

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

WT/DS285

**Oral Statement of the United States
December 10, 2003**

1. Mr. Chairman, members of the Panel, at the outset let me express the appreciation of the United States for your willingness to serve in this dispute. The United States looks forward to this opportunity to address the claims raised by Antigua and Barbuda concerning U.S. regulation of remote supply of gambling services, including cross-border supply.
2. There are two sets of issues that we would like to explore today.
3. The first set of issues relates to Antigua's failure to make its *prima facie* case. As the Appellate Body has pointed out, "mere assertions" are not enough for a complaining Member to make out a *prima facie* case. Antigua must provide persuasive evidence and argumentation on each of the elements of each of its claims. It has not done so. Indeed, Antigua's last-minute submission yesterday of over 2,000 pages of U.S. statutory text only serves to demonstrate the vastness of the burden that the complaining party has assigned itself in this dispute.
4. The second set of issues concerns whether, hypothetically, Antigua *could* find a legal basis for its claims under the General Agreement on Trade in Services. In fact, there is no legal foundation on which Antigua can construct claims as to either the existence of relevant commitments or the inconsistency of specific U.S. gambling restrictions with particular provisions of the GATS.
5. Before exploring these two sets of issues, the United States would like to return very briefly to the factual framework for this dispute.
6. Antigua's first submission paints a caricature of a United States where gambling is virtually omnipresent. Through this portrayal, Antigua asked the Panel to believe that restrictions on remote supply of gambling exist only to protect U.S. gambling providers from competitors in Antigua and elsewhere who might use the Internet or other remote gambling technologies to access the lucrative U.S. market.
7. The real picture, however, is very different. As our National Gambling Impact Study Commission observed, "nowhere is gambling regarded as merely another business, free to offer its wares to the public." Instead, gambling in the United States "is the target of special scrutiny by governments in every jurisdiction where it exists."
8. The purpose of that regulatory scrutiny is to protect the public, not to protect domestic industry. Indeed, if its purpose were protectionist, it would have failed miserably, since numerous foreign suppliers of gambling services are already present in the "massive" U.S.

market, as Antigua describes it.

9. Regardless of foreign or domestic origin, all providers of gambling services in the United States operate under severe restrictions. And when it comes to remote supply of gambling, those restrictions are particularly stringent.

10. Remote supply of gambling is a special area of concern for all the reasons detailed in the U.S. first submission. They include threats related to organized crime, money laundering, fraud and other criminal activities; the scope of availability of remotely supplied gambling, including its availability to children; and the particular health risks associated with gambling by remote supply. For these reasons, the United States places stringent restrictions on the ability of any operator to offer gambling services by remote supply, regardless of whether such services are supplied from the territory of another Member or from within the territory of the United States.

11. Against this factual background, I would like to turn to the issue of Antigua's failure of proof.

12. Antigua is the master of its own case. It has chosen to define the scope of measures at issue in this dispute in exceedingly broad terms. It has chosen to ignore the text and meaning of actual U.S. laws in its first submission. It has rejected the U.S. suggestion that it relate its claims to particular measures – even to the point of accusing the United States of engaging in “litigation tactics.” And Antigua alone has decided to withhold until yesterday – which I note is more than two months after the date of its first submission – the text of the very measures at issue in this dispute.

13. While the United States has some concerns about Antigua's strategy in this dispute, it is not our role to second-guess them. We can only point out that Antigua has thus far not provided sufficient evidence and argumentation to establish its *prima facie* case.

14. Up to now, Antigua is apparently still asserting a proposition about the collective effect of U.S. domestic laws relating to the remote supply of gambling, without regard to individual measures and how they work. Antigua, without any basis, labels this effect a “total prohibition on the cross-border supply of gambling and betting services.” It asserts baldly that, whatever the effect of the measures at issue individually, in concert they necessarily give rise to an inconsistency with the GATS. While in one breath Antigua claims the United States has not conceded any ground in this dispute, Antigua rests its case in large part on a supposed U.S. “concession.” No such concession was in fact ever made.

15. With respect to its burden of proof, Antigua has previously taken the position that it *only* needs to assert the alleged overall effect of U.S. domestic law, and that the particular causes of this alleged overall effect – the measures that supposedly result in this effect – are irrelevant. In essence, Antigua wants the Panel to assume the overall effect of U.S. domestic law without first determining how the measures at issue operate and interact, and whether such interaction would

in fact comprise the overall effect alleged by Antigua.

