

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2005-1)

APPELLANT SUBMISSION
OF THE UNITED STATES OF AMERICA

January 14, 2005

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Table of Reports Cited in This Submission

Short Title	Full Report Title and Citation
<i>Argentina – Footwear</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
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<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
<i>Canada – Aircraft (21.5)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000
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<i>Canada – Wheat</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004.
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<i>EC – Asbestos</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R, adopted 5 April 2001
<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
<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

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<i>United States – Cotton Underwear</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997
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I. INTRODUCTION

1. The United States appeals the report of the Panel in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (Gambling Panel Report)¹ on four major grounds:

- First, the Panel erred by making the case for Antigua and Barbuda (“Antigua”) concerning particular measures as to which Antigua’s evidence and argumentation were insufficient to establish a *prima facie* case.
- Second, the Panel erred by finding that the United States undertook specific commitments covering gambling services in its schedule of specific commitments annexed to the *General Agreement on Trade in Services* (“GATS”).
- Third, the Panel erred in its interpretation of Article XVI of the GATS (Market Access) and its application of Article XVI to the relevant U.S. measures.
- Fourth, the Panel erred in its interpretation of Article XIV of the GATS (General Exceptions) and its application of Article XIV to the relevant U.S. measures.

2. On each of these issues, the Panel’s report reflects a pattern in which the Panel first made proper findings acknowledging crucial legal and factual premises for its analyses, but then labored to reach contrary conclusions in spite of, rather than in accordance with, such findings.

For example:

- The Panel correctly found that it could not make the case for Antigua as to particular measures, but then proceeded to do so.
- The Panel correctly found that interpretation of the U.S. schedule must begin with its ordinary meaning, but then set aside that ordinary meaning in favor of an interpretation based on preparatory work.
- The Panel correctly found that the only market access limitations within the scope of Article XVI are the specific ones listed in Article XVI:2, but then erred in interpreting the scope of those limitations to include any limitation having prohibitive effect on part of a sector or mode of supply.
- The Panel correctly found that the relevant U.S. measures serve important U.S. interests within the scope of certain Article XIV exceptions, but then denied the

¹ WT/DS285/R, circulated November 14, 2004.

United States the benefit of those exceptions on the basis of a requirement, newly invented by this Panel, to consult or negotiate with other WTO Members before adopting those measures.

3. The Appellate Body need not reach all of these issues; each one is independently dispositive. Nevertheless, should the Appellate Body find that the Panel erred with respect to any one of these issues, the United States respectfully requests that the Appellate Body determine that the remaining Panel findings are without legal effect.²

4. As the United States has stressed throughout this dispute, U.S. restrictions on gambling by Internet, telephone, and other remote means of supply apply equally to all services and suppliers, whether foreign or domestic. If an Internet gambling website based in Antigua moved its operations to the United States and engaged in precisely the same activity, that activity would be just as illegal as it is when supplied from Antigua. Its operators, moreover, would be even more likely to face prosecution. Aside from certain erroneous findings in the narrow field of horseracing, which the United States appeals below, nothing in this Panel Report suggests the contrary.

5. In view of the fact that U.S. restrictions on gambling on gambling by remote supply are non-discriminatory, the central question in this dispute is whether anything in the GATS requires the United States, in the sensitive field of gambling services, to treat services and suppliers of Antigua *more favorably* than its own domestic services and suppliers by allowing them to provide gambling by Internet, telephone, and other means of remote supply in ways that domestic suppliers cannot. The answer is that nothing in the GATS requires that result. There is no U.S. commitment covering gambling. The United States imposes no limitation in the form of quotas or any other type of limitation prohibited by Article XVI. And finally, Article XIV confirms that nothing in the GATS prevents the United States from imposing restrictions on

² See, e.g., Appellate Body Report, *United States – Customs Bonding*, paras. 90, 97; Appellate Body Report, *United States – Line Pipe*, para. 199; Appellate Body Report, *Canada – Dairy (21.5) II*, para. 158; Appellate Body Report, *United States – Cotton Yarn*, para. 127; Appellate Body Report, *United States – FSC*, para. 132.

gambling by remote supply for reasons of public morals, public order, and the enforcement of certain of its criminal laws.

II. ARGUMENT

A. The Panel erred by failing to find that Antigua did not make a *prima facie* case of GATS-inconsistency as to any measure, and by making the case for Antigua concerning several particular measures.

6. The Panel in this dispute erred by making the case for Antigua concerning three particular U.S. federal laws³ and eight U.S. state laws⁴ as to which Antigua's own evidence and argumentation were insufficient to establish a *prima facie* case, with the consequence that the United States was denied a fair opportunity to defend these laws. Specifically, the United States seeks review by the Appellate Body of the Panel's legal conclusion that it "should consider" these three federal and eight state laws "in determining whether or not the United States is in violation of its obligations" under the GATS,⁵ including the conclusion that Antigua had met its burden of proof that these laws "result in a prohibition on the cross-border supply of gambling and betting services."⁶

7. In this dispute, Antigua pursued an approach of attempting to cut down a purported forest – the alleged effect of all potentially relevant U.S. gambling laws – without cutting down any of the individual trees. The result is that Antigua did not make – indeed specifically declined to make – a *prima facie* case as to particular measures. The United States therefore asks the

³ 18 U.S.C. § 1084 (commonly known as the Wire Act); 18 U.S.C. § 1952 (commonly known as the Travel Act or as the Interstate Travel in Aid of Racketeering ("ITAR") statute); and 18 U.S.C. § 1955 (commonly known as the Illegal Gambling Business ("IGB") statute).

⁴ Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.; Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws; South Dakota: § 22-25A-8 of the S.D. Codified Laws; Utah: § 76-10-1102(b) of the Utah Code; Colorado: § 18-10-103 of the Colorado Revised Statutes; Minnesota: §§ 609.75, Subdivisions 2-3 and 609.755(1) of Minn. Stat. Ann.; New Jersey: paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of the N.J. Code; and New York: § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L.

⁵ Panel Report, para. 6.209.

⁶ Panel Report, para. 6.249.

Appellate Body to find that the Panel erred in law to the extent that it absolved Antigua from the necessity of establishing a *prima facie* case showing the relevance, meaning, and GATS-inconsistency of any particular U.S. law and required the United States to defend these particular laws without regard to whether or not the complaining party had already established its *prima facie* case.⁷

1. Antigua provided little discussion concerning the specific measures as to which the Panel made adverse findings, and did not assert that they specifically violated Article XVI of the GATS.

8. Antigua made it clear over the course of the Panel proceedings in this dispute that “[t]he subject of this dispute” in its view was “the *total prohibition on the cross-border supply of gambling and betting services*.”⁸ The Panel correctly declined to make findings concerning this “total prohibition” because (among other reasons) it was merely a description of the supposed effect of many unspecified measures, not a measure in and of itself.⁹

9. In spite of finding that Antigua’s arguments under Article XVI relied only on the existence of this alleged “total prohibition,”¹⁰ the Panel nonetheless made adverse findings under Article XVI concerning three specific U.S. federal laws and four specific U.S. state laws.¹¹ As shown in Annex I of this submission, Antigua’s assertions concerning these particular laws were minimal and did not address the necessary elements of its claims. For example:

⁷ The requested finding would be analogous to the Appellate Body’s finding in paragraph 108 of its Report in *EC–Hormones*. See Appellate Body Report, *EC – Hormones*, para. 108 (“To the extent that the Panel purports to absolve the United States and Canada from the necessity of establishing a *prima facie* case showing the absence of the risk assessment required by Article 5.1, and the failure of the European Communities to comply with the requirements of Article 3.3, and to impose upon the European Communities the burden of proving the existence of such risk assessment and the consistency of its measures with Articles 5.4, 5.5 and 5.6 *without regard to whether or not the complaining parties had already established their prima facie case*, we consider and so hold that the Panel once more erred in law.” (original emphasis)).

⁸ First submission of Antigua and Barbuda, para. 136 (original emphasis).

⁹ Panel Report, paras. 6.175-6.185.

¹⁰ Panel Report, para. 6.210 and n. 777.

¹¹ The Panel initially made the case for Antigua with respect to the eight laws listed in footnote 4, but ultimately made adverse findings as to only the first four of those eight measures.

- Antigua never specifically alleged that the three federal laws or the four state laws were inconsistent with Article XVI.
- The four state laws were never specifically mentioned in the main body of any of Antigua's submissions. As shown in Annex I, the Panel had to comb through exhibits and footnotes to exhibits to find even the barest assertions about some of these laws.
- Antigua made scattered assertions in its submissions regarding the three federal laws, including asserting at times that they prohibited cross-border supply. But, as elaborated in Annex I, those references were mere assertions that never culminated in any clear or consistent argument by Antigua that particular provisions of those specific laws allegedly violated Article XVI of the GATS.
- Antigua raised serious doubts about its understanding of both U.S. state and federal laws, such as admitting "some uncertainty about the exact scope" of the Wire Act, the Travel Act and the IGB statute,¹² and unspecified uncertainties with respect to U.S. state laws.¹³ Antigua explained that such doubts were, in its view, inconsequential to the case it was seeking to make against the "overall result" of all possibly relevant U.S. gambling laws – the alleged "total prohibition."¹⁴
- Most notably, none of these laws was identified as the focus of the dispute until after all of the U.S. submissions and oral statements had been made. They were first identified as such by the Panel in its interim report, when the United States no longer had an opportunity to present evidence and arguments concerning them.

¹² Opening statement of Antigua and Barbuda at the first panel meeting, para. 21.

¹³ Opening statement of Antigua and Barbuda at the first panel meeting, para. 19 (stating that "[t]here are differences, however, in the territorial scope of the laws, as state laws typically only apply or have reach within the territory of the state at issue," and admitting that "there appear to exist small differences in substantive scope of some of the laws").

¹⁴ See Opening statement of Antigua and Barbuda at the first Panel meeting, paras. 19, 23.

2. Antigua, as the complaining party, bore the burden of proving any alleged inconsistency of U.S. measures with U.S. GATS obligations.

10. The initial burden on a complaining party in WTO dispute settlement proceedings is now well established. As the Appellate Body explained in *EC – Hormones*: “The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the [relevant agreement] on the part of the responding party, or more precisely, of its . . . measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.”¹⁵ A complaining party must provide “evidence and argument sufficient to establish a presumption” of inconsistency.¹⁶ In the course of doing so, a complaining party is required to identify relevant evidence, starting with the relevant measures, provide legal argumentation, and relate the evidence to that argumentation.¹⁷ The panel’s task is to examine and weigh all evidence on the record and decide whether the complaining party, as the party bearing the original burden of proof, has convinced the panel of the validity of its claims.¹⁸ The Appellate Body has further observed that “under the usual allocation of the burden of proof, a responding Member’s measure will be treated as WTO-consistent, until sufficient evidence is presented to prove the contrary.”¹⁹

¹⁵ Appellate Body Report, *EC – Hormones*, para. 98. *See also*, Appellate Body Report *United States – Shirts and Blouses* at 14 (“a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim”); and Appellate Body Report, *India – Mailbox*, para. 74 (noting that the Panel had “properly requir[ed] the [complaining party] to establish a *prima facie* case” before proceeding to the next step of its evaluation of the claim at issue).

¹⁶ Appellate Body Report, *United States – Shirts and Blouses*, p. 14.

¹⁷ *See* Appellate Body Report, *United States – Shirts and Blouses* at 13-14. Concerning the obligation to relate evidence to argumentation, *see* Appellate Body Report, *Canada – Wheat*, para. 191 (“[I]t 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.”).

¹⁸ Appellate Body Report, *Japan – Varietals*, para. 127.

¹⁹ Appellate Body Report, *Canada – Dairy (21.5) II*, para. 66. *See also* Appellate Body Report, *United States – German Steel*, para. 157.

11. In this dispute, Antigua alone bore the burden of making a *prima facie* case with respect to any alleged inconsistency of U.S. measures with U.S. GATS obligations. This was true whether Antigua wished to challenge U.S. measures individually or the operation of two or more measures in combination. In either case, for Antigua to sustain its burden it had to identify precisely what U.S. measures it was challenging and provide evidence and argumentation sufficient to establish a presumption that those specific measures breached a U.S. obligation under the GATS.

3. The Panel had no authority to make the case for Antigua.

12. It is also well established that a WTO panel errs when it relieves the complaining party of its burden of initially making the *prima facie* case and assumes that burden on its behalf.²⁰ The Appellate Body in the *Japan – Varietals* dispute reversed a panel for making findings on a claim notwithstanding the failure of the complaining party, the United States, to establish a *prima facie* case as to that particular claim. The Appellate Body explained that a complaining party must make its own *prima facie* case of WTO-inconsistency, and that a panel that assumes that role exceeds the limits of its authority under the DSU:

Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that panels have a significant investigative authority. However, *this authority cannot be used by a panel to rule in favour of a complaining party which has not established a prima facie case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the SPS Agreement, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.*²¹

13. It is significant to note that, in contrast to Antigua's minimal discussion of particular U.S. laws in the present dispute, the complaining party in *Japan – Varietals* specifically discussed the

²⁰ The United States specifically argued before the Panel that a complaining party may not "seek to have the responding party or the panel make the *prima facie* case on the complaining party's behalf." Closing statement of the United States at the first Panel meeting, para. 2.

²¹ Appellate Body Report, *Japan – Varietals*, paras. 125-131 (emphasis added).

relevant measure (“determination of sorption levels”) and provided specific argumentation that was consistent with the panel’s findings regarding this measure under Article 5.6 of the SPS Agreement.²² Nonetheless, the Appellate Body found that the panel made the case for the complaining party in that dispute because the complaining party’s argumentation regarding “determination of sorption levels” did not go so far as to include the specific argument that “determination of sorption levels” was an alternative measure for purposes of demonstrating a breach of Article 5.6 of the *SPS Agreement*.²³

14. The recent Appellate Body report in *Canada – Wheat* confirms that the limitation on a Panel’s authority clarified in *Japan – Varietals* extends beyond cases under the SPS Agreement. In connection with a finding adverse to the United States in *Canada – Wheat*, the Appellate Body specifically clarified that a complaining party cannot expect a panel to bear the burden of determining the relevance of particular measures:

In our view, 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.²⁴

These reports reflect the broad principle that the complaining party itself must prove all the elements of *prima facie* case through the evidence and argumentation in its submissions. Under this principle, a WTO panel that assumes any part of that burden errs by making the case for the complaining party. And under this principle, the burden of identifying the relevant measures from the many listed in Antigua’s Panel Request, and explaining why they were relevant to an alleged breach of Article XVI, was a burden for Antigua itself – not the Panel – to sustain.²⁵

²² See Appellate Body Report, *Japan – Varietals*, para. 125; Panel Report, *Japan – Varietals*, paras. 8.91, 8.95, and 8.98.

²³ Appellate Body Report, *Japan – Varietals*, paras. 126-130.

²⁴ Appellate Body Report, *Canada – Wheat*, para. 191.

²⁵ See Appellate Body Report, *Canada – Wheat*, para. 191; Appellate Body Report, *Canada Aircraft 21.5*, para. 50 (noting that the “burden of explaining the relevance of the evidence, in proving the claims made, naturally rests on whoever presents that evidence”).

4. The Panel correctly found that Antigua failed to identify with sufficient precision the measures that were the subject of its *prima facie* case.

15. As the Panel initially recognized, Antigua's chosen approach to its burden was not legally sustainable, in part because Antigua did not identify with sufficient precision the relevant specific measures. Antigua adopted an approach of challenging the supposed effect of all *potentially relevant* U.S. gambling measures in the aggregate, regardless of the operation of any specific measure. Antigua termed this alleged effect the "total prohibition" on cross-border supply of gambling and betting services – a term that Antigua viewed as embracing the collective effect of all possibly relevant U.S. measures listed in its panel request. Antigua clarified that the laws listed in its Panel Request "only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States."²⁶ But Antigua would not say, when directly asked by the Panel, precisely what individual laws might meet those criteria.²⁷ Indeed, Antigua forcefully rejected the very idea that the Panel should undertake an analysis of particular measures:

Antigua finds it difficult to see how—much less why—the Panel would go about assessing "separately" the specific impact of each of the 93 legislative prohibition measures listed in the Annex to Antigua's panel request. Such an approach would be unnecessary, cumbersome, repetitive, time consuming and would not serve to enhance the legitimate rights of the defence (other than by simply frustrating the effectiveness of WTO dispute settlement).²⁸

Antigua held to this position throughout the dispute, condemning the analysis of individual measures as "wasteful and absurd,"²⁹ "wasteful and unnecessary,"³⁰ and "formalistic."³¹

²⁶ First written submission of Antigua and Barbuda, para. 141; Panel Report, para. 6.200.

