the results of Elliott and Navin, Exhibit AB-213, who failed to find any impacts for Native American reservations in a much broader sample than the Siegel and Anders study. Nor do they attempt to explain the apparent contradiction between Elliot and Navin’s findings for riverboat casinos and their findings for Native American casinos.

8. Furthermore, the argument put forward by Antigua and its consultants rests on the implicit assumption that individuals budget a specific amount of money for gambling that must be redistributed with the introduction of a new gambling option. Based on results discussed in the submitted studies, however, this does not appear to be the case.⁶ The relatively rapid growth of the gambling industry is more consistent with the hypothesis that increasing the available forms of gambling increases total expenditures on gambling, rather than merely shifting expenditures among gambling options.

9. In short, Antigua and its consultants have not explained why they think Internet gambling would be highly substitutable with land based gambling. Nor have they accounted for unique variables that would be likely to impact substitutability in the case of Internet gambling, such as availability of Internet access⁷ and the different nature of the Internet gambling environment.⁸

10. Tellingly, Antigua provides no direct economic data on cross-price elasticities of demand between Internet and land-based gambling, in spite of the fact that one of Antigua’s consultants acknowledges that it is “common practice to assess substitution through studies that estimate ‘cross-price elasticities of demand.’”⁹ Past panel reports reviewing an economic substitution argument have relied on high-quality statistical evidence of the existence of cross-price elasticities of demand (in this case, it would be between Internet and land-based gambling or

⁶ Elliot and Navin reported that Gulley and Scott (1989) found that “[e]ach additional dollar bet on the state lottery is estimated to lead to a decline of three cents in thoroughbred racing handle.” David O. Gulley and Frank A. Scott Jr, “Lottery Effects On Pari-Mutuel Tax Revenues”, *National Tax Journal*, vol. 42, 1989, 89-93 as cited in Elliott and Navin, Exhibit AB-213. Even Elliott and Navin’s results on the impact of riverboats found that for each \$5 in additional gross outlays at the boats, state lottery revenues fell by only \$1.38. Thus, it appears that the greater impact of the addition of gambling options was to increase overall expenditures on gambling.

A study by Kearney (2003) similarly indicates that increasing gambling options results in increased gambling expenditures. Kearney found that in the United States, total household expenditures on gambling increased after the introduction of a state lottery. See Melissa Schettini Kearney, “State Lotteries and Consumer Behavior” draft Sept. 2003, p. 30, available at <http://www.wellesley.edu/Economics/kearney/mskearney-lotteries-9-03.pdf> (“Data from micro-level surveys of gambling behavior corroborate the claim that household lottery gambling is financed by a reduction in non-gambling expenditures, not by substitution away from alternative forms of gambling.”).

⁷ Internet gambling requires access to a computer and the Internet, whereas the land-based forms of gambling analyzed in the literature cited by Antigua did not require the participant to own any special equipment. As some studies have indicated, many lottery players tend to be from lower income households and may be less likely to own a computer.

⁸ Other forms of gambling require much more active engagement on the part of the participant to reach, with specific intent to gamble, the point of sale. On the Internet, however, pop-up ads and other inducements may cause the potential gambler to reach the gambling opportunity without any specific intent to gamble, and then encourage gambling in an environment of unmatched ease and privacy. This very different environment for gambling on the Internet is likely to result in individuals gambling through Internet use who would not otherwise be involved in gambling activity.

⁹ See Exhibit AB-211 (quoting a report by Pion Economics).

remote and non-remote gambling), not the unsupported speculation and “stylized facts” offered by Antigua and its consultants.¹⁰

11. Moreover, evidence from the United Kingdom, relied upon heavily by Antigua and its consultants, has little weight in an assessment of consumer behavior in the United States.¹¹ Nonetheless, it is noteworthy that Antigua’s own consultant stated in that context that Internet betting exchanges were complementary to, rather than substitutes for, existing betting on bookmakers.¹² Together with the foregoing analysis, this statement further confirms that Antigua’s assertions of substitutability between Internet and land-based gambling rest on questionable and unsupported assumptions, rather than on facts.

¹⁰ See Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R; WT/DS10/R; WT/DS11/R, adopted November 1, 1996, at para. 6.31 (noting that elasticity of substitution is measured through “[f]ormal statistical methods” and “based on actual observations,” and criticizing a party’s failure to examine particular variables). See also Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R; WT/DS110/R, adopted June 15, 1999, at paras. 7.63-64 (treating studies regarding cross-price elasticity of demand with caution because they lacked supply side data and used small statistical samples, and stating that “a high estimated coefficient of elasticity would be important evidence to demonstrate that products are directly competitive or substitutable *provided that the quality of the statistical analysis is high.*” (emphasis added)). In this dispute, Antigua has provided no statistical analysis whatsoever comparing Internet and land-based gambling.