16. Antigua’s assertion that a mere allegation is all it needs to meet its burden of proof is wrong. The Appellate Body has stated in its *German Steel* report that the burden of providing evidence and argumentation begins with providing the text of the measures at issue, and is then followed by the presentation of authorities and arguments as to the meaning of these measures. The Appellate Body has also explained in *India - Patents* that an examination of the meaning of relevant provisions of domestic legislation is not just helpful, it is essential to determining whether a Member has complied with its obligations. To borrow the Appellate Body’s own phrase, a panel or the Appellate Body “must look at *the specific provisions*” of domestic law.

17. The same is true in this dispute. As the United States has repeatedly emphasized, Antigua’s notion of a total prohibition has no legal status under U.S. law. Antigua’s mere assertion that this is the effect of U.S. law, without a demonstration of the alleged causes, cannot underpin a panel finding that this is in fact the effect. Assumptions and assertions are not sufficient. In order for the Panel to be able to discharge its duty to make an objective assessment of the collective effect of domestic law with all its significant nuances, Antigua must first provide sufficient evidence and argumentation to support its view of precisely how each individual measure at issue operates under U.S. domestic law. As noted in the U.S. first submission, such an approach is consistent with that taken by the panel in *U.S.–Export Restraints* and by other panels.

18. After assessing how each individual measure operates under U.S. law, Antigua must then – given its claim of a collective effect – bear the further burden of proving this collective effect. In *Japan – Film*, the panel found that, in order to establish a claim of collective effect, the United States was required to “provide this Panel with a detailed showing of how these alleged ‘measures’ interact with one another in their implementation so as to cause effects different from, and additional to, those effects which are alleged to be caused by each ‘measure’ acting individually.”

19. The same standard applies here. Assuming that Antigua proves the meaning of individual measures, it must show their collective effect through evidence and argumentation regarding how these alleged measures interact with one another in their implementation under U.S. domestic law. To borrow a phrase used by Antigua this morning, Antigua must piece together the “puzzle” of its *prima facie* case.

20. Yesterday, Antigua finally gave this Panel the text of the laws that it alleges may or may not comprise the U.S. regulatory structure for remote supply of gambling services. Along with the text of these laws, Antigua provided incomplete, and in some cases misleading, thumbnail sketches of what some of the laws supposedly contain. There are also texts of non-measures and other documentation that the United States was not expecting in what essentially amounts to an additional submission by Antigua. Nonetheless, a cursory analysis of yesterday’s new documentation (which is frankly all we’ve been able to do so far given the timing of the

submission) only further reinforces our view that Antigua has yet to provide sufficient evidence and argumentation to support its view of the meaning of each measure at issue, how each measure is relevant to remote supply of gambling services, and finally how each measure interacts with other measures so as to establish Antigua's *prima facie* case in this dispute. Indeed, the sheer volume of yesterday's submission only further highlights the vastness of Antigua's unmet burden.

21. Antigua has explicitly sought to shift its burden of proof onto the United States by claiming that the United States is in the best position to meet this burden and that the U.S. legal system is complex. However, not only is Antigua's position contrary to the well-established view of burden of proof in WTO dispute settlement, it is also well-established in the WTO that complexity is not a viable excuse for re-allocating the burden of proof. The presumption remains that the laws of the United States are consistent with the GATS unless and until Antigua as the complainant proves otherwise.

22. Turning now to the substance of Antigua's claims, I want to begin by observing that the Uruguay Round negotiators made the GATS very broad; almost all services are within its scope. At the same time, the GATS negotiators explicitly preserved the right of Members to regulate services, subject to their specific commitments and obligations.

23. Antigua's substantive challenge in this case, should it get that far, is to first prove that the United States has made a commitment that include gambling. Antigua has failed to do so, and I will explain why in a moment. But beyond that, Antigua must then grapple with the fact that even assuming the existence of a commitment, Members remain free to regulate services, even to the extent of declaring particular activities to be illegal, so long as they do so in a manner consistent with their GATS commitments and obligations.