²⁷ Panel Report, paras. 6.202-6.204 (quoting and discussing Antigua's response to Panel question 10).

²⁸ Antigua and Barbuda's comments on the U.S. request for preliminary rulings, para. 17.

²⁹ Opening statement of Antigua and Barbuda at the first Panel meeting, para. 24.

³⁰ Opening statement of Antigua and Barbuda at the first Panel meeting, para. 25.

³¹ Opening statement of Antigua and Barbuda at the second Panel meeting, para. 13.

16. Confronted with this approach, the Panel correctly observed that “in light of the ... *prima facie* requirements of Antigua’s burden of proof, we believe it is crucial, and not ‘wasteful and unnecessary’, to be precise and consistent in the identification of the measures at issue.”³² In addressing individual U.S. laws, the Panel recalled the U.S. argument that Antigua’s failure to say precisely what laws were or were not relevant, or to offer argumentation on specific provisions, did not meet the basic elements of a *prima facie* case. The Panel appeared to agree with the United States by concluding that Antigua was “effectively asking the Panel to identify for itself which of the listed measures [in Antigua’s panel request] and which provisions of these measures *could* be construed as imposing a prohibition on the cross-border supply of gambling and betting services.”³³ The Panel then reached the conclusion, consistent with the Appellate Body’s analysis in *Japan – Varietals* and *Canada – Wheat*, that it was “not ... permissible” for the Panel to assume the burden of “identifying the laws upon which Antigua might have relied in order to support a case that Antigua has itself not articulated precisely.”³⁴

5. The Panel erred when, rather than concluding that Antigua failed to make its *prima facie* case, the Panel instead made the case for Antigua.

17. After the Panel properly rejected Antigua’s attempt to treat the alleged “total prohibition” as the measure at issue in this dispute,³⁵ properly found that Antigua had failed to identify the

³² Panel Report, para. 6.180.

³³ Panel Report, para. 6.204 (original emphasis). The Panel also correctly states that “[e]ven among the measures that could be described as imposing such a prohibition, Antigua states that *most of them could arguably* be applied independently to impose a prohibition on the cross-border supply of gambling and betting services. However, the Panel is left to determine for itself which measures could be applied independently to impose such a prohibition.” *Id.* (italics in original, underlining added).

³⁴ Panel Report, para. 6.207.

³⁵ The Panel properly rejected Antigua’s attempt to proceed against the “total prohibition” on grounds that (1) it was a mere description of an alleged effect rather than an instrument containing rules or norms; (2) the “total prohibition” was not specifically identified in Antigua’s panel request; (3) the “total prohibition” was imprecisely defined from the perspective of implementation of any possible adverse ruling; and (4) the simple allegation of a “total prohibition” did not meet Antigua’s burden of “identifying measures with some detail and

laws it viewed as supporting its case, and correctly found that the Panel could not do so on Antigua's behalf,³⁶ the necessary conclusion was that Antigua lacked the most basic elements of a *prima facie* case. The Panel, however, erred by failing to draw that inevitable legal conclusion from its findings: The Panel should have concluded, based on its own analysis and the legal standards described above, that by failing to identify the relevance of particular measures to its claims of breach, Antigua failed to provide an essential element of a *prima facie* case that any particular U.S. measure was inconsistent with GATS Article XVI or any other provision of the GATS.

18. Unfortunately, as it did several times in this dispute, the Panel in this instance turned away from its initial correct findings and conclusions.

19. The Panel's own words also reveal that, although aware that its actions were "not ... permissible," the Panel, rather than simply concluding that Antigua failed to make a *prima facie* case, made the case for Antigua:

[I]n our view, Antigua has effectively left the Panel to search through the material that Antigua has submitted to identify which among the 93 measures identified in Antigua's Panel request result in violations of the GATS. We do not consider that it is permissible for us to search through the items listed in Antigua's Panel request for the purpose of identifying the laws upon which Antigua might have relied in order to support a case that Antigua has itself not articulated precisely.

... [Panel quotes *Japan – Varietals*]

Nevertheless, in light of the encouragement by the Appellate Body in *Canada – Autos* to pay close attention to and to undertake a serious analysis of Antigua's claims, we 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.³⁷

explanation so as to allow the United States to defend itself adequately." Panel report, paras. 6.175-6.185.

³⁶ Panel Report, paras. 6.204-6.207.

³⁷ Panel Report, paras. 6.207-6.209 (emphasis added). The United States discusses below why the Panel fundamentally misunderstood this passage in *Canada – Autos* and therefore its claim to find support for its findings in this passage was misplaced.

This quotation reflects that, having correctly found that Antigua left the Panel to “determine for itself which measures could be applied independently to impose [a prohibition on the cross-border supply of gambling and betting services],”³⁸ and having then correctly found it was “impermissible” for the Panel to assume that task, the Panel nonetheless assumed it. This was error.

20. There is no dispute between the parties that the Panel made the case with respect to particular federal and state laws: Antigua has already expressly conceded that “*the Panel apparently determined for itself* whether the evidence in front of it was sufficient to consider the various federal and state laws on a case-by-case basis.”³⁹

21. The Panel in fact went even further, creating entirely new arguments for Antigua. It is important to recall that Antigua itself declined to argue that any *particular* U.S. law was inconsistent with Article XVI or other provisions of the GATS; rather, Antigua was making an argument about the alleged overall effect of all *possibly relevant* U.S. laws and other purported measures.⁴⁰ Antigua also clarified that its references to and discussions of particular laws were presented for a specific purpose – as “evidence of and discussion about the construction of the total prohibition under United States law” – not for the purpose of arguing that a particular subset of U.S. laws individually or in combination were inconsistent with the GATS.⁴¹ When asked by the Panel to address specific measures, Antigua responded by reasserting its “total prohibition” approach.⁴² Antigua thus clarified that it was challenging the “total prohibition”

³⁸ Panel Report, para. 6.204.

³⁹ Comments of Antigua and Barbuda on U.S. request for review of the interim report, para. 11 (emphasis added).

⁴⁰ First submission of Antigua and Barbuda, para. 136.

⁴¹ Second submission of Antigua and Barbuda, para. 19. When Antigua made references to specific measures in its second submission, its express purpose for doing so was “in order to ensure that the Panel has a clear picture of the total prohibition.” *Id.* Antigua also clarified that, in order to avoid loopholes that might complicate a challenge to individual measures, “we have not challenged the Wire Act alone.” Opening Statement of Antigua and Barbuda at the first Panel meeting, para. 22.

⁴² See Antigua’s responses to Panel questions 10 and 32. When the Panel asked Antigua about its references to specific measures and whether it intended to rely on other specific laws,

without regard to the provisions of any particular measures. Antigua further clarified that its decision not to challenge U.S. laws individually was a conscious strategic choice, the objective of which was to ensure that the Panel's findings would encompass all possibly relevant laws, without limitation to those specifically identified by Antigua.⁴³

22. Indeed, as soon as Antigua's first submission revealed its "total prohibition" approach, the United States requested that "the Panel invite Antigua to make a further submission, identifying the specific measures at issue from the Annex to its panel request and presenting arguments with respect to these measures."⁴⁴ Antigua turned down this opportunity.⁴⁵ The United States continued to urge that Antigua must be more precise at later stages of the proceedings, but Antigua continued to reject any such obligation.⁴⁶

Antigua again clarified that "[a]ll this material concerning specific laws further substantiates the existence of a total prohibition." Antigua and Barbuda's Response to Panel question 32. It asserted that "most of these laws could be applied independently of each other to prohibit cross-border supply," but did not identify those laws or pursue this line of argument.

⁴³ Opening statement of Antigua and Barbuda at the first panel meeting, para. 22 ("Antigua and Barbuda needs to ensure that ... the United States cannot take the position that it needs to amend only the Wire Act and can continue to apply its other prohibition laws. This is particularly important because given the huge amount of American legislation on gambling and betting, it cannot be excluded that Antigua and Barbuda has been unable to identify all domestic laws that could possibly be applied against the cross-border supply of gambling services.") Antigua's approach of not arguing specific measures was apparently also designed to leave it unclear whether particular state gambling laws were inconsistent with WTO rules, with the result, according to Antigua, that U.S. federal intervention would be required. *See id.*, para. 24; Opening Statement of Antigua and Barbuda at the second panel meeting, para. 18.

⁴⁴ Request for preliminary rulings by the United States, paras. 22-23. The United States made a similar request in its response to Panel question 32, asking for time to "respond to any new arguments or comment on any new evidence advanced by Antigua concerning measures that it has not addressed in its previous submissions and statements."

⁴⁵ Antigua and Barbuda's comments on the U.S. request for preliminary rulings, para. 27 ("Antigua believes it is not necessary to submit a supplemental submission as suggested by the United States.").

⁴⁶ For example, at the second Panel meeting, Antigua stated that "the United States essentially submits that the Panel can only assess Antigua's claim if we first provide a 'precise statutory analysis' of all federal and state laws and regulations applying to the cross-border supply of gambling and betting services from Antigua.... The United States also believes that it is incumbent upon the Panel to 'examine the independent meaning of each specific measure

23. The Panel, having properly rejected Antigua's attempt to challenge the alleged overall effect of all possibly relevant U.S. measures, erred by setting out to piece together from the debris of Antigua's argument a new and different argument that Antigua did not in fact make – namely, that a *specifically identified subset* of U.S. gambling laws operated individually or in combination to breach U.S. obligations under Article XVI of the GATS. The Panel did this by first observing that Antigua's claims of breach of Articles XVI and other provisions of the GATS were premised on the existence of a "total prohibition" on the cross-border supply of gambling and betting services.⁴⁷ Applying the burden of proof for these claims, the Panel should have examined whether Antigua sustained its burden of identifying the particular laws and provisions of those laws comprising such a prohibition and providing argumentation regarding how those particular laws allegedly constituted or contributed to it. Since Antigua had failed to identify these laws, the Panel instead took Antigua's burden on itself.⁴⁸

24. The Panel approached this burden by assembling a 21-page table listing "the laws that Antigua *apparently* relies upon in claiming that the cross-border supply of gambling and betting services is prohibited" – *i.e.*, Antigua's whole universe of possibly relevant laws.⁴⁹ The table is

(...).' This concerns thousands of pages of legislative and regulatory provisions and (as the United States itself has noted) would make this case simply impossible. No matter how confidently the United States may so assert, there is no support for this kind of formalistic approach, either in the GATS, any of the other WTO Agreements or under WTO jurisprudence." Second opening statement of Antigua and Barbuda, para. 13.

⁴⁷ Panel Report, para. 6.210 and n. 777 (stating in the text that "the factual premise for Antigua's claims of violation of Articles XVI, XVII and VI is the existence of a prohibition on the cross-border supply of gambling and betting services," and clarifying in the footnote that "Antigua relies upon the existence of a 'total prohibition'" with respect to its Articles XVI and XVII claims).

⁴⁸ It should also be noted that the United States does not accept that the Panel's findings on the meaning and operation of the various laws are correct. The task of reaching these findings was undertaken in error, and consequently the Panel lacked the evidence and argumentation needed to reach accurate conclusions on these issues.

⁴⁹ Panel Report, para. 6.209 (emphasis added) and annex E. The table, included as Annex E of the Panel Report, lists constitutional provisions, laws, and rules and regulations cited in Antigua's panel request and/or its submissions, annexes, and exhibits. For each provision or range of provisions, the table indicates whether that item was "contained" in Antigua's panel request, its "exhibit," or in a submission.

essentially an index of instances in which Antigua made any indirect or direct reference to one of the listed items, regardless of the specific context of argumentation in which Antigua made that reference. On the basis of this table, the Panel assessed whether Antigua had made a “prima facie demonstration that [particular laws] are inconsistent with the GATS” by asking whether particular laws were “discussed by Antigua to an extent that would enable *the Panel to identify* according to which particular provisions and how the laws result in a prohibition on the cross-border supply of gambling and betting services.”⁵⁰

25. Significantly, the Panel’s words reveal that the Panel used the wrong standard for assessing Antigua’s *prima facie* case. Rather than asking whether the complaining party had identified the relevant subset of measures and provided argumentation that they resulted in a prohibition – something the Panel had already concluded Antigua did not do⁵¹ – the Panel improperly assessed the completeness of Antigua’s *prima facie* case on the basis of whether the Panel could use any of the raw materials in Antigua’s submissions to identify *for itself* whether and how particular laws resulted in a prohibition.

26. After using this incorrect *prima facie* case standard to eliminate some of the items in the table, the Panel turned to the remaining laws. With respect to three federal laws and eight state laws,⁵² the Panel found references to those laws in Antigua’s submissions and concluded that these laws “have been discussed in Antigua’s submissions and those discussions indicate according to which particular provisions of and how the laws result in a prohibition on the cross-border supply of gambling and betting services.”⁵³

⁵⁰ Panel Report, para. 6.215, 6.217 (emphasis added). The Panel also eliminated from consideration the Interstate Horseracing Act (IHA), on the ground that Antigua appeared to argue that this statute allowed rather than prohibited remote supply of gambling and betting services. Panel Report, para 6.218.

⁵¹ Panel Report, paras. 6.204, 6.207.

⁵² See *supra*, notes 3 and 4.

⁵³ Panel Report, para. 6.249. The Panel repeated this general conclusion using virtually identical words for each law. See paras. 6.223 (three federal laws), 6.226 (Colorado), 6.229 (Louisiana), 6.232 (Massachusetts), 6.235 (Minnesota), 6.239 (New Jersey), 6.242 (New York), 6.245 (South Dakota), and 6.248 (Utah).

27. The limited nature of this conclusion is revealing: The Panel only found that Antigua provided “discussions” somewhere in its submissions or exhibits that “indicated” that certain particular provisions of U.S. laws resulted in a prohibition. The Panel did not find that Antigua had identified the specific relevance of these measures to its claims of breach or provided the legal argumentation required to establish a *prima facie* case.⁵⁴ Indeed, the Panel had already demonstrated in paragraphs 6.200 through 6.207 of its Report that Antigua had failed to precisely identify the relevant laws, and that Antigua had left it to the Panel to “determine for itself” which laws could be applied independently to impose a prohibition.⁵⁵ It was therefore misleading at best for the Panel to suggest that Antigua had “indicated” that provisions of particular laws resulted in a prohibition. In fact, the Panel in paragraphs 6.219 through 6.249 of its Report was doing exactly what it said Antigua had left it to do – it was erroneously perusing Antigua’s submissions to see if it could identify *for itself* particular measures that could result in a prohibition, and creating arguments to that effect that Antigua did not make.

28. The Panel continued this error of making the case for the complaining party in a later section of the report where the Panel discussed the application of GATS Article XVI to the individual U.S. measures listed in paragraph 6.249 of the report.⁵⁶ Nowhere in these 65 paragraphs (6.356-6.421) does the Panel even once cite or quote from a single argument by Antigua asserting that those particular measures were inconsistent with Article XVI.⁵⁷ The reason for this is simply that Antigua never provided those 65 paragraphs of argument for itself. The Article XVI arguments actually made by Antigua relied on the alleged existence of the alleged “total prohibition” produced by all possibly relevant laws, not any particular measure or measures.⁵⁸ Antigua thus made only general assertions, without supporting argumentation, that

⁵⁴ See Appellate Body Report, *United States – Shirts and Blouses* at 13-14. Concerning the obligation to relate evidence to argumentation, see Appellate Body Report, *Canada – Wheat*, para. 191 (“[I]t 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.”).

⁵⁵ Panel Report, para. 6.204, 6.207 (original emphasis).

⁵⁶ Panel Report, paras. 6.356-6.421.

⁵⁷ See Panel Report, paras. 6.356-6.421.

⁵⁸ See Panel Report, para. 6.210 & n. 777.