¹¹ See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, adopted November 1, 1996, p. 20 (quoting the observation in the Report of the Working Party on *Border Tax Adjustments* that “consumers’ tastes and habits ... change from country to country”). See also Minutes of Evidence Taken before Joint Committee on the Draft Gambling Bill, Thursday, 8 January 2004, Q250, available at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtgamb/uc139-iii/uc13902.htm> (response of Dr. Mark Griffiths, Antigua’s consultant in the present dispute, testifying that “[E]very country has a different culture of gambling. ... Every country I have looked at that has de-regulated in a big way has seen an increase in problem gambling, and I do not see why that should not occur here, but there will be a different culture in terms of what people will enjoy gambling on.”); David Paton, Donald S. Siegel, and Leighton Vaughan Williams, “A Policy Response to the E-Commerce Revolution: The Case of Betting Taxation in the U.K.,” *Economic Journal*, Vol. 111, Issue 480, F296-F314 (2002) (“It is clear, then, that there are major differences in the nature of gambling activity and how it is perceived and regulated in UK and the USA.”), cited in Exhibit AB-210.

¹² See Minutes of Evidence Taken before Joint Committee on the Draft Gambling Bill, Tuesday, 13 January 2004, Q324, available at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtgamb/uc139-iv/uc13902.htm> (response of Professor Williams, stating that “the turnover that is going through betting exchanges is complementary not substitute for existing betting on bookmakers”). A gambling industry representative testifying before the same committee alongside Professor Williams stated that “we are in the business of providing destination leisure opportunities through which gaming is delivered. That is a very, very different market from somebody betting at a betting exchange or on internet gaming.” See *id.*, Q326 (response of Mr. John Kelly, Cross-Industry Group on Gaming Deregulation).

In the same hearing, Professor Williams also qualified his own conclusions regarding substitutability of gambling generally by stating that “I have found only weak evidence, however, of substitution between casino and gaming spend and betting and only weak evidence to date of a substitution effect between gaming activity and bingo activity.” *Id.* at Q315 (response of Professor Williams). This statement confirms that any belief that substitutability may exist between land-based forms of gambling is by no means universal, and therefore substitutability cannot simply be assumed to exist between Internet and land-based gambling.

Antigua’s “Anecdotal Evidence” Assertion

12. In the third paragraph of its response to Question 40, Antigua asserts that there is “considerable further anecdotal evidence of competition between Internet and other gambling,” but the sources it cites provide no support for this view.¹³ Indeed, in some cases the sources contradict this view by suggesting that Internet gambling is a complement to, rather than a substitute for, land-based gambling.¹⁴

13. Much stronger “anecdotal” evidence comes from industry leaders from both the Internet and land-based gambling industries who contradict Antigua’s assertions that these two different services are in competition with one another. For example, American Gaming Association President Frank Fahrenkopf has testified before the U.S. Congress that Internet gambling is not a competitive threat to U.S. commercial casinos.¹⁵

¹³ The Article “Online Betting growth called threat to Nevada” cited in footnote 10 of Antigua’s response to question 40 reports on assertions that Nevada and Nevada-based casinos are losing moneymaking opportunities because U.S. law prevents them from taking their “fair share” of Internet gambling revenues. Nowhere does this article state or imply that Internet gambling is competing for revenues with non-remote forms of gambling. It merely confirms the U.S. position that Internet gambling is illegal for domestic operators as well as cross-border operators. Similarly, the article “NYRA, Magna Withhold Simulcast Signal From Attheraces” cited in footnote 10 of Antigua’s response explains that the concern in that case was not Internet competition; it was the failure by certain providers to direct betting data into the common pool used in all parimutuel wagering.

¹⁴ For example, in footnote 10 of its response to question 40, Antigua cites the Bear Stearns report. Once again, an examination of that report shows that it supports the U.S. position. The cited pages of the report provide no evidence of direct competition between Internet and land-based gambling. On the contrary, the Bear Stearns analysts theorize that Internet gambling is a complement to land-based gambling in that it allows land-based operators to “cross-market to a different customer base.” Exhibit AB-36, p. 33. This is consistent with the same report’s conclusion that “Internet gamers are generally not the same customer as land-based gamers.” *See id.*, p. 55.

¹⁵ Mr. Fahrenkopf stated that:

There is simply no comparison between the social, group-oriented entertainment experience of visiting a casino resort and the solitary experience of placing a bet or wager using a personal computer. Visiting a casino today is about much more than legal wagering opportunities. Whether measured by how people spend their time or how they spend their dollars, guests of U.S. commercial casinos are increasingly attracted as much or more by restaurants, shows, retail, recreation, and other non-gaming amenities.

The view that Internet gambling is not a competitive threat to U.S. commercial casinos is shared by financial analysts at major Wall Street firms, whose job it is to analyze the competitive impact of market developments on the industries and firms they cover, including the major publicly traded gaming companies the AGA represents.