24. Much of the debate in this dispute thus far has centered on Antigua's claim as to the existence of a U.S. commitment for gambling. All parties to this dispute agree that the GATS schedules are an integral part of the treaty; they must be interpreted according to the customary international rules of treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention.

25. Those rules tell us to begin with the ordinary meaning of the terms. In this case the terms of the U.S. schedule indisputably say nothing about gambling as such – neither the word “gambling” nor any synonym for that word appears anywhere in the text of the U.S. schedule. This means that Antigua bears the heavy burden of proving that the United States, *without explicitly saying so*, undertook an implicit commitment covering its longstanding and deeply rooted system of regulations on gambling.

26. The United States submits that if the United States and its Uruguay Round negotiating partners had intended such a commitment on the part of the United States, especially on this very sensitive issue, the U.S. schedule would have said so explicitly. Needless to say, it does not.

27. Antigua nonetheless proposes that gambling is implicit in the ordinary meaning of “other recreational services (except sporting),” or perhaps within “entertainment services.” However, the United States has shown that Antigua has failed to prove that the ordinary meanings of the words “recreational” or “entertainment” encompasses gambling. In fact, dictionary definitions point to a very different conclusion. Of the three key terms at issue here, “recreational,” “entertainment,” and “sporting,” the only one that dictionaries associate with gambling is “sporting.” And the U.S. schedule explicitly excludes sporting.

28. Customary rules of treaty interpretation further instruct the interpreter to look at the ordinary meaning of words “in context.” The context for the U.S. schedule includes other Members’ schedules. Accordingly, the proper context for the U.S. schedule includes the fact that some Members inscribed references to the UN provisional Central Product Classification, which I will refer to as the “CPC,” in their schedules, while the United States and other Members did not. Indeed, if you leaf through all the schedules to the GATS, you will find thousands of numerical CPC references; you will find schedules without any such references; and you will find schedules in which some of the commitments refer to the CPC and others do not. In the schedule of the United States, you will find no reference to the CPC.

29. All of this makes clear that not all parties intended that their schedules refer to the CPC – and for good reason. The CPC was designed as a statistical device. It was not purpose-built to serve as a nomenclature for binding services commitments. It is hardly surprising then that some Members, including the United States, preferred not to inscribe references to it.

30. This is not to say that the non-CPC Members have undertaken no commitments, nor is the United States suggesting that its obligations are defined by its own subjective expectations. To the contrary, non-CPC commitments are interpreted in exactly the same way as any normal term of a treaty is interpreted: They are to be given their ordinary meaning, in context, and in light of the object and purpose of the treaty.

31. It has been suggested that the Panel should have recourse to the CPC in this dispute because the Appellate Body in the *EC–LAN* dispute found that panels in goods disputes should have recourse to the Harmonized System. This argument ignores the fact that Harmonized System numbers were an explicit and integral part of the schedule at issue in *EC–LAN*,¹ while it is undisputed that the U.S. schedule makes no reference to the CPC.

32. Context reveals another significant fact for the interpretation of the U.S. schedule. The United States has shown that even among Members who generally referred to the CPC, restrictions on gambling were thought to belong in sectors other than “entertainment services” and “other recreational services.” A number of assertions have been made in an attempt to

¹ See *European Communities - Customs Classification of Certain Computer Equipment*, Panel Report, WT/DS62/R, adopted 22 June 1998, paras. 2.10, 2.15.

distinguish particular schedules of other Members. To avoid an extended digression, the United States will leave these ancillary issues for its second submission.

33. The important point is that the other schedules cited in the U.S. first submission reveal that Members had difficulty with this issue even in the presence of CPC references. In their absence, Antigua has even less basis to assert that the United States undertook an implicit commitment for gambling. Antigua must be held to its burden of proving where gambling *does* fall in the U.S. Schedule.

34. Customary rules of treaty interpretation further instruct the interpreter to look at the ordinary meaning of words in light of the treaty's object and purpose. Two considerations about the object and purpose of the GATS are especially relevant here.

35. First, the GATS recognizes "the right of members to regulate ... the supply of services within their territories in order to meet national policy objectives." Second, it provides a framework for "progressively higher levels of liberalization," exemplified by the adoption of a "positive list" approach to scheduling. That approach provided that Members' obligations would depend to a large extent upon the making of "specific" commitments. These objects and purposes of the GATS tend to confirm that Panels should respect a Member's decision to exclude CPC references from its "positive list" commitments.