U.S. laws were inconsistent with Article XVI of the GATS.⁵⁹ Moreover, Antigua failed to raise a presumption that any particular law was inconsistent with Article XVI because Antigua admitted the existence of “uncertainty,” “loopholes,” and territorial and substantive limitations in these laws that limited the extent to which any one of them could be considered to prohibit such cross-border supply of gambling and betting services.⁶⁰ To make a *prima facie* case regarding any individual measure, Antigua had to provide “evidence sufficient to raise a presumption that what is claimed is true.”⁶¹ Antigua failed to do so by expressly leaving these questions unresolved. It stated that addressing them would be “wasteful and absurd”⁶² because, in

⁵⁹ For example, Antigua made the blanket assertion that “[t]he 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.’” Second submission of Antigua and Barbuda, para. 37. Antigua’s support for this assertion consisted of the further assertion that “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.” Antigua did not elaborate on this assertion, nor did it articulate an argument relating the substance of any specific federal or state law to Article XVI.

⁶⁰ Referring to U.S. gambling laws, Antigua admitted that “there is some uncertainty about the exact scope of these laws.” Opening statement of Antigua and Barbuda at the first Panel meeting, para. 22. Antigua pointed, for example, to “loopholes” in the federal Wire Act. *Id.*, paras. 21-22. Antigua conceded the existence of similar unspecified uncertainties in unspecified U.S. state laws:

There are differences, however, in the territorial scope of the laws, as state laws typically only apply or have reach within the territory of the state at issue. Furthermore there appear to exist small differences in substantive scope of some of the laws. The overall result, however, is that all cross-border supply of gambling and betting services from outside the United States is always caught by one (and normally several) of the United States’ prohibition laws.

Id., para. 19. Antigua also admitted that the “territorial or substantive scope” of individual measures was limited. *Id.*, paras. 19, 23.

⁶¹ See Appellate Body Report, *United States – Shirts and Blouses* at 14.

⁶² Opening statement of Antigua and Barbuda at the first panel meeting, para. 24. Antigua specifically cited its desire to avoid loopholes as a reason for not challenging the Wire Act individually. *Id.*, para. 22.

Antigua's view, the admitted gaps in individual laws simply did not matter to Antigua's challenge against the alleged effect of all possibly relevant measures.⁶³

29. The Panel's arguments that particular measures breached Article XVI were thus arguments of its own creation, not arguments made by Antigua. In making and considering these arguments, the Panel, "simply and erroneously relieved the complaining Member of the task of showing the inconsistency of the responding Member's measure" with Article XVI.⁶⁴

30. The same reasoning that led the Appellate Body to find in *Canada-Wheat* that the United States could not "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 [its] legal position"⁶⁵ supports a similar finding in this dispute that Antigua failed to make a *prima facie* case regarding any particular law, and that consequently the burden never shifted to the United States to defend particular U.S. laws.⁶⁶ The Panel had no authority to "determine for itself"⁶⁷ the relevance of the pieces of legislation submitted by Antigua or advance arguments regarding those laws under Article XVI of the GATS that Antigua did not make.

6. The Appellate Body in *Canada – Autos* did not find that a panel in a services dispute could make the case for a complaining party.

31. In making the case for Antigua, the Panel mistakenly relied on the Appellate Body report in *Canada – Autos*. That report provides no legal support for a panel to make the case for a complaining party in a services dispute.

⁶³ See *id.*, para. 23.

⁶⁴ Appellate Body Report, *Canada – Aircraft*, para. 194 (explaining the Appellate Body's findings in *Japan – Varietals*).

⁶⁵ Appellate Body Report, *Canada – Wheat*, para. 191.

⁶⁶ See Appellate Body Report, *Canada – Dairy*, paras. 62-66 (finding that *if the complainant succeeded in establishing a presumption*, the respondent could try to rebut this presumption. Thus, the respondent's measure was treated as WTO-consistent until proven otherwise); Appellate Body Report, *India – BOPs*, para. 109 (noting that the onus of bringing forward evidence and arguments to rebut was not shifted until after a panel determined whether a *prima facie* case had been made).

⁶⁷ Panel Report, para. 6.204.

32. The Panel acknowledged the Appellate Body's finding in *Japan – Varietals* that a panel may not make the case for a complaining party.⁶⁸ However, the Panel then cited the Appellate Body's statement in *Canada – Autos* that "claims made under the GATS deserve close attention and serious analysis" to justify doing otherwise.⁶⁹ Although the Appellate Body's statement in *Canada – Autos* is clearly true, it does not imply that a Panel in a services dispute may make the case for a complaining party. By treating this statement as an excuse for disregarding important legal principles and exceeding the established scope of its powers, the Panel revealed how far beyond established legal principles it was willing to go to bolster its misguided approach. There is no question that a panel in a GATS dispute must be as just as scrupulous in avoiding making the case for a complaining party as a panel in any other dispute.⁷⁰ The Panel in this dispute erred by asserting and acting otherwise.

7. The Appellate Body's reasoning in *Thailand – H-Beams* provides no support for the Panel's actions.

33. In making the case for Antigua, the Panel also mistakenly relied on the reasoning in the Appellate Body report in *Thailand – H-Beams*.⁷¹ That report reveals no legal support for a panel to make the case for a complaining party.

34. In the *H-Beams* dispute, Thailand alleged that "the claims of Poland were not sufficiently clear, and that the Panel, therefore, overstepped the limits of its authority in asking questions of the parties."⁷² The Appellate Body rejected this argument, finding that it was within a panel's authority to ask questions of the parties relating to their legal claims that the Panel deemed necessary to "clarify and distil the legal arguments."⁷³ The Appellate Body distinguished this

⁶⁸ Panel Report, para. 6.208.

⁶⁹ Panel Report, para. 6.209. In any event, Antigua made no claims under Article XVI of the GATS concerning particular laws, so there were no "claims" to examine closely. Rather, the Panel was examining claims not made.

⁷⁰ The United States trusts that panels would view every provision of the covered agreements at issue as deserving "close attention and serious analysis."

⁷¹ Panel Report, n. 775 (citing Appellate Body Report, *Thailand – H-Beams*, para. 136) .

⁷² Appellate Body Report, *Thailand – H-Beams*, para. 135.

⁷³ Appellate Body Report, *Thailand – H-Beams*, para. 136.

action of asking questions from the action of making the case for a complaining party, which was impermissible under the principle reflected in *Japan – Varietals*. The Appellate Body thus quoted approvingly the statement by the *H-Beams* panel that “we may not relieve Poland of its task of establishing the inconsistency of Thailand’s AD investigation and resulting measure with the relevant provisions of the AD Agreement.”⁷⁴

35. The record in the present dispute reflects that the Panel did in fact ask questions that appeared to the United States to be designed to elicit any argumentation that Antigua might wish to offer concerning individual U.S. measures.⁷⁵ Antigua’s responses reaffirmed that Antigua was seeking to make a case based on the alleged effect of all possibly relevant laws, rather than any particular measures.⁷⁶ The Appellate Body report in *H-Beams* in no way suggests that this Panel could nonetheless identify and create arguments concerning particular measures. Indeed, *H-Beams* indicates just the opposite: A panel errs if it – like the Panel in the present dispute –

⁷⁴ Appellate Body Report, *Thailand – H-Beams*, n. 92.

⁷⁵ See Panel questions 10 and 32. *H-Beams* is relevant to a panel’s authority to ask such questions. The United States does not appeal the Panel’s action of asking those questions. Indeed, at the earliest stage of this dispute the United States itself suggested to the Panel that it elicit such arguments more directly by “invit[ing] Antigua to make a further submission, identifying the specific measures at issue from the Annex to its panel request and presenting arguments with respect to these measures.” Request for preliminary rulings by the United States, para. 22.

⁷⁶ In responding to Panel question 10 inviting argumentation on specific measures, Antigua reasserted its objective to “challenge the United States total prohibition, as a measure in and of itself” and did not discuss individual measures in response to the Panel’s invitation to identify specific legislative and regulatory provisions that it claimed to amount to a prohibition on the cross-border supply of gambling and betting services as such. Antigua’s response to Panel question 10. Similarly, in responding to Panel question 32, Antigua again asserted that “[a]ll the specific laws contained in Antigua’s Panel request form part of the total prohibition that effectively exists in the United States” and clarified that all of its evidence relating to specific laws “further substantiates the existence of a “total prohibition.” Antigua’s response to Panel question 32. Although Antigua also asserted in response to question 32 that “most of” the laws in its Panel request could be applied independently of each other to prohibit cross-border supply from Antigua, Antigua did not take the opportunity presented by Panel questions 10 and 32 to identify which laws could allegedly be so applied, nor did it provide evidence and argumentation to support the mere assertion that the independent application of any individual law would result in a breach of a GATS obligation.

crosses the line from asking questions that aim to “clarify and distil” a party’s arguments to relieving the complaining party of its burden to make a *prima facie* case.

8. The Panel erred to the extent that it may have relied on purported admissions by the United States as a reason to make the case for Antigua.

36. In making the case for Antigua, the Panel referred 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.”⁷⁷ As the Panel also observed, the United States never conceded that any particular measure in this dispute had this effect (mirroring the fact that Antigua never argued the effect of particular measures).⁷⁸ In rebutting Antigua’s arguments about the alleged effect of all possibly relevant laws, the United States further clarified that U.S. law in general, rather than imposing a “total prohibition,” restricted gambling and betting services in such a way that certain cross-border gambling and betting services were not permitted and certain others were permitted.⁷⁹ This cannot be taken as an admission with respect to any particular measure. To the extent that the Panel relied on these

⁷⁷ Panel Report, paras. 6.164, 6.210.

⁷⁸ Panel Report, para. 6.210. Furthermore, the United States made its view of the alleged “total prohibition” explicit at the Panel’s second meeting:

Antigua continues to insist that the United States has conceded or agreed to propositions with which the United States in fact disagrees. Let me be absolutely clear. The United States neither concedes nor agrees with any of Antigua’s propositions about the alleged “total prohibition.” That label neither embodies nor accurately describes U.S. law.

Closing statement of the United States at the second Panel meeting, para. 2, first bullet (original footnote omitted).

⁷⁹ See Response of the United States to Panel question 35; Second submission of the United States, paras. 26-27. The Panel misinterpreted the U.S. response to question 35 as a statement that “federal *and* state laws prohibit the remote supply of gambling and betting services” (original emphasis). The United States made no such broad statement. The U.S. response to question 35 identified certain activities as “restricted both domestically and cross-border,” emphasizing the non-discriminatory nature of the restrictions. The U.S. response to question 35 did not state whether or to what extent these restrictions were attributable to either federal or state measures, and by no means did the United States describe them as a flat prohibition on the remote supply of gambling and betting services.

clarifications as to the overall effect of U.S. law as a basis for making the case for Antigua with respect to particular measures, it was in error.

9. The Panel's approach of making the case for the complaining party is unreasonable and unfair to the responding party.

37. A responding party in WTO dispute settlement is entitled to know precisely what measures it must defend in a dispute settlement proceeding, and what arguments are being advanced against those measures.⁸⁰ When the Panel in this dispute assumed Antigua's burden of specifically identifying a subset of particular U.S. measures and assembling arguments regarding their meaning, application, and consistency with Article XVI, it prevented the United States from knowing precisely what measures and arguments it would be required to defend. By doing this, and by advancing new arguments against those measures, the Panel deprived the United States of the opportunity to respond.⁸¹ Ironically, the United States explicitly and repeatedly requested the opportunity to respond to any arguments that Antigua might wish to make concerning particular measures.

38. This Panel's approach thus leads to unfair consequences. Specifically, it forces a responding party to guess which particular measures a complaining party is challenging particular measures and respond accordingly, even though the complaining party might state otherwise. That is an unreasonable expectation to place on responding parties, and leads to the result that a responding party may ultimately be required to defend – or, as in this case, be denied

⁸⁰ See Appellate Body Report, *United States – FSC*, para. 166 (finding that “the letter and spirit of the procedural rules” for WTO dispute settlement contemplated the “opportunity to defend”).

⁸¹ For example, if the United States had known by virtue of Antigua's argumentation that it was being called upon to defend § 76-10-1102(b) of the Utah Code and § 22-25A-8 of the South Dakota Codified Laws, the United States could have pointed out that, by their express terms, the former only applies when the act in question occurs “upon or in any real or personal property” owned, rented, or controlled by the actor, and the latter only applies if the actor “establish[es] a location or site in this state.” The United States could have argued on this basis that these measures related to situations where there was supply through a commercial presence, rather than the situations of cross-border supply at issue in this dispute. See Comments of the United States on the interim report, para. 26 (bringing this issue to the attention of the Panel).

the opportunity to defend – measures that the complaining party not identified with sufficient precision or failed to include in its arguments. It is particularly unreasonable in this case, where the scope of possibly relevant laws in Antigua’s Panel request was remarkably broad, ranging from laws on bullfighting,⁸² bribery,⁸³ and cheating,⁸⁴ all the way to a statute making it illegal to dispose of a refrigerator without first removing the door.⁸⁵ Out of this forest of possibly relevant laws, the three federal laws and four state laws as to which the Panel ultimately made adverse findings in this dispute were only identified as the focus of this dispute for the first time in the Panel’s interim report, thus denying the United States any opportunity to present evidence and arguments about them.

10. Separately and in addition to the foregoing errors, the Panel’s approach also violated Article 11 of the DSU.

39. Separate and apart from the foregoing errors, the Panel’s actions in making the case for the complaining party in this dispute went so far that they also gave rise to a violation by the Panel of its duty under Article 11 of the DSU. Although this error arises in part out of the same actions by the Panel, it is a separate and additional error, not a subsidiary claim. This error is based not simply on the Panel’s action of relieving the complaining party of its burden and making a case on its behalf (which was erroneous for the reasons described above), but on the egregious nature of the departure by this Panel from its assigned role of objective arbitrator. The Panel in this dispute did not make a small leap to a conclusion not expressly asserted by the complaining party, as was the case in *Japan – Varietals*. This Panel made many giant leaps, and

⁸² See Iowa Code § 725.11. See also Georgia Code § 16-12-37 (dogfighting).

⁸³ See, e.g., Arkansas Statutes § 5-66-115 (prohibiting bribery of participants in sporting events); California Penal Code §§ 337b through 337e (same); Georgia Code §§ 16-12-33 and 16-12-34 (same); Massachusetts General Laws, Chapter 271, §§ 39 and 39A (same).

⁸⁴ See, e.g., California Penal Code §§ 337u -337z; Delaware Code §§ 1470 and 1471; Maryland Code, Criminal Law, § 12-109; Massachusetts General Laws, Chapter 271, §§ 12 and 32; Ohio Revised Code § 2915.05; Oregon Revised Statutes § 167.167; Virginia Code § 18.2-327; Washington Revised Code §§ 9.46.196-9.46.1962. See also California Penal Code §§ 337f through 337h (drugging of racing animals); Vermont Statutes title 13, § 2153 (same).

⁸⁵ Massachusetts General Laws, Chapter 271, § 46 (imposing a fine for failure to remove doors from discarded refrigerators).

in doing so assumed the role of complaining party in grave breach of its obligation to remain objective.

40. Article 11 of the DSU states that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements[.]” The United States appreciates that Article 11 appeals are not to be made lightly or as mere subsidiary arguments in support of other claims.⁸⁶ An allegation of violation by a Panel of Article 11 is a “very serious allegation” that “goes to the very core of the integrity of the WTO dispute settlement process itself.”⁸⁷ In assessing such allegations, the Appellate Body has looked to whether the Panel’s actions represented “an abuse of discretion amounting to a failure to render ‘an objective assessment of the matter before it.’”⁸⁸

41. Unfortunately, the Panel in this dispute exceeded the bounds of objectivity that constrain WTO panels. As shown above, the Panel explicitly recognized that it could not make the case for a complaining party. Conscious of that limit on its authority, the Panel willfully disregarded this limit on its authority and discretion. The Panel’s cited legal basis for doing so consisted of a transparent distortion of the Appellate Body’s statement in *Canada – Autos* and an inapposite citation to *Thailand – H-Beams*.

42. The Panel then went well beyond assessing the case presented to it by Antigua. Where Antigua failed to present argumentation concerning specific measures, this Panel took on that task to such a degree that even Antigua was forced to admit that the Panel was acting “for itself” rather than on the basis of Antigua’s argumentation. Moreover, the Panel did not just fill in small gaps or make minor inferences. It created an entirely new approach to the case on behalf of the complaining party, and created page after page of argumentation until it had made that case to its own satisfaction. And all of this was done for the first time in the interim report, after the parties had already provided their submissions and statements. In short, the parties to the dispute were mere spectators to the Panel’s regrettable performance.

⁸⁶ See Appellate Body Report, *United States – Steel 201*, paras. 494-499.

⁸⁷ See Appellate Body Report, *EC – Poultry*, para. 133.