Testimony of Frank J. Fahrenkopf, Jr., President and CEO, American Gaming Association, Before the Senate Banking Committee, March 18, 2003, available at http://www.senate.gov/~banking/_files/fahrenkopf.pdf. *See also* Net Gambling Bills Protect Established Gambling Interests, Tech Law Journal available at <http://www.techlawjournal.com/internet/19991025b.htm> (October 25, 1999) (quoting Mr. Fahrenkopf as stating that “We are not concerned about losing business to Internet gambling. There is simply no comparison between playing at home on a computer and the broad entertainment experience our destination resorts offer. Wall Street analysts confirm that view.”)

14. Prominent companies in the Internet gambling industry appear to share this view. For example, Boss Media, one of a handful of major suppliers of Internet gambling technology, states on its website that “Boss Media considers that Internet casinos do not compete with land-based casinos.”¹⁶ Similarly, a 2002 industry report funded by Microgaming, another major supplier of Internet gambling technology, concluded that Internet gambling and land-based gambling are actually complementary products, rather than competitors.¹⁷

Antigua’s “General Proposition” Assertion

15. In the fourth paragraph of its response to question 40, Antigua refers to “the general proposition that ‘Internet-based’ commerce competes with ‘land-based’ commerce” and cites a press release concerning a United States Federal Trade Commission staff report on sales of wine over the Internet. The United States fails to see how this discussion of an unrelated industry is relevant in any way to Antigua’s specific burden of proof regarding gambling services. As the United States pointed out at paragraph 56 of its second submission, the issue in this dispute is not whether remotely supplied services are *always* like non-remote services. Likeness is a case-by-case analysis. In the case of gambling, Antigua has failed to support its assertions of likeness with economic evidence or with any other credible evidence.

Comment on Antigua and Barbuda’s Response to Question 33 (“Could Antigua provide a list of the gambling and betting services they seek to supply cross-border to the United States and that they claim are subject to a prohibition.”)

16. The United States is surprised by the list of services in Antigua’s response to question 33. This new taxonomy of services is difficult to reconcile with Antigua’s previous statement identifying Internet “virtual casinos” and Internet and telephone sports betting (“sportsbook”) operators as the types of services and suppliers it licenses.¹⁸ If the items in Antigua’s response to question 33 are now to be considered as the services sought to be provided by Antigua, then the United States submits that in addition to its many other failures to make a *prima facie* case, Antigua has failed to relate its argumentation and evidence to this particular list of services, or show how any specific U.S. measure(s) affect the supply of the newly listed services.

17. The United States also finds it ironic that after consistently seeking to diminish or dismiss the serious regulatory concerns reflected in U.S. law, Antigua now asserts its own right to

¹⁶ See http://www.bossmedia.se/about/risk_analysis.asp, Exhibit U.S.-45.

¹⁷ See Internet Gaming: An Industry Survey, Internet Gaming & Wagering Business, p. 7, available at <http://www.microgaming.com/themes/microgaming/brochure/survey.pdf> (August 2002) (“[C]ontrary to earlier fears from within the terrestrial gaming industry, online gambling is not expected to detract from the total amount wagered offline. In fact, pundits now believe that online gambling will help develop the land-based casino market by educating future gamblers virtually.”)

¹⁸ See First Submission of Antigua & Barbuda, paras. 39-40. See also Second Submission of the United States, para. 31 (discussing these services).

prohibit services that it considers “offensive.” Antigua asserts such a right while at the same time attempting to deny the United States the authority to restrict services that the United States views (on firm evidence) as posing serious law enforcement, consumer protection, and health risks – not to mention threats to public order and morals.

Comment on Antigua and Barbuda’s Response to Question 36 (“With respect to the reference to the ‘very few exceptions limited to licensed sportsbook operations in Nevada’ in the second paragraph of Exhibit AB-73, could the United States identify these exceptions, even on an illustrative basis?”)

18. Antigua’s comments on question 36 incorrectly describe the Professional and Amateur Sports Protection Act, codified at 28 U.S.C. §§ 3701-3704. Antigua’s comment on question 36 states that

Under the legislation known as the “PASPA,” the United States federal government expressly exempted four states, Nevada, Oregon, Delaware, and Montana, from its general prohibition on sports betting other than horse racing, greyhound racing and jai alai. ... There is nothing in the PASPA or other federal laws restricting the ability of these states to engage in the full range of sports betting services on a commercial or state-owned basis. (emphasis added)

Both of the quoted sentences are incorrect.

19. The purposes of the Professional and Amateur Sports Protection Act (PASPA) were described in the U.S. response to question 36. Essentially, the PASPA halted all sub-federal authorization of sports-related gambling in the United States.