36. It has been suggested that the United States either failed to clarify its "other recreational services (except sporting)" commitment during negotiations, or that it fails to prove the scope of that commitment in this dispute.

37. Both of these assertions can be very easily dealt with. On the first issue, the Appellate Body has already made it clear that the importing party does not bear the burden of clarifying its commitments. On the contrary, in the *EC-LAN* case, the Appellate Body found that the job of clarifying a Member's schedule is a task for *all* interested parties to achieve *through negotiations*. This Panel need only point out to Antigua that, consistent with *EC-LAN*, no panel may impose such a clarification on the parties *post hoc* through dispute settlement rather than through negotiations.

38. On the second issue – at the risk of stating the obvious – Antigua is the party asserting the existence of a U.S. commitment for gambling services, and it alone bears the burden of proving the scope of any commitment that it alleges to be relevant. This is particularly true in this case, where the text reflects a conscious choice by the United States not to adopt CPC references. To throw the burden onto the United States to prove the negative would be nothing more than an unjustifiable attempt to reverse the burden of proof.

39. Antigua bears the burden of proof and has not sustained its burden. Ultimately, the only piece of evidence that it has to support its arguments is the CPC. The United States has explained that the CPC is negotiating history, not context. And in the view of other negotiating

history recording the intent of the parties not to be bound by the CPC, or any other extra-agreement nomenclature, it is clear that the CPC was not intended to control the interpretation of a Member's commitments in the absence of an explicit reference to the CPC in a Member's schedule.

40. Without an explicit reference to the CPC in the U.S. schedule, Mr. Chairman, Antigua has no viable argument for a U.S. commitment. The most it can do is urge that, based on plain meaning, gambling somehow relates to recreation; that it somehow relates to entertainment; and that the Panel should therefore look for a way to fit it into the U.S. sector 10 commitments, notwithstanding the "sporting" exception. As the United States pointed out in its first submission, at best that argument would lead to the conclusion that gambling services fall in a sector 10.E "other" category, which the United States chose not to inscribe in its schedule.

41. At the end of the day, what Antigua really wants is for this Panel to validate Antigua's subjective position that the U.S. schedule should be read as if it referred to the CPC, even though it clearly does not. The Panel should decline this invitation, particularly in a context where the text of the U.S. schedule provides no evidence of a specific intention of the parties to incorporate a commitment in the sensitive area of cross-border gambling services.

42. At this point I want to leave aside the issue of commitments and turn to the substance of Antigua's assertions of a violation of the GATS. The only way to respond to these assertions is to assume, for the sake of argument, the existence of a relevant sectoral commitment with respect to some as-yet unspecified measure affecting the cross-border supply of gambling services. That is an exceedingly generous *arguendo* assumption in this case, given the state of Antigua's arguments.

43. Even if we make that assumption, however, Antigua's nonspecific and often cursory descriptions of alleged inconsistencies with the GATS in its first submission fail to demonstrate any breach of U.S. obligations. As I address these allegations, please bear in mind that in no case would the United States concede the premise that the United States has made a specific commitment applicable to cross-border gambling.

44. I'll begin with Article Sixteen of the GATS, covering market access. Antigua's first submission treats this provision as if it enshrines a general rule barring measures that impede "market access" in whole or in part. That is simply the wrong interpretation. A market access commitment in a particular sector does not imply that Members lose all rights to restrict particular types of activity in that sector. For example, a commitment for cross-border supply of medical services does not imply that Members must then permit doctors to diagnose patients over the telephone or over the Internet.

45. The only question under Article Sixteen is whether the measure is in fact one of the ones listed in Article Sixteen, paragraph two. The list includes, in relevant part, measures identified by their particular "form" – such as "in the form of numerical quotas." Given the sparse

argumentation in Antigua’s first submission, the United States can only point out again that our restrictions on certain remote supply gambling activities are expressed as limitations on the character of the activity supplied, not as quantitative limits or other restrictions within the ambit of Article Sixteen, paragraph two.