⁸⁸ See Appellate Body Report, *EC – Poultry*, para. 133.

43. The United States respectfully requests the Appellate Body to find that this Panel violated its duty under Article 11 of the DSU to “make an objective assessment of the matter before it” by so egregiously exceeding its authority and discretion that it assumed the role of complaining party, and denied the responding party a fair opportunity to defend itself, in this dispute.

44. In summary, the Panel erred in concluding that it “should consider” three federal and eight state laws “in determining whether or not the United States is in violation of its obligations” under the GATS, including the conclusion that Antigua had met its burden of proof that these laws “result in a prohibition on the cross-border supply of gambling and betting services.” Antigua did not make a *prima facie* case as to particular measures. Instead, the Panel, despite acknowledging that this action was “not ... permissible,” made the case for the complaining party. Its actions in doing so were so egregious that they also gave rise to a violation by the Panel of its duty under Article 11 of the DSU.

B. The Panel erred by finding that the United States undertook specific commitments on gambling and betting in its GATS schedule.

45. At the time of the Uruguay Round negotiations, U.S. measures regarding restriction of gambling, including non-discriminatory restrictions on “remote” forms of gambling regardless of origin, were well established.⁸⁹ Antigua provided no evidence that the preparatory work for the GATS indicated that Antigua or any other participant in the Uruguay Round ever tried to negotiate for the United States to change its gambling laws.⁹⁰ On the contrary, Antigua asserted

⁸⁹ The United States has restricted gambling since Colonial times. Remote supply of gambling first emerged with the advent of a reliable postal service, and as early as 1827 the United States enacted restrictive legislation in response to questionable lotteries that operated by mail. In 1961, the United States expanded its federal gambling laws to cover the supply of gambling by wire communication facilities and other facilities in interstate or foreign commerce. See First submission of the United States, para. 8.

⁹⁰ When the GATS was negotiated, each country had an opportunity to come to the bargaining table with “requests” to liberalize another trading partner’s rules governing a particular service. Countries also made “offers” (either in response to requests or unilaterally) identifying service sectors where they were willing to make “standstill” commitments or

that the United States offered a commitment for recreational services simply as a way of encouraging Members to broaden the coverage of their GATS schedules.⁹¹ Given the existence and long history of U.S. practice in this area, no one could reasonably have expected that by making this commitment the United States was committing to reverse well-established U.S. restrictions on gambling without negotiation.

46. In fact, the United States expressly excluded “sporting,” the ordinary meaning of which includes gambling, from the U.S. commitment for recreational services. The context of this limitation confirms that it is this ordinary meaning – and not the United Nations provisional Central Product Classification (“CPC”), to which the U.S. schedule does not refer – that controls the interpretation of the U.S. schedule. The Panel erred by misinterpreting the ordinary meaning of “sporting” and improperly treating preparatory work for the GATS as context. Here again, the Panel in this dispute turned away from a correct initial conclusion – that the text is the paramount factor in interpretation GATS schedules – and erroneously went out of its way to read the U.S. schedule as if it were based on the CPC.

1. The Panel misinterpreted the U.S. commitment for sector 10.D of the U.S. schedule, “other recreational services (except sporting)”

47. Several disputes involving the interpretation of schedules to various WTO agreements have made their way through WTO dispute settlement, clarifying certain basic principles concerning interpretation of a schedule. The interpretation of a schedule must proceed according to the same customary rules of interpretation of international law that apply to any other provision of a covered agreement.⁹² Pursuant to those rules, the interpreter must interpret the

liberalize. These requests and offers formed the basis for a painstaking process of negotiation of specific commitments. The United States is unable to locate any record of a negotiation concerning U.S. restrictions on gambling services. Antigua, which bears the burden of proof on this issue, has provided none.

⁹¹ Opening statement of Antigua and Barbuda at the second Panel meeting, para. 25 (speculating that “the United States, as the main advocate of the GATS and in an attempt to convince developing countries to open their services markets, made commitments in all sectors where it did not perceive an immediate competitive threat.”).

⁹² Appellate Body Report, *EC – LAN*, para. 84; Panel Report, *EC – Sugar*, para. 7.148.

text in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the agreement.⁹³ In some cases, the text may refer to a particular source that elaborates the meaning of the commitment, such as the CPC. In such cases it is appropriate for a panel to examine the meaning of the text in light of the referenced source.⁹⁴ In other cases, however, the text includes no such reference. In those cases, a Panel must be guided first by the ordinary meaning of the terms, and may resort to dictionary definitions as a starting point.⁹⁵

48. A panel may look to the preparatory work of a schedule only to confirm an interpretation made in accordance with Article 31 of the *Vienna Convention*, or if such an interpretation leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.⁹⁶ The United States is well familiar with the challenge of clarifying another Member's schedule. In *EC – LAN*, for example, the issue involved clarifying the scope of the EC's tariff commitments on certain equipment. There, the Appellate Body found that a panel may not place the burden of clarifying a commitment in a schedule on the responding party; indeed, the Appellate Body found that "exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed," and clarification of schedules was a task for all parties to the Uruguay Round negotiations to achieve through negotiations.⁹⁷ Similarly, in *Canada – Dairy*, the issue involved clarifying the scope of Canada's tariff concessions on milk imports. There, the Appellate Body found that the language was not clear on its face and so it was appropriate to examine the circumstances surrounding the conclusion of the agreement, including the understanding of the parties that the commitment

⁹³ *Vienna Convention*, Art. 31.

⁹⁴ See Panel Report, *EC – Bananas*, para. 7.289 (interpreting the EC schedule to the GATS).

⁹⁵ See Panel Report, *Korea – Government Procurement*, paras. 7.33, 7.42 (interpreting Korea's schedule to the *Agreement on Government Procurement*).

⁹⁶ See Panel Report, *Korea – Government Procurement*, para. 7.13.

⁹⁷ See Appellate Body Report, *EC – LAN*, paras. 109 and 110.

made meant that the prevailing situation in Canada was intended to continue.⁹⁸ A Panel interpreting a provision of a schedule must bear in mind that schedules are intended to reflect the common intentions of the parties to a negotiation, and that the relevant question is therefore to assess the objective evidence of the *mutual* understanding of the negotiating parties.⁹⁹

a. The Panel misinterpreted the ordinary meaning of the text and context of sector 10.D of the U.S. schedule.

49. The first and most important issue before the Panel was whether the word “sporting” included gambling, in which case gambling is outside the scope of sector 10.D by virtue of the U.S. inscription of “except sporting.” The Panel fundamentally erred in concluding that “the *ordinary* meaning of ‘sporting’ does not include gambling.”¹⁰⁰ A proper interpretation, consistent with the customary rules of treaty interpretation of international law, would have resulted in a finding that the ordinary meaning of “sporting” includes gambling.

50. Further, the Panel erred in its reading of the context and other interpretive factors, leading it to reach the erroneous conclusion that sector 10.D of the U.S. schedule included a commitment covering gambling. A proper reading of the context and other interpretive factors supports the U.S. position that the United States made no commitment covering gambling.

i. The Panel’s interpretation erroneously relied on the meaning of terms in non-authentic languages.

51. In reaching its conclusion regarding the meaning of “sporting,” the Panel, in a section added after the interim report, erroneously relied on the meaning of the words “*sportifs*” and “*deportivos*” respectively in French and Spanish, finding that they “do not cover gambling-related activities.”¹⁰¹ While it is appropriate to examine treaty text in *authentic* languages, the Panel in this instance disregarded the cover page of the U.S. schedule, which

⁹⁸ Appellate Body Report, *Canada – Dairy*, paras. 138-139.

⁹⁹ Panel Report, *Korea – Government Procurement*, para. 7.75 (citing *EC – LAN*).

¹⁰⁰ Panel Report, para. 6.61 (original emphasis).

¹⁰¹ Panel Report, paras. 6.60-6.61.

states, “[t]his is authentic *in English only*.”¹⁰² Since French and Spanish are not authentic languages for the U.S. schedule, the Panel erred by resting its interpretation of “sporting” on French and Spanish definitions. This error contributed to the Panel’s overall error in concluding that the meaning of “sporting” in the U.S. schedule did not include gambling. The Appellate Body should therefore find that the Panel erred in basing its interpretation of “sporting” on an assessment of the ordinary meaning of a term the Panel claimed was a correct translation of “sporting” in non-authentic languages.

ii. The Panel misinterpreted the ordinary meaning of the term “sporting” in the U.S. schedule to the GATS.

52. A further ground for the Panel’s conclusion regarding the ordinary meaning of “sporting” was a series of English-language dictionary definitions. The Panel’s analysis of ordinary meaning based on these definitions was also erroneous.

53. Under customary rules of interpretation of international law, “[t]he meaning of a treaty provision, properly construed, is rooted in the ordinary meaning of the terms used.”¹⁰³ Dictionaries provide a valuable starting point.¹⁰⁴ Although they are not decisive in all cases, it is significant to note in this case how many English dictionaries confirm that the ordinary meaning of “sporting” includes gambling. All of the following are cited in the Panel report:

- The *Shorter Oxford English Dictionary* defines sporting in part as “[d]esignating an inferior sportsman or a person interested in sport from purely mercenary motives. Now *esp.* pertaining to or interested in betting or gambling.”¹⁰⁵

¹⁰² United States of America, Schedule of Specific Commitments, GATS/SC/90, 15 April 1994 (emphasis added). It is commonplace for GATS schedules to be authentic in only one language. For example, the schedules of the European Communities and Japan are authentic in English only, and the schedule of Mexico is authentic in Spanish only.

¹⁰³ Appellate Body Report, *United States – Lumber CVD Final*, para. 58.

¹⁰⁴ See e.g., Appellate Body Report, *Korea – Dairy*, para. 84.

¹⁰⁵ Panel Report, para 6.55 (quoting *The Shorter Oxford English Dictionary*).

- *Collier's Dictionary* defines sporting in part as “of or relating to gambling, esp. on sports.”¹⁰⁶
- *The Merriam-Webster Dictionary* defines sporting in part as “of or relating to dissipation and especially gambling.”¹⁰⁷
- *The American Heritage Dictionary* defines sporting in part as “[o]f or associated with gambling.”¹⁰⁸
- *The Random House Dictionary of the English Language* defines sporting in part as “interested in or connected with sports or pursuits involving betting or gambling *the sporting life of Las Vegas*.”¹⁰⁹
- *Webster's II New Riverside University Dictionary* defines sporting in part as “[o]f or having to do with gambling.”¹¹⁰
- *The Encarta World English Dictionary* defines sporting as “relating to gambling, or taking an interest in gambling.”¹¹¹

54. Taken together, these sources confirm that the ordinary meaning of “sporting” in English includes activity pertaining to gambling.¹¹² The Panel erred by failing to give the word “sporting” in the U.S. Schedule that ordinary English-language meaning, as required by the customary rules of interpretation of international law reflected in the *Vienna Convention*.

¹⁰⁶ *Id.*, para. 6.56 (quoting *Collier's Dictionary*, 1977).

¹⁰⁷ *Id.* (quoting *Merriam-Webster Dictionary Online*). See also *id.*, para 6.58 (quoting *Webster's Third New International Dictionary*, 1986, defining “sporting” in part as “of, relating to, or preoccupied with dissipation and esp. gambling”).

¹⁰⁸ *Id.* (quoting *The American Heritage Dictionary*, online edition).

¹⁰⁹ *Id.*, para. 6.58 (quoting *The Random House Dictionary of the English Language*, 2nd ed., 1987).

¹¹⁰ *Id.* (quoting *Webster's II New Riverside University Dictionary*, 1988).

¹¹¹ *Id.* (quoting *Encarta World English Dictionary*, 2004).

¹¹² Indeed, Antigua appeared to concede in its submissions that the meaning of “sporting” included gambling. See Opening statement of Antigua and Barbuda at the second Panel meeting, para. 26.

55. Instead, the Panel’s reasoning suggests an effort by it to avoid, rather than give effect to, this ordinary meaning of “sporting” by resorting to a series of legally irrelevant considerations and incorrect inferences drawn from its selective reading of the definitions.

(A) The use of “sporting” in connection with gambling is not necessarily pejorative.

56. First, the Panel highlighted “definitions” of “sporting” (but cited only one such definition) used in connection with gambling that “appear to convey a pejorative connotation.”¹¹³ As an assessment of ordinary meaning, the Panel’s statement is baseless. There is no evidence that “sporting” in connection with gambling is exclusively or even predominantly a pejorative usage. Nor is it clear why it should matter if a term is derogatory, so long as the derogatory meaning is part of the ordinary meaning.¹¹⁴

57. Significantly, however, by incorrectly asserting that “sporting” in reference to gambling is pejorative, the Panel implicitly confirmed that “sporting” does in fact refer to gambling.

(B) “Sporting” is an appropriate term to describe service activities involving gambling.

58. The Panel selectively relied on a single dictionary for the assertion that “‘sporting’, when defined to encompass gambling, is used mainly to qualify a person ... interested in betting” and therefore “may not be the most appropriate word for describing services activities.”¹¹⁵ Whether “sporting” is or is not the “most appropriate” word to describe a service is irrelevant. Other dictionaries confirm the use of “sporting” for gambling in a broader sense (*e.g.*, “the sporting life

¹¹³ Panel Report, para. 6.59.

¹¹⁴ The United States notes that a number of terms used in the GATS have potentially derogatory meanings (*e.g.*, “discrimination.”).

¹¹⁵ Panel Report, para. 6.59.

of Las Vegas”¹¹⁶), and none suggests that it is inappropriate to describe a gambler, or “sporting man,” as a consumer of a “sporting service.”¹¹⁷

(C) “Sporting” includes both sports-related and other forms of gambling.

59. The Panel inferred from a selective reading of certain definitions that “[s]everal dictionary definitions suggest ... that gambling activities encompassed under ‘sporting’ are essentially those relating to sporting events.”¹¹⁸ This observation by the Panel contradicts and undermines the Panel’s later conclusion that “the ordinary meaning of ‘sporting’ does not include gambling.”¹¹⁹ The Panel’s observation here confirms that, at a minimum, “sporting” encompasses sports-related gambling.

60. The United States is puzzled that the Panel could so explicitly observe that the ordinary meaning of “sporting” includes sports-related gambling, but then fail to conclude that any gambling activities were excluded by virtue of the ordinary meaning of the words “except sporting” in the U.S. schedule. The Panel’s apparent decision to completely ignore the “gambling” component of sporting just because the Panel was not satisfied that “sporting” meant *all* gambling is illogical and inconsistent with careful, good-faith interpretation.

61. A careful reading of all of the above-quoted definitions of “sporting” makes it apparent that the ordinary meaning of “sporting” in fact encompasses all forms of gambling, not just sports-related gambling. While it is true that one dictionary cited in the Panel report suggests that sporting refers “especially” to sports gambling,¹²⁰ this is a matter of emphasis and does not

¹¹⁶ *Id.*, para. 6.58 (quoting *The Random House Dictionary of the English Language*, 2nd ed., 1987).

¹¹⁷ The Panel also alluded to the definition of a “sporting woman” as a prostitute. Panel Report, para. 6.59. Under the interpretive approach adopted by the Panel, nothing would appear to stop a Member from arguing that prostitution is part of “other recreational services,” so the United States fails to see why the Panel would be surprised to see it excluded.

¹¹⁸ Panel Report, para. 6.59.

¹¹⁹ Panel Report, para. 6.61 (original emphasis omitted).

¹²⁰ *Collier’s Dictionary*, para. 6.56 and n. 614.

exclude other forms of gambling. The many other dictionaries that refer to gambling as part of the meaning of “sporting” neither state nor imply a limitation to sports-related gambling.

iii. The Panel should have concluded that the ordinary meaning of “sporting” unambiguously includes all gambling, thus all gambling is excluded from the U.S. schedule.

62. The Panel should have concluded based on the evidence of ordinary meaning before it that the ordinary meaning of “sporting” unambiguously includes all gambling, and the United States therefore specifically excluded gambling from its schedule by insertion of the words “except sporting.” Instead, the Panel sought to avoid or minimize the ordinary meaning of “sporting.” The United States respectfully requests that the Appellate Body reverse this error by finding that the ordinary meaning of “sporting” includes both sports-related gambling and all other forms of gambling.

b. The Panel misinterpreted the context of the relevant U.S. commitment.

63. The customary rules of interpretation of international law require that an interpreter interpret the text of a GATS commitment in accordance with the ordinary meaning to be given to its terms “in their context.” Article 31.2(a) of the *Vienna Convention*, reflecting the customary rules of interpretation of international law, defines “context” as:

[I]n 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.