20. The PASPA permitted the continuation of certain previously authorized sports betting activity in some states (although, contrary to Antigua’s description, such states are not “expressly” mentioned in the legislation). However, the statute did not provide that those states had unlimited ability to add new forms of sports wagering.

21. As it happens, Nevada, Oregon, Delaware and Montana¹⁹ had authorized particular forms of sports-related gambling during the time periods specified in the legislation, and these particular forms of gambling were therefore permitted to be authorized in the future under the terms of the statute. Of these states, only Nevada allowed sportsbook services. The others allowed sports-related lottery games.²⁰

¹⁹ During the Congressional debate on the PASPA, “calcutta” wagering in Wyoming and parimutuel bicycle wagering in New Mexico were also mentioned at one point as previously authorized forms of gambling.

²⁰ No state enacted new legislation allowing covered sports betting before expiration of the time periods specified in the legislation, thus the scope of permissible activity remains as it was as of the enactment of the legislation.

22. The PASPA does not permit the future authorization of sports betting in these states in any form beyond that which existed at the time of the enactment of PASPA. Thus, Oregon, Delaware and Montana may not now enact legislation authorizing sportsbook services, and Nevada may not now enact legislation authorizing sports-related lottery games.²¹ As a result, Nevada is the only place in the United States where sportsbook services may be authorized.

23. In the context of the present dispute, it is also important to note that nothing in the PASPA creates an exception for any domestic or foreign operator from the application of 18 U.S.C. § 1084. Thus the PASPA does not permit the authorization in any state of Internet sports gambling in violation of 18 U.S.C. § 1084, or of any other interstate or cross-border transmission of a bet or wager using a wire communications facility. Moreover, Antigua has advanced no theory on which the PASPA could be found to violate any provision of the GATS.

24. On the issue of parimutuel betting on horse races, Antigua’s comment on question 36 that “[f]urther, while the United States appears to distinguish in several ways between horse racing and other forms of sports betting, Antigua believes that there is really no logical basis for the distinction” is baseless. Indeed, while Antigua has made a number of assertions concerning parimutuel betting on horse races, the fact remains that Antigua has offered no specific evidence

²¹ A Senate Committee report discussed how the PASPA would apply to those states that had authorized some form of sports wagering. This report stated that:

Under paragraph (1) of subsection (a), Oregon and Delaware may conduct sports lotteries on any sport, because sports lotteries were conducted by those States prior to August 31, 1990. Paragraph (1) is not intended to prevent Oregon or Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act. At the same time, paragraph (1) does not intend to allow the expansion of sports lotteries into head-to-head betting. ...

Under paragraph (2), casino gambling on sports events may continue in Nevada, to the extent authorized by State law, because sports gambling actually was conducted in Nevada between September 1, 1989, and August 31, 1990, pursuant to State law. Paragraph (2) is not intended to prevent Nevada from expanding its sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act. Furthermore, sports gambling covered by paragraph (2) can be conducted in any part of the State in any facility in that State, whether such facility currently is in existence. At the same time, paragraph (2) does not allow a State sports lottery to be established in any State in which such a lottery was not in operation prior to August 31, 1990.

The narrowness of subsection (a) reflects the committee’s policy judgment that sports gambling should be strictly contained.

Senate Report No. 102-248 (1992), reprinted in 1992 U.S.C.C.A.N. 3553,3561, excerpt at Exhibit U.S.-46. Thus, Nevada, Oregon, Delaware, and Montana do not possess unlimited ability to add new forms of sports wagering.

demonstrating that any Antiguan gambling services and suppliers are “like” U.S. parimutuel horse race betting services and their suppliers.

Comment on Antigua’s response to Question 41 (“With respect to Antigua’s arguments in paragraph 38 of its second oral statement, is Antigua now arguing that all gambling and betting activities that involve the experience of winning and losing money are necessarily ‘like’ and that this would constitute the main criterion in deciding ‘likeness’ under Article XVII?”)

25. Antigua states that “the experience of winning or losing money is the *sine quo non* of gambling and betting services which could equally well be delivered locally or ‘remotely.’”

26. Further to the arguments that the United States has already made rebutting this argument, we note the recent testimony of Professor Griffiths, Antigua’s consultant in this dispute, who stated before a Joint Committee of the British Parliament that

My guess is that for 99 per cent of the people who go to a destination to gamble, like myself when I go to Las Vegas or wherever, it is because I think I am going to have a fun time. I do not go there to win money. If I win, that is a bonus. When I go to my local casino in Nottingham, I go there to have a meal, be with friends, have a talk or whatever and the gambling is incidental. My guess is that for most people who go to destination resorts that would be their aim, just to have a fun time out. Yes, they may win some, they may lose some, but the point is that this is not being done in isolation.²²

²² See Minutes of Evidence, Thursday, 8 January 2004, *supra* n. 11, Q257 (response of Dr. Mark Griffiths).