46. It has been suggested that an across-the-board prohibition on cross-border services could amount to the same thing as a zero quantitative restriction, because under such a prohibition no foreign supplier can provide gambling services from outside the territory of the United States. The legal premises for this argument are obscure; the text of Article Sixteen, paragraph two, quite clearly refers to the numerical expression of such limitations. Moreover, the basic factual premise for this argument is completely absent. There is no across-the-board prohibition on the cross-border supply of gambling services in U.S. law. U.S. law certainly restricts the remote supply of gambling, but these restrictions are not so broad that they prohibit *all* cross-border supply of gambling services. An examination of specific provisions of U.S. law, had Antigua undertaken one, would have borne this out.

47. Turning to the national treatment rule in Article Seventeen of the GATS, Antigua has failed to prove the fundamental premises that its services and service suppliers are “like” U.S. services and service suppliers, and it has not shown how specific U.S. measures accord Antiguan services and service suppliers less favorable treatment.

48. Here it seems that the differences between the views of Antigua and the United States flow from a fundamental difference in our respective understandings of the principle of national treatment. Antigua appears to claim that a cross-border commitment for gambling services would mean that allowing any domestic gambling opens the door to all forms of cross-border gambling, regardless of likeness of services or service suppliers.

49. If we applied this novel view of national treatment to the medical services example I mentioned a moment ago, it would mean that so long as certain domestic doctors are allowed to diagnose certain patients under limited circumstances within a Member’s territory, all cross-border doctors must be allowed to diagnose all patients by telephone or Internet throughout that Member’s territory.

50. The United States takes a very different view. A cross-border commitment for national treatment entitles the provider of another Member to offer services only to the extent that like domestic suppliers can offer the like services. That simply means that where domestic doctors cannot diagnose patients over the telephone or by other means of remote supply, neither can foreign doctors.

51. The burden rests on Antigua to provide evidence and argumentation demonstrating that Antiguan gambling services and service suppliers are “like” particular U.S. services and service suppliers for purposes of GATS Article Seventeen, something Antigua first attempted to do only this morning. In this respect, the United States has already described in detail the significant

differences that distinguish different gambling services and service suppliers, including very significant differences between remote supply of gambling and the limited forms of terrestrial gambling permitted in the United States. Contrary to Antigua’s assertions, these differences are not “superficial”; they are fundamental.

52. The burden also rests on Antigua to provide evidence and argumentation showing that its services and suppliers receive “less favorable treatment.” 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. In this regard, I would like to correct the misstatement by Antigua this morning that Antiguan gambling services “are prohibited because they are supplied from abroad.” This is incorrect. Our laws governing remote supply of gambling apply equally within the United States.

53. Turning to Article Six of the GATS, Antigua’s claim simply does not correspond to the text of this provision. Antigua cites portions of Article Six relating to the *administration* of U.S. measures, but it identifies no flaws in the administration of U.S. gambling laws. Instead, its arguments seek to convert Article Six into an implicit obligation of better-than-national-treatment. Under Antigua’s view, Article Six effectively means that Members must let cross-border suppliers supply services that are beyond the scope of activities permissible for suppliers with a local presence. The text of Article Six simply does not bear that interpretation.

54. Finally, Antigua’s assertion that some U.S. measure or measures violates Article Eleven, which deals with “restrictions on international transfers and payments,” was completely unsubstantiated in its first submission. Antigua offered no theory as to how or why a particular measure might violate Article Eleven, and it has conceded that the only example it cited in this regard – an agreement between the New York Attorney General and Pay Pal, Inc. – is not being challenged as such. This empty assertion is emblematic of Antigua’s complete failure to offer evidence and argumentation in support of its substantive claims.

55. In summary, Mr. Chairman, Antigua’s additional submission yesterday gives the Panel hundreds of measures and non-measures to look at, but Antigua has yet to prove the meaning of each of these items; what part, if any, each one plays in relation to gambling; or how they interact to produce the particular collective effect incorrectly asserted by Antigua. As to that alleged effect, Antigua has failed to prove that it violates any U.S. commitment or obligation under the GATS. In fact, Antigua cannot meet these burdens; the facts and the law will not sustain them. Thus, the United States respectfully submits that Antigua leaves the Panel with no choice but to reject Antigua’s claims in their entirety.

56. Mr. Chairman, this concludes the statement of the United States. Our delegation would be pleased to respond to any questions that you or the other members of the Panel may have.