64. The concept of “context” in the rules of treaty interpretation is distinct from that of “preparatory work of a treaty.” Context has primary interpretive significance under Article 31 of the *Vienna Convention*, while preparatory work is merely a supplementary means of interpretation under Article 32.

65. An important question for the Panel in this dispute was whether certain documents used in the preparation of Members' GATS schedules, namely "W/120"¹²¹ and the "1993 Scheduling Guidelines,"¹²² were "context" or, as their role in the negotiations suggests, mere "preparatory work." How the Panel answered that question was significant because the W/120 document referred to the CPC, which in turn was the source of Antigua's theory that "recreational services" in a GATS schedule includes gambling and "sporting" does not. If the W/120 document was mere preparatory work, however, it could not ordinarily be used to support a meaning at odds with the ordinary meaning of the "sporting" exclusion – which, as the United States has just explained, includes gambling. Against this background, the Panel erroneously elevated W/120 and the 1993 scheduling guidelines from the status of "preparatory work" to that of "context." This amounted to erroneous initial recourse by the Panel to a meaning referenced in the preparatory work (*i.e.*, the CPC) that was at odds with the ordinary meaning of the text.

i. W/120 and the 1993 Scheduling Guidelines were part of the preparatory work for the GATS.

66. The Panel began by observing that "it is indubitable that the 1993 Scheduling Guidelines and W/120 assisted Members in the preparation of their schedules."¹²³ The United States agrees with this statement. Both documents were used to varying degrees by Members in the preparation of schedules. The Panel could logically have concluded from this that they were "preparatory work."

67. An item of preparatory work could become "context" *only* if Members agreed to memorialize it in a form meeting the requirements of Article 31.2 of the *Vienna Convention* – as part of the treaty, as an agreement relating to the treaty made between all the parties in connection with the conclusion of the treaty, or as an instrument made by one or more parties in

¹²¹ *Services Sectoral Classification List: Note by the Secretariat*, MTN.GNS/W/120 (10 July 1991) ("W/120").

¹²² *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, MTN.GNS/W/164 September 1993 ("1993 Scheduling Guidelines").

¹²³ Panel Report, para. 6.79.

connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

ii. The Panel lacked a legal basis for elevating W/120 and the 1993 Scheduling Guidelines from “preparatory work” to “context.”

68. The Panel lacked foundation for elevating the W/120 document and the 1993 scheduling guidelines from “preparatory work” to context. Contrary to the Panel’s reasoning, these documents are neither “agreement[s] ... made between all [Members],” nor “instrument[s] ... made by one or more [Members]” but accepted by all of them as such.¹²⁴

69. The W/120 document clearly stated that it was a note “by the Secretariat,” not an agreement or instrument *made by all parties*, nor an instrument *made by one or more parties* with acceptance by all, as required by Article 31.2. It was subject to significant qualifications – it reflected the comments of Members “to the extent possible,” and “could, of course, be subject to further modification in the light of developments in the services negotiations and ongoing work elsewhere.”¹²⁵ These qualifications show that the documents were far from reflecting “agreement ... between all” Members. On the contrary, the schedules to the GATS, which form integral parts of its text, show a wide disparity in the extent to which Members used the W/120 classifications and their cross-references to the CPC.¹²⁶

¹²⁴ Similar to the “Modalities Paper” (Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme, MTN.GNG/MA/W/24, 20 December 1993) that has been discussed in previous panel and Appellate Body reports in connection with the *Agreement on Agriculture*, the W/120 document and the 1993 scheduling guidelines were left out of the agreement on purpose. See Panel Report, *EC – Sugar*, para. 7.349 (unadopted). The parties in *EC – Sugar* disagreed about whether the Modalities Paper was context or mere preparatory work. The Panel did not draw conclusions on this issue because it found that even if it treated the paper as context, as one party urged, it did not support that party’s arguments. *Id.*, paras. 7.341-7.346, 7.349-7.352.

¹²⁵ W/120, cover note.

¹²⁶ The fact that Members referred to W/120 in a footnote to the DSU does not make it “context” for the interpretation of a GATS schedule. The reference to W/120 in the DSU relates exclusively to the 11 principal sectors in that document, not to its sub-sectors or CPC cross-references. Thus to the extent that the Panel meant to cast footnote 14 of the DSU as an

70. The 1993 Scheduling Guidelines were similarly qualified. The guidelines stated that they were merely “intended to assist in the preparation of offers, requests and national schedules of initial commitments.”¹²⁷ They further stated that they represented an “attempt to answer ... questions” and “*should not be considered as an authoritative legal interpretation of the GATS.*”¹²⁸ The document containing the guidelines is self-described as a “note ... circulated by the Secretariat in response to requests by participants,” not as an agreement made by *all* participants, or by one with acceptance by all, as required by Article 31.2.¹²⁹ And, as with W/120, the schedules to the GATS show a wide disparity in the extent to which Members followed the scheduling guidelines. (For example, the United States, while generally following the structure suggested in W/120, did not adopt the cross-references to the CPC suggested in W/120.) This confirms that Members did not feel that they had “accepted” or entered into any “agreement” with respect to these documents.

71. The Panel’s finding to the contrary is based on a fiction. The fact is that both documents were notes prepared by the Secretariat, not made “between all parties” or “by one or more parties.” To overcome that fact, the Panel created the fiction that the Uruguay Round participants “can ... be considered to be the ‘intellectual’ authors” of documents prepared or circulated by the Secretariat.¹³⁰ The Panel cited no legal authority in support of this supposition. It is legally flawed in at least two respects. First, the rule of interpretation relating to context does not care about the “intellectual authorship” of a document. Second, the Panel’s supposition is simply incorrect. Authorization for the GATT Secretariat to draft a document does not imply substantive agreement with all the contents of that document, nor does it imply agreement to be bound by the document as an interpretive tool in dispute settlement. The marking of a green band on a Secretariat document signified nothing more than participants’ acquiescence in the

“acceptance” by all members of the substance of W/120, even under the Panel’s erroneous approach it could have been at most an acceptance limited in purpose and scope to issues other than those for which the Panel used it.

¹²⁷ 1993 Scheduling Guidelines, para. 1.

¹²⁸ 1993 Scheduling Guidelines, para. 1 (emphasis added).

¹²⁹ 1993 Scheduling Guidelines, n. 1.

¹³⁰ Panel Report, para. 6.80.

formal sharing of the document with other participants. Parties to the negotiation remained at liberty to disagree with the content of Secretariat documents, and did disagree in this case, as demonstrated by the divergent approaches to scheduling reflected in the GATS schedules that formed part of the GATS.¹³¹

72. Neither W/120 nor the 1993 Scheduling Guidelines fulfill the requirements to be considered context for purposes of international customary rules of treaty interpretation. These were mere *negotiating* documents prepared and circulated for the purpose of sharing ideas and working toward an agreement. That makes them preparatory work.¹³²

c. The context for the U.S. commitment shows that the Panel's interpretation violates the principle of effective interpretation.

73. In contrast to the 1993 Scheduling Guidelines and the W/120 document, the U.S. schedule and the schedules of other WTO Members do form part of the context for the U.S. commitment at issue in this dispute. However, the Panel failed to give any weight to the fact that

¹³¹ The United States notes that the Panel's findings on this issue imply that documents created by the WTO Secretariat could also be treated as agreements by all Members for purposes of dispute settlement. Conferring this inflated status on WTO Secretariat documents would make it extremely difficult to secure consent of Members to circulation of such documents, greatly hampering the day-to-day work of the Secretariat. The effect of the Panel's treatment of the guidelines makes them essentially a binding document, even though they were never adopted as such and the document itself reflects this. This treatment of the guidelines will have a chilling effect on Members' interest in requesting non-binding guidance or even factual summaries from the Secretariat out of concern that panels may improperly rely on such documents as sources of authoritative interpretation – even where the document states clearly that it is not to be so used.

¹³² In contrast to the current round of services negotiations, the guidelines were not even formally adopted by the Members as guidelines. *See* Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS): Adopted by the Council for Trade in Services on 23 March 2001, S/L/92 (28 March 2001). In adopting these 2001 guidelines, the 2001 Committee on Trade in Services emphasized that they were adopted “as a non-binding set of guidelines” that Members “are invited to follow ... on a voluntary basis in the future scheduling of their specific commitments.” Decision on the Guidelines of the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS): Adopted by the Council for Trade in Services on 23 March 2001, S/L/91 (29 March 2001). The Committee decided that the guidelines “shall not modify any rights or obligations of the Members under the GATS.” *Id.*

many other Members' schedules refer to CPC numbers, but the U.S. schedule does not. This fact supports the view that the U.S. schedule must be interpreted according to its ordinary meaning and cannot be presumed to follow CPC meanings.

74. The Appellate Body has specifically noted that the principle of effective interpretation applies in the interpretation of provisions of a schedule, and has criticized a panel for failing to give legal effect to terms of a schedule.¹³³ Under the same principle, the absence of CPC numbers in the U.S. schedule must have some effect, because otherwise their presence in other Members' schedules would be rendered superfluous. The Panel should have given effect to the absence of CPC numbers in the U.S. schedule by starting from the premise – consistent with customary rules of interpretation of international law reflected in the *Vienna Convention* – that terms such as “sporting” in the U.S. schedule were used in accordance with their ordinary meaning, regardless of any special meaning referenced by other Members who inscribed CPC numbers in their schedules.

d. The Panel's interpretation relies on an erroneous presumption.

75. Instead of following the ordinary meaning of the terms in the U.S. schedule, read in the context of other Members' schedules, the Panel 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.”¹³⁴ The Panel erred in two respects by creating this presumption. First, a presumption that the CPC meaning applies to the U.S. schedule in the absence of an express departure violates the principle reflected in *EC – LAN*. In that dispute the Appellate Body indicated that it was error for a panel to presumptively construe a schedule against the responding party in that dispute, the European Communities.¹³⁵ The same principle supports the U.S. position in this dispute. Second, the Panel confused the W/120 *structure* with its cross-references to the CPC. The fact that other Members inscribed CPC

¹³³ Appellate Body Report, *Canada – Dairy*, paras. 133, 135 (interpreting Canada's schedule to the *Agreement on Agriculture*).

¹³⁴ Panel Report, paras. 6.103-6.106.

¹³⁵ See Appellate Body Report, *EC – LAN*, paras. 100 - 110.

references and the United States did not confirm that the United States cannot be “assumed” to have followed CPC meanings even where it followed the W/120 structure. If the Panel’s assumption to the contrary were correct, there would have been no need for other Members to inscribe CPC references.¹³⁶ That they did so further supports the argument that the United States repeatedly made to the Panel that the United States generally followed the W/120 structure, but did not accept, and was in no way bound to accept, its cross-references to the CPC.¹³⁷

e. The Panel should have found that gambling properly resides in sector 10.E, “Other.”

76. The Panel also erred by failing to find that gambling properly resides in sector 10.E, “Other,” where the United States made no commitment.¹³⁸ According to the W/120 structure, sector 10 includes (A) entertainment services (including theater, live bands, and circus services); (B) news agency services, (C) libraries, archives, museums, and other cultural services; (D) other recreational services (except sporting); and (E) other. Antigua initially contended that the characteristics of gambling services could be described as falling within the ordinary meaning of

¹³⁶ In para. 6.121 of its report, the Panel asserts that the reference in cover notes to draft U.S. schedules indicates that “the common intention of the Members, at the time the US specific commitments were negotiated, was that where the US Schedule visibly followed W/120 without any clear and explicit departure, the specific commitments at issue were to be interpreted in the light of W/120 and the CPC numbers associated with it.” This conclusion cannot be reconciled with the final text of the U.S. schedule that was accepted by all Members as an integral part of the GATS. If Members were relying on the cover reference to W/120 in draft U.S. schedules for coverage of certain services not referenced in the text of the U.S. drafts, they would not have agreed to its removal. In fact, the final U.S. schedule, unlike a number of other schedules, does not contain a cover note referring to W/120. Moreover, no evidence has been presented in this dispute that draft U.S. schedules ever referred to the CPC.

¹³⁷ See First submission of the United States, para. 64; Response of the United States to Panel question 3.

¹³⁸ As the United States explained to the Panel, this argument is not in the alternative, nor is it inconsistent with the United States’ exclusion of sporting from sector 10.D. Other Members’ schedules reflect some difference of views among participants in the Uruguay Round negotiations as to whether gambling was properly classified in 10.D or 10.E. To avoid doubt, the United States excluded gambling from the former sector (by inscribing “except sporting”) and did not make a commitment in the latter.

either “entertainment” or “recreational” – either A or B. If true, this one service could be subject to different commitments. To avoid that kind of uncertainty, the W/120 structure provides 10.E as a catch-all “other” category. (This “other” category is not in the CPC.) Services that belong in sector 10, but which do not fit 10.A through 10.D, find their home in 10.E. Other Members’ schedules confirm that scheduling gambling in sector 10.E was one of several accepted approaches used by Members.¹³⁹

77. This context confirms that a similar interpretation of the U.S. schedule is reasonable, *i.e.*, that gambling falls within sector 10.E, where the United States made no commitment for gambling, prostitution, or any of the other miscellaneous services that could potentially be characterized as either “entertainment” or “recreational.” Given the existing U.S. practice of restricting gambling and the absence of negotiations for a U.S. commitment on gambling, this interpretation makes more sense than interpreting gambling in the U.S. schedule as part of “other recreational services.”

2. The Panel could not have reached the same conclusion if it had treated the 1993 Scheduling Guidelines and W/120 as preparatory work.

78. As an alternative ground for its findings, the Panel stated in para. 6.95 of its Report that it would have reached the same conclusion if it had treated the 1993 Scheduling Guidelines and W/120 as preparatory work and used that preparatory work to resolve the alleged ambiguity of the text of the U.S. commitment. This alternative ground is also in error.

79. Under the customary rule of interpretation of international law reflected in Article 32 of the *Vienna Convention*, preparatory work can only be used in cases where interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to an absurd or unreasonable result. Preparatory work cannot be used to override the unambiguous ordinary meaning of the text.¹⁴⁰ As explained above, the ordinary English-language meaning of

¹³⁹ See First submission of the United States, para. 74 and n. 106.

¹⁴⁰ See *Report of the International Law Commission on the work of its eighteenth session, Geneva, 4 May - 19 July 1966* in *Yearbook of the Int'l L. Comm'n*, 1966, vol. II, p. 222-223 (“There are many dicta in the jurisprudence of international tribunals stating that where the

“sporting” unambiguously includes gambling. Also, the U.S. schedule plainly does not contain CPC references where the schedules of others do, and preparatory work cannot override this clear textual difference. The Panel thus erred by stating that it could reach a different conclusion than that under an Article 31 analysis based on preparatory work reflected in the 1993 Scheduling Guidelines and W/120.

80. Moreover, even if one assumes *arguendo* that the U.S. commitment was ambiguous, the overriding consideration in an assessment of preparatory work in this dispute is the absence of evidence that Antigua or any other party sought to negotiate for a U.S. commitment for gambling services. In the past, panels and the Appellate Body have, in examining the preparatory work for a schedule, examined whether there was evidence of negotiations to achieve the particular outcome in question.¹⁴¹ Similarly, in this dispute Antigua, which bears the burden of proof on this issue, has offered no evidence of any relevant exchanges between the parties on a U.S. commitment for gambling and betting services.

3. The Panel erred by attributing interpretive significance to certain USITC explanatory materials.

81. The Panel asserted that the United States International Trade Commission (“USITC”) explanatory materials reproduced in Exhibit AB-65¹⁴² represented either a supplementary means of interpretation under Article 32 of the *Vienna Convention* or “subsequent practice” within the meaning of Article 31.3(b) of the *Vienna Convention*. This too was error.

ordinary meaning of the words is clear and makes sense in the context, there is no occasion to have recourse to other means of interpretation.”)

¹⁴¹ See Appellate Body Report, *Canada – Dairy*, para. 139; Panel Report, *EC – Sugar*, paras. 7.212-7.213.

¹⁴² The document in question is merely an “explanatory” text prepared by an independent agency with no authority to negotiate or interpret agreements on behalf of the United States. The document states that “[t]o facilitate comparison of the U.S. Schedule with foreign schedules, the USITC has developed a concordance....” This does not indicate that USITC was purporting to issue an interpretation. The document is not, and does not purport to be, in any way binding or authoritative as a matter of U.S. law. Nor has it been approved by Congress. Moreover, the United States notes that facilitating “comparison” with other documents in no way implies identity of meaning between the U.S. schedule and such other documents.

82. The Panel erroneously relied on an alleged unilateral “practice” of the United States, as reflected in the USITC document, to “confirm” its interpretation of the U.S. schedule. In reaching this conclusion, the Panel disregarded the observation of the Appellate Body in *Chile – Price Bands*, in which the Appellate Body described “subsequent practice” as a “discernible pattern of acts or pronouncements implying an agreement among WTO Members.”¹⁴³

Explanatory materials prepared unilaterally by only one independent organ of one of the Members do not constitute such a pattern, and therefore have no particular status under the customary rules of interpretation of international law reflected in the *Vienna Convention*.¹⁴⁴

83. The Panel’s conclusion that the USITC explanatory materials were “attributable” to the United States under principles of international law relating to responsibility for wrongful acts, as reflected in Article 4 of the *Draft Articles on the Responsibility for States of Internationally Wrongful Acts*, represented a misguided and erroneous detour by the Panel. First, no one has alleged that the USITC document embodies a “wrongful act.” Second, the United States notes that Article 4 of the Draft Articles on the Responsibility for States of Internationally Wrongful Acts is part of a draft that has not been adopted by states, and is not in any event a “customary rule[] of interpretation of international law” within the meaning of Article 3.2 of the DSU. Third, the principles cited by the Panel are inapplicable in any event because USITC was not purporting to take any action on behalf of the United States or to interpret the U.S. schedule; it was merely appending some general explanatory material to a copy of the U.S. Schedule. On the whole, the Panel’s approach to this issue reflects a misguided and erroneous attempt to

¹⁴³ See *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Appellate Body Report, WT/DS207/AB/R, adopted 23 October 2002, para. 214. The United States repeatedly brought this observation by the Appellate Body to the Panel’s attention. See First submission of the United States, n. 90; Response of the United States to Panel question 2.

¹⁴⁴ Neither Antigua nor the Panel identified any other elements of a “pattern” in this regard. In addition, the United States notes that any interpretive value attributable to such materials under Article 32 would be negligible. The issue here relates to the interpretation of a term of an annex to the GATS, not the meaning of U.S. law or the legal status of the USITC. Neither the United States (through the USITC or otherwise) nor any other Member may unilaterally adopt multilaterally binding interpretations of a term of the GATS, or any other WTO agreement.

exaggerate the importance of a document that has no relevance under the customary rules of *interpretation* of international law by referring to other purported principles of international law that are, in the present context, wholly irrelevant.

4. The Panel misinterpreted the objects and purposes of the GATS insofar as they relate to specific commitments.

84. The Panel also erred in insisting that the analysis of the U.S. schedule in accordance with its ordinary meaning fails to provide the level of clarity demanded by the objects and purposes of the GATS.¹⁴⁵ Article 3.2 of the DSU requires WTO panels to follow the customary rules of interpretation of international law, which require that the *ordinary meaning* of a provision be read in its context and *in light of* the agreement's object and purpose. The object and purpose is not to serve as an independent basis for disregarding or overriding the ordinary meaning.

85. Moreover, the Panel misinterpreted the scope of the reference to "conditions of transparency" in the preamble to the GATS. Consistent with Article III of the GATS, the objective of transparency refers to making information about relevant measures and agreements available. Contrary to the Panel's inference, the preamble to the GATS does not state an objective of making the sometimes-arcane substance of relevant measures or agreements "readily understandable." Indeed, anyone who has tried to explain the mechanics of a GATS schedule to a non-expert could hardly resist smiling at the notion that a GATS schedule must be "readily understandable."

86. The Panel referred to the Appellate Body's statement in *EC – LAN* that the security and predictability of mutually advantageous arrangements for reducing trade barriers is an object and purpose of the WTO Agreement. However, the Panel failed to note that, in that same report, the Appellate Body stressed that clarity in a schedule (in that case a goods schedule) was a task to be achieved through negotiations among all interested parties.¹⁴⁶ If the interested party chose not to

¹⁴⁵ Panel Report, paras. 6.106-6.109.

¹⁴⁶ Appellate Body Report, *EC – LAN*, para. 110. *See also* Appellate Body Report, *Canada – Dairy*, paras. 138-139; Panel Report, *Korea – Government Procurement*, para. 7.81.

clarify a particular outcome through negotiations, it harms rather than aids security and predictability to impose through dispute settlement a result that was not intended.

87. Moreover, the preamble to the GATS confirms that the achievement of liberalization “through multilateral negotiations” and “on a mutually advantageous basis ... while giving due respect to national policy objectives” is an object and purpose of the GATS. This object and purpose underscores that GATS commitments must be interpreted in accordance with their ordinary meaning in a manner that is faithful to the bargain struck at the negotiating table, where Members have the opportunity to balance their desires for liberalization against competing policy objectives to restrict particular services. Interpreting a schedule in the manner adopted by the Panel undermines this objective, because the interpretation does not accurately reflect the mutual expectations of all parties to the Uruguay Round negotiations (and certainly not of the United States), nor does it reflect “due respect to national policy objectives” of the United States, already deeply rooted at the time of the negotiations, to restrict remote supply of gambling services.

5. The Panel erred by resolving alleged ambiguities in the meaning of an entry in a schedule against the importing party; such an approach was found erroneous in previous WTO disputes.

88. The Panel erred by departing from the approach clarified in the Appellate Body report in *EC – LAN* and resolving alleged ambiguities in the meaning of an entry in the U.S. schedule against the importing party. As explained above, the United States considers that its schedule unambiguously excludes gambling, and we appeal the Panel’s finding that the schedule was ambiguous. However, that issue aside, the Panel’s approach of construing any alleged ambiguities against the United States is erroneous, and has been found so in previous disputes involving interpretation of schedules.

89. In *EC – LAN*, the Appellate Body explained that it was error for a Panel to construe ambiguities in a schedule against the importing Member because the responsibility to remove ambiguities fell on both importing and exporting Members:

It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs. On the other hand, exporting

Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed.¹⁴⁷

90. In spite of longstanding U.S. restrictions on gambling, Antigua did not pursue negotiations to ensure that its rights were described in such a manner in the U.S. GATS schedule that Antigua's export interests with respect to gambling would be guaranteed.¹⁴⁸ If there was any lack of clarity in the U.S. schedule as a result, the Appellate Body report in *EC – LAN* confirms that the Panel erred by construing it against the importing Party.

91. The panel report in *Korea – Government Procurement* further confirms that ambiguous commitments should not be construed against the responding party in the absence of some evidence to confirm that the parties intended the specific commitment to cover the subject matter at issue.¹⁴⁹ In that dispute, the United States alleged “that the understanding of the parties at the time of the negotiations” with respect to Korea's schedule to the Agreement on Government Procurement “was that there was a concession with respect to the IIA [Inchon International Airport] project.”¹⁵⁰ With respect to the interpretation of schedules in general, the panel observed, “if it is necessary to go beyond the text in a violation case, the relevant question is to assess the objective evidence of the mutual understanding of the negotiating parties.”¹⁵¹ The Panel examined the history of Korea's offers and exchanges between the parties during the negotiations and found that Korea's statements in those exchanges left coverage of the IIA project ambiguous.¹⁵² Significantly, the panel placed the burden of this ambiguity on the United States, stating that “the United States ... had over two and a half years before reaching a final agreement during which time this ambiguity could have been cleared up” and should not have

¹⁴⁷ Appellate Body Report, *EC – LAN*, para. 109.

¹⁴⁸ In discussing the negotiations at paras. 24 and 25 of its opening statement at the second panel meeting, Antigua gave no indication that it had pursued negotiations to secure coverage of gambling services in the U.S. schedule.

¹⁴⁹ See also Appellate Body Report, *Canada – Dairy*, paras. 138-139.

¹⁵⁰ Panel Report, *Korea – Government Procurement*, para. 7.74.

¹⁵¹ Panel Report, *Korea – Government Procurement*, para. 7.75.

¹⁵² Panel Report, *Korea – Government Procurement*, paras. 7.76-7.81.

relied on conclusions drawn from ambiguous statements.¹⁵³ Similarly, in this dispute Antigua had ample opportunity to clarify any perceived ambiguity in the U.S. schedule, but it has not come forward with any evidence suggesting that it or any other party even raised the issue of coverage of gambling with the United States, much less sought to clarify any ambiguity in the U.S. schedule in this regard. Given those circumstances, the Panel in this dispute, like the panel in *Korea – Government Procurement*, should have concluded that the negotiating history confirms that “there was no mutual understanding” between the parties to the GATS negotiations on the coverage of gambling in the U.S. schedule.¹⁵⁴

92. Overall, the Panel’s approach of construing GATS commitments against the importing party would, if upheld, encourage Members to seek market access for services by expanding commitments through dispute settlement, rather than bargaining for express commitments. It would also discourage Members from making commitments at all for fear that they will be expanded beyond what was agreed.

6. The Panel’s interpretation leads to an absurd and unreasonable result.

93. The United States has explained above that the U.S. schedule, interpreted in accordance with the rule of interpretation reflected in Article 31 of the *Vienna Convention*, does not include a commitment for gambling services. Further confirmation of this interpretation comes from the fact that the Panel’s interpretation is “manifestly absurd or unreasonable” within the meaning of Article 32 of the *Vienna Convention*.

94. The customary rules of interpretation of international law emphasize the text of a treaty as the starting point for interpretation for one fundamental reason – because that text is “presumed to be the authentic expression of the intentions of the parties.”¹⁵⁵ In this case, however, the Panel used the text to reach a result as to which the intent of the parties is highly

¹⁵³ Panel Report, *Korea – Government Procurement*, para. 7.81.

¹⁵⁴ See Panel Report, *Korea – Government Procurement*, para. 7.82.

¹⁵⁵ See *Report of the International Law Commission on the work of its eighteenth session, Geneva, 4 May - 19 July 1966* in *Yearbook of the Int’l L. Comm’n*, 1966, vol. II, p. 220.

questionable, and which conflicts with long-established policies of the Member alleged to have made the commitment. Under that circumstance, the United States submits that it is “absurd or unreasonable” to bind the United States to a result that no one appears to have intended in the form of coverage under “other recreational services (except sporting)” of activities such as gambling and prostitution.

95. In *EC – LAN*, the Appellate Body confirmed that if, after applying Article 31, the meaning of the term leads to a result that is “manifestly absurd or unreasonable,” a treaty interpreter could proceed to examine “...supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion,” pursuant to Article 32 of the *Vienna Convention*. The term “circumstances of [the] conclusion” could allow for, where appropriate, “an examination of the historical background against which the treaty was negotiated.”¹⁵⁶ In this dispute, the United States has shown above that there was no evidence of a negotiation on gambling services with the United States by Antigua or any other party. The United States has also pointed to strong historical evidence that it maintained strict regulation of gambling, including gambling by remote supply, for a very long time prior to the Uruguay Round. These considerations confirm the correctness of the interpretation advanced by the United States, and should in any event demonstrate that the Panel’s interpretation, with its unintended consequences, was in error.

96. In summary, 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)” was erroneous. Instead of giving effect to the unambiguous ordinary meaning of “sporting,” which includes gambling, the Panel relied on preparatory work to read the U.S. schedule as if it were based on the United Nations provisional Central Product Classification (“CPC”). It disregarded the fact that many other Members’

¹⁵⁶ Appellate Body Report, *EC – LAN*, paras. 85-86 (also referencing I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., (Manchester University Press, 1984), p. 141: (“... the reference in Article 32 of the Convention to the circumstances of the conclusion of a treaty may have some value in emphasizing the need for the interpreter to bear constantly in mind the historical background against which the treaty has been negotiated.”)).

schedules refer to CPC numbers, but the U.S. schedule does not, and further erred by relying on an alleged unilateral “practice” of the United States reflected in a USITC document to “confirm” its interpretation of the U.S. schedule. It relied on dictionary definitions in non-authentic languages rather than on the ordinary meaning of the schedule in its only authentic language, English. The result is an approach that, if upheld, would improperly permit Members to expand negotiated commitments through dispute settlement.

C. The Panel erred in its interpretation of Article XVI of the GATS (Market Access) and its application of Article XVI to the relevant U.S. measures.

97. Article XVI of the GATS does precisely what it says it does: it stops Members from imposing, whether at the border or through domestic regulation, certain precisely defined limitations on services and/or service suppliers, such as limitations in the form of quotas, monopolies, economic needs tests, and the various other limitations expressly mentioned in Article XVI:2. Article XVI thus represents a precisely defined constraint on certain problematic limitations specifically identified by the Members.

98. The Panel in this dispute – the first to interpret in depth the scope of the Article XVI obligation in dispute settlement – appeared to believe that allowing limitations to “escape” Article XVI would permit Members to do anything they want, including discriminating against foreign services and suppliers. The Panel thus made the misguided observation that an interpretation consistent with the terms of Article XVI would “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.”¹⁵⁷ In making this observation, the Panel neglected the obvious fact that measures that fall outside the precise terms of Article XVI remain subject to other provisions of the agreement, including, where applicable, its provisions on national treatment (Article XVII) and domestic regulation (Article VI). Notwithstanding this, the Panel apparently considered it necessary to import these functions into Article XVI by expanding the obligations found there beyond those found in the text.

¹⁵⁷ Panel Report, para. 6.332.

99. Although the Panel started its analysis by correctly recognizing that it was required to focus on particular provisions of Article XVI:2, it once again turned away from this initial correct premise in pursuit of a misguided result. The heart of the Panel's error lay in converting two of the prohibitions on specific forms of market access limitations listed Article XVI:2 into general prohibitions on any measure having an effect similar to that of a "zero quota," regardless of form. As the United States pointed out to the Panel, this "zero quota" theory is an invention that finds no support in the text.¹⁵⁸

100. The Panel should have found the relevant U.S. laws to be consistent with Article XVI:2(a) and XVI:2(c) for the reason that they are neither in the form of numerical quotas nor expressed in terms of designated numerical units in the form of quotas. Instead, the Panel erroneously concluded 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."¹⁵⁹ The United States respectfully requests that the Appellate Body reverse this erroneous finding.

101. As a preliminary matter, however, the United States reiterates that the Appellate Body need not reach the substance of the Article XVI analysis because this Panel erred in making the case for the complaining Party.¹⁶⁰ The Appellate Body also need not reach this issue since the United States made no commitment covering gambling services in its schedule to the GATS.

¹⁵⁸ See, e.g., Response of the United States to Panel question 39.

¹⁵⁹ Panel Report, para. 7.2.

¹⁶⁰ A determination as to whether a Member has violated Article XVI requires scrutiny of the challenged measure to see if it meets the Article XVI requirements described in the preceding section. The record amply reflects that Antigua never offered this Panel the necessary level of precise statutory analysis for any measure. Antigua's Article XVI argument rested entirely on a vague "array of measures that constitute a total prohibition" on the cross-border supply of gambling services. See Panel Report at n. 777 ("With respect to its Article XVI claim, Antigua relies on the existence of a 'total prohibition' on the cross-border supply of gambling and betting services...."). Antigua thus failed to make an argument against individual measures under Article XVI. It was error for the Panel to make that argument on Antigua's behalf.

1. The closed list in Article XVI:2 defines the universe of restrictions prohibited by Article XVI.

102. The Panel in this dispute at first correctly recognized that it was required to restrict its Article XVI inquiry in this dispute to an examination of whether Antigua proved that any specific U.S. measures fall within the particular types of measures listed in Article XVI:2.¹⁶¹ Antigua focused its arguments, and the Panel focused its analysis, on Article XVI:2(a) and XVI:2(c). Sub-paragraph (a) bars the maintenance or adoption of “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.” Sub-paragraph (c) bars “limitations on the total number of service operations ... expressed in terms of designated numerical units in the form of quotas or the requirements of an economic needs test.” The panel correctly found that the lists in XVI:2(a) and (c) are “exhaustive lists” rather than “illustrative lists,” and that the word “whether” does not suggest the contrary.¹⁶²

103. These provisions may be summarized as follows:

Subject matter of limitation	Prohibited form/manner of expression
number of service suppliers (sub-paragraph (a))	“ <u>in the form of numerical quotas</u> , monopolies, exclusive service suppliers or the requirements of an economic needs test” (emphasis added)
total number of service operations or total quantity of service output (sub-paragraph (c))	“ <u>expressed in terms of designated numerical units in the form of quotas</u> or the requirement of an economic needs test” (emphasis added)

104. Paragraphs (a) and (c) each involve two explicit criteria. First, the subject matter of the limitation must match the subject matter specified in the column on the left. Second, the “form” of the limitation and/or the manner in which it is “expressed”¹⁶³ must correspond to the detailed

¹⁶¹ Panel Report, para. 6.318.

¹⁶² See Panel Report, paras. 6.322-6.325.

¹⁶³ The ordinary meaning of the verb “express” in this context is “[r]epresent in language; put into words” or “manifest by external signs.” See *id.*, p. 890.

specifications reproduced in the column on the right. (Also, with respect to sub-paragraph (c), the numerical units in question must be “designated.”¹⁶⁴)

2. The Panel misinterpreted Article XVI:2(a)

105. By its terms, the relevant portion of the text of Article XVI:2(a) applies only to a “limitation on the number of service suppliers” that is “in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test.” The Panel interpreted Article XVI:2(a) in a manner inconsistent with this aspect of its text.

106. The United States is particularly concerned that in the first dispute to involve in-depth consideration of Article XVI:2(a), this Panel failed to analyze and give effect to the ordinary meaning of key terms, such as “form” and “numerical quotas,” as required by the customary rules of interpretation of international law reflected in Article 31 of the Vienna Convention.¹⁶⁵

107. As the United States pointed out to the Panel, the ordinary meaning of “form” in the context of Article XVI:2(a) refers to the particular shape or arrangement in which the limitation is manifested, as distinct from its alleged effect.¹⁶⁶ It is undisputed that the relevant “form” in Article XVI:2(a) for purposes of this dispute is that of “numerical quotas.” The ordinary meaning of “numerical quota” in the context of Article XVI:2(a) derives from that of the words “numerical” (which means “of, pertaining to, or characteristic of a number or numbers”) and

¹⁶⁴ The ordinary meaning of the verb “designate” in this context is “[p]oint out, indicate, specify.” *See id.*, p. 645.

¹⁶⁵ The Appellate Body has repeatedly emphasized that the interpretation of a provision of a WTO Agreement must begin with its text. *See, e.g.*, Appellate Body Report, *United States – Lumber CVD Final*, para. 58 (“The meaning of a treaty provision, properly construed, is rooted in the ordinary meaning of the terms used.”).

¹⁶⁶ *See* Second submission of the United States, para. 21, n. 20 (citing *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.”). *Cf.* Appellate Body Report, *United States – Section 211*, paras. 143-148 (finding that an obligation relating to the “form” of a trademark “does not encompass matters related to ownership” of the trademark).

“quota” (which means a “quantity ... which under official regulations must be ... imported”).¹⁶⁷ The term “numerical quota” thus refers to the expression, by means of a number, of a limitation on the number of service suppliers.

108. By ignoring the “form” requirement in Article XVI:2(a), the Panel violated the fundamental rule of treaty interpretation that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to [its] terms.”¹⁶⁸ The Appellate Body has emphasized that Panels are not free to disregard terms of a treaty. On the contrary, “[a]n examination of the ordinary meaning of the terms of a treaty must take into account *all* of those terms.”¹⁶⁹ The Panel erred by disregarding the actual words Article XVI:2(a), namely its “form” requirement.

109. The Panel not only failed to apply the form requirement of Article XVI:2(a); it *directly contradicted the text* of Article XVI:2(a). The text of Article XVI:2(a) states that the measures falling within its scope include only:

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 test¹⁷⁰

The Panel directly contradicted this text by finding that:

¹⁶⁷ Response of the United States to Panel question 39. 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” and, at p. 2454, defines “quota” in relevant part as “**2** The share of a total or the maximum number or quantity belonging, due, given, or permitted to an individual or group. ... **b** The maximum number (of immigrants or imports) allowed to enter a country within a set period; (a) regulation imposing such a restriction on entry to a country.” The term “quota” also has a particular meaning in the context of a trade agreement. According to one treatise, “[q]uotas are numerical limitations on imports or exports.” Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy*, p. 123-124 (Oxford 2003).

¹⁶⁸ *Vienna Convention*, Art. 31.1.

¹⁶⁹ Appellate Body Report, *Korea – Beef*, para. 97 (emphasis in original). Similarly, in *EC – Hormones*, the Appellate Body stated that, “the fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination.” Appellate Body Report, *EC – Hormones*, para. 181.

¹⁷⁰ (emphasis added).

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).¹⁷¹

In making this finding contrary to the text of the GATS, the Panel erred by failing to “read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used.”¹⁷²

110. The Panel appears to have reasoned that it was free to ignore the “form” requirement in this instance because an interpretation of the form requirement in Article XVI:2(a) that is faithful to the text “would be inconsistent with the commitment made by the United States when inscribing the word ‘None’ in the market access column of its schedule of commitments for sub-sector 10.D.” The Panel stated that this would lead to the allegedly “absurd” result that a law stating that “all foreign services are prohibited” would escape the application of Article XVI.¹⁷³ Of course, if there was a full national treatment commitment, a law stating that “all foreign services are prohibited” would violate Article XVII of the GATS to the extent that like services are permitted domestically, so it is not at all clear why the Panel thought such a measure could escape the GATS.

111. A market access commitment under the GATS is simply a commitment to refrain from imposing certain types of limitations that are clearly and precisely set out in the text of Article XVI:2, such as limitations in the form of quotas, monopolies, economic needs tests, and the various other limitations expressly mentioned. A limitation that does not match these criteria may have the *effect* of limiting to zero the number of service suppliers, operation, or output. Contrary to the Panel’s reasoning however, that effect does not satisfy the “form” requirements of Article XVI:2.¹⁷⁴

¹⁷¹ Panel Report, para. 6.332 (emphasis added). This statement would be correct only if the measure were a monopoly or exclusive service supplier, but from the context it is clear that this was not the Panel’s intended meaning.

¹⁷² Appellate Body Report, *EC – Hormones*, para. 181.

¹⁷³ Panel Report, para. 6.332.

¹⁷⁴ The Panel incorrectly reasoned that measures that have the effect of limiting, for any fraction of a service or mode of supply, the number of suppliers of a service or the quantity of service operations or output can be viewed as measures “in the form of numerical quotas” by virtue of that effect. *See* Panel report, paras. 6.330, 6.347, 6.333-6.338, 6.350-6.355. In

112. The Panel was wrong to think that confining the scope of application of Article XVI as provided for in its text would “produce absurd results” or “be inconsistent with the commitment” made by a Member in the market access column of its schedule.¹⁷⁵ A Member that makes a market access commitment has not committed to provide unlimited ability to supply the relevant services in all cases. It has only committed that market access will not be impeded by the precise limitations set out in Article XVI:2. Even if ability to supply the service is constrained by other limitations, a Member’s market access commitment remains meaningful because it binds the Member not to impose these precise types of limitations. At the same time, it preserves the Member’s right to regulate through other forms of limitation. This result, far from being “absurd,” is consistent with the balance between liberalization and continued regulation reflected in the GATS. The Panel’s approach, by contrast, greatly constrains the right of Members to regulate services – one of the objects and purposes of the GATS.¹⁷⁶

3. The Panel misinterpreted Article XVI:2(c)

113. As with Article XVI:2(a), the text of Article XVI:2(c) does not support the Panel’s interpretation. Specifically, the Panel erroneously used an incorrect reading of the French and Spanish texts as the basis for an interpretation that is inconsistent with the English text, which is susceptible to only one reading.¹⁷⁷ This was significant because, in the Panel’s mistaken view, the French and Spanish texts support the conclusion that Article XVI:2(c) applies to any limitation on the total number of service operations, regardless of whether that limitation is “expressed in terms of designated numerical units.” As shown below, the Panel’s reading of the

reaching this conclusion, the Panel erred by confusing the effect of a measure with its form. Under the express terms of Article XVI:2(a) it is the “form” of the limitation, not its effect, that matters.

¹⁷⁵ Panel Report, paras. 6.330, 6.332.

¹⁷⁶ GATS, preamble. It should also be recalled that a limitation that is beyond the scope of Article XVI can nonetheless be the subject of negotiation. Examples of this include the Reference Paper on Basic Telecommunications and the U.S. schedule on financial services.

¹⁷⁷ The Panel created this argument on its own. Antigua never advanced any argument about the meaning of the French and Spanish texts.

French and Spanish texts is baseless. Moreover, the Panel ignored its obligation to adopt “the meaning which best reconciles the texts.”

114. The three authentic texts of Article XVI:2(c) read as follows:

English	French	Spanish
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	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	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

115. The commas in the French and Spanish versions where none exist in the English version appear to have confused the Panel. The absence of a comma or disjunctive pronoun in English between the words “expressed in terms of designated numerical units” and the words “in the form of quotas” in Article XVI:2(c) requires reading these words together as a unitary requirement (*i.e.*, “expressed in terms of designated numerical units in the form of quotas”); there is no English textual basis to read them disjunctively. In French and Spanish, however, the presence of comma between the reference to numerical units and the reference to quotas created, in the Panel’s view, a list of three separate limitations.

116. A customary rule of interpretation of international law, reflected in Article 33.4 of the *Vienna Convention*, provides guidance for reconciling any potential inconsistency between equally authoritative texts in different languages. Article 33.4 states that:

[W]hen a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

117. The interpreter’s first step under this rule is determine whether application of the basic rules of treaty interpretation removes any possible difference of meaning. In this case such application does indeed remove any possible difference of meaning.

118. The Panel’s central conclusion with regard to the French text of Article XVI:2(c) incorrectly asserts that:

According to the French versions, there are three possible types of limitations that fall within the scope of subparagraph (c), namely: (i) limitations exprimées en unités numériques déterminées; (ii) limitations exprimées sous forme de contingents; and (iii) limitations exprimées sous forme de l'exigence d'un examen des besoins économiques. These three possibilities also exist under the Spanish version. (underlining added)¹⁷⁸

The underlined words in this quotation reveal the Panel's misreading of the ordinary meaning of the French text. The only way to break the French text of Article XVI:2(c) into three separate requirements is to read the word "*exprimées*" (expressed) as independently modifying *each* of the three clauses that come after it. The Panel tried to create this impression by reading the words "*sous forme*" into the text in a place where they do not appear – something a Panel is not permitted to do under the rules of treaty interpretation.¹⁷⁹

119. The grammatically correct ordinary meaning of the French text of Article XVI:2(c) is that the phrase enclosed in commas, "*exprimées en unités numériques déterminées*"¹⁸⁰ is a relative clause set off by commas.¹⁸¹ Its function is to further complete the sense of its antecedent, "*limitations*" by adding descriptive information about the limitations. As such it is not an item in a disjunctive list. It is, along with the phrases before and after it, part of a cumulative description of the limitations. This means that where the Panel saw three types of limitations within the scope of subparagraph (c) in French, there are really just two: (i)

¹⁷⁸ Panel Report, para. 6.343.

¹⁷⁹ Appellate Body Report, *India – Mailbox*, para. 45 (quoted in Appellate Body Report, *United States – Line Pipe*, para. 98). Once the improperly inserted words "*sous forme*" (in the form) are removed, the grammatical problem with the Panel's interpretation becomes clear: It requires one to read in the French text of Article XVI:2(c) a nonsensical prohibition on "*limitations exprimées de l'exigence d'un examen des besoins économiques*" (limitations expressed of the requirement of an economic needs test).

¹⁸⁰ In English: "expressed in terms of designated numerical units."

¹⁸¹ Setting off a descriptive relative clause with commas is characteristic of this type of relative clause in French usage and shows that the relative clause could be removed from the sentence without making the rest of the sentence ungrammatical. See Anne Judge and F.G. Healey, *A Reference Grammar of Modern French*, p. 344 (1995) (explaining that relative clauses of this type "are usually marked off from the rest of the sentence by commas or intonation").

limitations exprimées en unités numériques déterminées, sous forme de contingents,¹⁸² and (ii) *limitations exprimées en unités numériques déterminées, sous forme de l'exigence d'un examen des besoins économiques*¹⁸³. This interpretation works equally in Spanish, and unlike the Panel's interpretation it is consistent with the the English text. That makes it correct under the rule of interpretation reflected in Article 33.4 of the *Vienna Convention*.

120. Even if, contrary to fact, it were possible to read the French and Spanish as a disjunctive list, that meaning would be plainly inconsistent with the English text and therefore incorrect. Under the customary rule of interpretation of international law reflected in Article 33:4 of the *Vienna Convention*, the Panel was required to adopt a meaning that best reconciles all authentic texts.¹⁸⁴ In this case that meaning, as described above, requires that only “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” fall within the scope of Article XVI:2(c).¹⁸⁵

4. None of the U.S. state and federal laws as to which the Panel made adverse findings violate Article XVI:2 because none are “in the form of numerical quotas” or “expressed as designated numerical units in the form of quotas.”

121. None of the U.S. state and federal laws as to which the Panel made adverse findings are limitations 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.”

¹⁸² In English: “limitations expressed in terms of designated numerical units in the form of quotas.”

¹⁸³ In English: “limitations expressed in terms of designated numerical units in the form of the requirement of an economic needs test.”

¹⁸⁴ See Appellate Body Report, *Chile – Price Bands*, para. 271 (criticizing a panel for reaching a conclusion by interpreting the French and Spanish versions of the term “ordinary customs duty” to mean something different from the ordinary meaning of the English version, and observing that under the rule of interpretation contained in Article 33(4) of the *Vienna Convention*, “when a comparison of the authentic text discloses a difference of meaning ..., the meaning which best reconciles the texts ... shall be adopted.”)

¹⁸⁵ The words “form,” “numerical,” and “quotas” in Article XVI:2(c) have essentially the same meaning as in Article XVI:2(a), discussed above.

Nor does the form or manner of expression of these laws match any of the other forms identified in Article XVI:2(a) and XVI:2(c).

122. To the contrary, as the United States repeatedly pointed out to the Panel, these laws represent domestic regulation limiting the *characteristics* of supply of gambling services, not the *quantity* of services or suppliers.¹⁸⁶ In particular, they reflect the choice of the United States to ensure that the characteristics of gambling services are such that they can be readily monitored and regulated, as is the case when the services are non-remotely supplied. This also explains why the particular U.S. laws at issue do not reflect the expression of designated numerical units in the form of quotas and do not take the form of quotas: They are designed to restrict *qualities* of service activities rather than *quantities* of suppliers, operations, or output.

123. The Panel, relying on the erroneous interpretation discussed above, improperly examined whether the effect of U.S. laws was to impose a so-called “zero quota” on service suppliers, or service operations or output. Under a proper interpretation of Article XVI:2(a), the Panel would have examined the “form” of the purported limitations on the number of service suppliers in U.S. law (*i.e.*, the particular shape or arrangement in which they are manifested, as distinct from their alleged effect) to determine whether that form was a “numerical quota” (*i.e.*, the expression, by means of a number, of a limitation on the number of service suppliers). Similarly, under a proper interpretation of Article XVI:2(c), the Panel would have examined the manner in which the purported limitations on the total number of service operations or the total quantity of service output in these laws were “expressed” (*i.e.*, how they were represented in language or put into words) to determine whether they were “expressed as designated numerical units in the form of quotas.”

¹⁸⁶ See, e.g., Second submission of the United States (“In fact, the subject matter of the U.S. restrictions on gambling mentioned by Antigua is the *character of the activity involved*, without regard to the ‘number of service suppliers’ or the ‘total number of service operations of total quantity of service output.’”); Response of the United States to Panel question 39 (“U.S. restrictions on remote supply of gambling are restrictions on the attributes of a service, not limitations on market access.”). See also Panel Report, para. 6.328 (summarily dismissing this argument).

124. The relevant U.S. laws are, as the United States has asserted throughout this dispute, entirely in the “form” of and “expressed” as non-numerical, non-quota criteria that restrict certain activities, rather than numbers of providers, operations, or output.¹⁸⁷ The Panel’s findings demonstrate nothing to the contrary. Specifically:

Federal laws: The Panel’s findings confirm that the Wire Act, the Travel Act, and the IGB statute all restrict the character of activity that may lawfully be engaged in by gambling businesses. Taken together, they require that certain activities by these businesses not be conducted over a wire communication facility, and require gambling businesses to comply with state laws:

- The Panel found that the Wire Act restricts the activities in which gambling business may engage by making it a crime for them to transmit bets or wagers using a “wire communications facility.”¹⁸⁸
- The Panel found that the Travel Act restricts the use of “any facility in interstate or foreign commerce” for forms of “unlawful activity” defined by certain characteristics, such as business enterprises involving gambling in violation of U.S. state or federal law.¹⁸⁹
- The Panel found that the IGB statute makes it a federal crime to violate state law in the operation of gambling businesses meeting certain size requirements.¹⁹⁰

State laws:

¹⁸⁷ See, e.g., First submission of the United States, para. 86, Second submission of the United States, paras. 22, 24.

¹⁸⁸ Panel Report, paras. 6.360-6.362.

¹⁸⁹ Panel Report, paras. 6.366-6.367.

¹⁹⁰ Panel Report, paras. 6.375-6.375.

- The Panel found that § 14:90.3 of the Louisiana Revised Statutes Annotated restricts services involving the use of the Internet for various gambling activities.¹⁹¹
- The Panel found that § 17A of chapter 271 of the Massachusetts Annotated Laws restricts certain services that involve acceptance of bets by telephone.¹⁹²
- The Panel found that § 22-25A-8 of the South Dakota Codified Laws restricts services involving the use of the Internet to conduct a gambling business.¹⁹³
- The Panel found that § 76-10-1102 of the Utah Code Annotated restricts the conduct of gambling activities upon or in certain real or personal property.¹⁹⁴

125. Aside from its erroneous “zero quota” findings, the Panel did not identify any limitation on service suppliers, operations, or output in any of these laws that stated any numerical units or was in the form of quotas. Thus none of the U.S. federal and state laws as to which the Panel made adverse findings falls within the ambit of Article XVI:2(a) and XVI:2(c) when those provisions are properly interpreted as applying only to limitations 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.”¹⁹⁵ Under a proper interpretation of Article XVI:2(a) and XVI:2(c), the United States does not violate Article XVI of the GATS by maintaining these provisions.

¹⁹¹ Panel Report, paras. 6.384, 6.386.

¹⁹² Panel Report, paras. 6.390, 6.392-6.393.

¹⁹³ Panel Report, paras. 6.407-6.409.

¹⁹⁴ Panel Report, paras. 6.413-6.415.

¹⁹⁵ The United States also notes that qualitative tests are beyond the scope of Article XVI. The Scheduling Guidelines make explicit what is already clear from the text of the Article: The criteria in sub-paragraphs (a) to (d) of Article XVI “do not relate to the quality of the service supplied.” Panel Report, paras. 6.413-6.415.

5. The Panel's interpretation of Article XVI:2(a) and Article XVI:2(c) limits the right of Members to regulate the supply of services in a manner that is at odds with this object and purpose of the GATS and leads to "absurd or unreasonable" results.

126. The Panel's interpretation of Article XVI:2(a) and Article XVI:2(c) is at odds with the object and purpose of the GATS and leads to "absurd or unreasonable" results. Much neutral regulation of service activities involves the prohibition of services that have particular characteristics. Indeed, the very concept of regulation of a service typically rests on the power of the state to prohibit services not supplied in accordance with state-imposed norms. In that sense, most regulation involves prohibiting that fraction of the service which, although abstractly possible, does not conform to the relevant norms. Under the Panel's interpretation of Article XVI, however, it would appear that very little domestic regulation could "escape" Article XVI if it can be described as prohibiting part of a sector or part of a mode of supply.¹⁹⁶ The United States submits that this result is absurd, unreasonable, and inconsistent with the object and purpose of the GATS to preserve "the right of Members to regulate ... the supply of services within their territories in order to meet national policy objectives."

127. An additional practical example may further clarify the serious threat that the Panel's interpretation of Article XVI poses to legitimate government regulation. In the field of advertising services, according to a factual paper by the Secretariat, 37 Members have made commitments in modes 1-3 without economically significant limits on market access.¹⁹⁷ However, as described in that paper, Members maintain a wide variety of regulations on advertising, and these often include prohibiting certain kinds of advertising altogether.¹⁹⁸

128. This regulatory practice in the advertising sector finds one of its most recent expressions in the fact that numerous governments around the world are currently engaged in efforts to find ways of stamping out the costly nuisance of unsolicited commercial e-mail (known colloquially

¹⁹⁶ See Panel Report, paras. 6.335, 6.338.

¹⁹⁷ Advertising Services: Background Note by the Secretariat, S/C/W/47, para. 21 (9 July 1998).

¹⁹⁸ *Id.*, paras. 11-19.

as “spam”).¹⁹⁹ Spam consists of mass-mailed electronic messages containing unsolicited direct advertising for goods and services. The delivery of such advertising is delivery of advertising material, and thus covered by many Members’ commitments in this sector.²⁰⁰ The United States is aware of at least one Member of the WTO that imposes a complete ban on unsolicited direct advertising by fax or email, or by use of automated calling machines, notwithstanding the fact that the Member in question has inscribed “none” in the market access column of its schedule for cross-border supply of “Advertising (CPC 871)”. Similarly, the United States is aware of another Member that maintains a prohibition on highway-side outdoor advertising signs, notwithstanding the fact that that Member has made a full market access commitment for supply of advertising services through commercial presence.

129. There is no reason why a Member’s imposition of nationality-neutral limitations such as these should violate Article XVI of the GATS, so long as the particular measures in question do not take the form of numerical quotas or any other form prohibited by Article XVI:2.

Nonetheless, the United States is concerned that because such measures limit to zero the supply of services in parts of a sector and/or parts of a mode of supply, the reasoning followed by the Panel in this dispute would deem them inconsistent with Article XVI:2(a) and XVI:2(c) of the GATS.²⁰¹ This simply illustrates the fact that the Panel’s interpretation unreasonably and absurdly deprives Members of a significant component of their right to regulate services by depriving them of the power to prohibit selected activities in sectors where commitments are made.

130. Perhaps recognizing that its “zero quota” interpretation would potentially call into question every domestic regulation that has the effect of prohibiting any fraction of a sector or mode of supply where a Member inscribes a market access commitment, the Panel attempted to

¹⁹⁹ See generally, Organization for Economic Cooperation and Development, Background Paper for the OECD Workshop on Spam, DSTI/ICCP(2003)10/FINAL (January 22, 2004), available at http://www.oecd.org/findDocument/0,2350,en_2649_22555297_1_119666_1_1_1,00.html.

²⁰⁰ See Advertising Services: Background Note by the Secretariat, S/C/W/47, Box 1 (noting that “delivery of ... advertising material” falls within CPC-defined commitments).

²⁰¹ See Panel Report, paras. 6.333-6.338.

limit the implications of its findings and preserve some scope for the right of Members to regulate services by finding that Article XVI is mutually exclusive with paragraphs VI:4 and VI:5 of Article VI (Domestic Regulation).²⁰² The Panel's reasoning on this point is unpersuasive.

131. The Panel's reasoning would limit Members' power to prohibit services to the relatively narrow field of "qualification requirements and procedures, technical standards and licensing requirements," leaving no scope for other regulatory controls, such as the anti-spam measures on advertising services discussed above. This would curtail the traditionally broad scope of neutral domestic regulation in sectors where commitments are made well beyond the expectations of Members, who understood and agreed that the GATS would preserve "the right of Members to regulate ... the supply of services within their territories in order to meet national policy objectives."²⁰³

132. Moreover, the text of Article VI does not support the Panel's interpretation of mutual exclusivity. Specifically, it does not state that any measure covered by Articles VI:4 and VI:5 is automatically exempt from any other Article of the GATS. To impose that interpretation would deprive other substantive obligations in the GATS of their meaning.²⁰⁴ There is simply no basis in the text to assume that measures conforming to Articles VI:4 and VI:5 of the GATS are beyond the scope of Article XVI. Indeed, it is easy to imagine qualification or licensing requirements that would take the form of numerical quotas and thus would, in the abstract, raise issues under *both* Article XVI and Article VI.²⁰⁵

²⁰² Panel Report, paras. 6.301-6.313.

²⁰³ GATS, preamble.

²⁰⁴ This is especially true if applied to Article VI:1 of the GATS, which imposes a requirement of "reasonable, objective and impartial" administration on "all measures of general application affecting trade in services."

²⁰⁵ For example, a measure requiring that, in order to obtain a license to provide a service in a Member's territory, a prospective licensee must demonstrate that no more than three competitors are already supplying the same service could escape scrutiny as a numerical quota under Article XVI merely because it is also a licensing requirement.

Moreover, the negotiating history cited by the Panel specifically states that discriminatory licensing criteria would be subject to Article XVII (National Treatment), thus confirming that Members never intended that measures falling within Article VI would, by virtue

133. The correct reading is that Article VI applies to domestic regulation of services, regardless of whether a Member's measure also falls within the scope of Article XVI. Under this interpretation, whether a measure violates Article XVI does not depend on whether it can be characterized as falling within Article VI:4 or VI:5. Instead, a breach of Article XVI depends solely on whether the measure in question matches one of the precise limitations set out in Article XVI:2. Of course, if those limitations are interpreted very broadly, they would swallow up every neutral domestic regulation that has the *effect* of prohibiting any fraction of a service or particular way of supplying the service – closing off a large field regulation. If the relevant words of Article XVI:2(a) and XVI:2(c) are interpreted as written, however, they preserve scope for neutral domestic regulation consistent with the object and purpose of the GATS that Members have the right to regulate services.

134. In conclusion, the approach to market access liberalization reflected in the GATS is not to provide for the unlimited ability to supply services throughout committed sectors or modes of supply. That approach, which this Panel embraces with its “zero quota” theory,²⁰⁶ is inconsistent with the balance between liberalization and regulation reflected in Members' right to regulate services. Rather, the approach taken under the GATS is to single out for removal, in sectors where commitments have been made, certain carefully-defined forms of market access limitations consistent with the ordinary meaning of the text of Article XVI(a) and Article XVI(c). Other limitations – whether or not they have the *effect* of limiting the ability to supply a service – fall outside the scope of Article XVI(a) and Article XVI(c). But they remain subject to other GATS provisions.

D. The Panel erred in its interpretation of Article XIV of the GATS (General Exceptions) and its application of Article XIV to the relevant U.S. measures.

of that fact, escape other GATS obligations. *See* Panel Report, para. 6.307 (quoting the 1993 Scheduling Guidelines).

²⁰⁶ See Panel Report, paras. 6.352, 6.355.

135. The Panel correctly found that three U.S. federal statutes contributed to the realization of certain purposes specified in Article XIV(a) and XIV(c) of the GATS.²⁰⁷ Once again, however, the Panel turned away from that correct beginning in pursuit of a misguided 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. The United States appeals this legal conclusion.

1. The Panel erred in its interpretation and application of the word “necessary” in Article XIV(a) and XIV(c).

136. The Panel erred in its legal analysis by failing to find that the three federal statutes in question, together with state laws in two of the three cases, were “necessary” for the realization of the purposes they serve under Article XIV(a) and XIV(c).

137. The sole basis for the Panel’s adverse finding on this point for both Articles XIV(a) and XIV(c) was its legal conclusion that the “necessity” test in Article XIV(a) and XIV(c) required the United States to “explore and exhaust reasonably available WTO-consistent alternatives to the US prohibition on the remote supply of gambling and betting services that would ensure the same level of protection,” and that this test, in combination with the specific market access commitment that the Panel erroneously found in the U.S. schedule, imposed on the United States an unfulfilled “obligation to consult with Antigua before and while imposing its prohibition on the cross-border supply of gambling and betting services.”²⁰⁸

²⁰⁷ Panel Report, paras. 6.494, and 6.533. *See also id.*, para. 6.560 and 6.562 (incorporating the Panel’s analysis of this issue with respect to the Article XIV(a) “necessity” test for purposes of Article XIV(c)). Although these findings are somewhat more limited than those requested by the United States, the United States does not appeal them.

²⁰⁸ Panel Report, paras. 6.528, 6.531, 6.534, and 6.562. The Panel found that, “[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.” Panel Report, para. 6.531. *See also id.*, para. 6.564 (concluding with respect to Article XIV(c) that “the United States has not explored and exhausted WTO-consistent

138. There was no legal basis for the Panel to conclude that Article XIV(a) and XIV(c) create a procedural requirement for a Member to consult or negotiate with another Member before adopting and while maintaining a measure that falls within an Article XIV exception.

a. The text of Article XIV(a) and (c) does not impose a requirement to consult or negotiate with other Members.

139. The 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, protect public order, or enforce GATS-consistent laws in reliance on Article XIV. The text of Article XIV(a) and XIV(c) states no such obligation. It simply refers to measures that are “necessary” for particular purposes. A panel may not add to or diminish the exceptions in Article XIV(a) and XIV(c).²⁰⁹ The Panel in this dispute, by imposing this additional requirement, made the error of impermissibly reading something into the GATS that is not there.²¹⁰

140. The ordinary meaning of “necessary” has been described in the following manner by the Appellate Body:

The word “necessary” normally denotes something “that cannot be dispensed with or done without, requisite, essential, needful”. We note, however, that a standard law dictionary cautions that:

alternatives in the form of consultations and/or negotiations to determine whether there is a way of ensuring that its organized crime concerns can be addressed in a WTO consistent manner.”).

²⁰⁹ See DSU Article 3.2 (“Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”); DSU Article 19.2 (“In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”).

²¹⁰ See Appellate Body Report, *Japan – Hot-Rolled*, para. 166 (“[W]e see no reason to read into Article 2.1 [of the *Antidumping Agreement*] an additional condition that is not expressed.”). See also Appellate Body Report, *United States – Steel 201*, para. 471 (“[T]he United States is asking us to read something into the *Agreement on Safeguards* that is not there, and this we cannot do.”).

[t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity”.²¹¹

141. This ordinary meaning indicates that “the word ‘necessary’ is not limited to that which is ‘indispensable’ or ‘of absolute necessity’ or ‘inevitable.’”²¹² Moreover, the concept of necessity is a continuum that may extend, depending on the nature of the interest served, all the way to measures that “make a contribution”.²¹³ In the services context, a panel should interpret this word in the light of the object and purpose of the GATS, including recognition of the “right of Members to regulate.” This includes the right of a Member to heavily restrict a highly risky service while allowing the use of a less risky service.²¹⁴

142. The issue raised in the text of Article XIV(a) and XIV(c) is whether a measure is “necessary” to the relevant objective. In both of those provisions, the word “necessary” modifies the word “measures,” indicating that necessity is a property of the measure itself. The question under Article XIV(a) and XIV(c) is therefore simply whether a Member’s measure has the property of being “necessary.” That question is logically independent of the type or degree of efforts invested by the Member to find a different measure – an issue as to which the text of Article XIV lays down no procedural requirement. As the Appellate Body found in *EC – Hormones*, it is error for a Panel to graft a procedural requirement onto a provision that does not contain one.²¹⁵

²¹¹ *Korea – Beef*, Appellate Body Report, para. 160 (interpreting Article XX of the GATT 1994).

²¹² *Korea – Beef*, Appellate Body Report, para. 161.

²¹³ *Korea – Beef*, Appellate Body Report, para. 161.

²¹⁴ *Cf. EC – Asbestos*, para. 168 (interpreting Article XX of the GATT 1994 in a goods context) (“Accordingly, it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place.”)

²¹⁵ *See* Appellate Body Report, *EC – Hormones*, paras. 188-190.

143. A comparison between GATS Article XIV(a) and XIV(c) and other GATS provisions that form part of its context further confirms that it was error for the Panel to read a procedural requirement of consultation or negotiation into Article XIV(a) and XIV(c). Specifically, the context reveals that where the parties to Uruguay Round negotiations intended to create a special obligation for a Member to consult or negotiate regarding its actions affecting its GATS obligations, over and above the obligations of GATS Article XXII and the DSU, they were perfectly capable of doing so expressly. For example, Article XII:1 permits a Member to “adopt or maintain restrictions on trade in services on which it has undertaken specific commitments” in the event of “serious balance-of-payments and external financial difficulties or threat thereof.” Such action by a Member is, however, subject to an *expressly stated* requirement of subsequent consultations with the Committee on Balance-of-Payments Restrictions, as set out in Article XII:5. Similarly, Article XXI:1(a) provides for the right of Members to modify or withdraw GATS commitments. Such action by a Member is, however, subject to an *expressly stated* requirement of prior negotiations set out in Article XXI:2(a).²¹⁶ These GATS provisions provide contextual evidence that if the Members had intended to create a requirement to consult or negotiate with other Members prior to the adoption or enforcement of relevant measures under Article XIV(a) and XIV(c), they would have done so expressly. The fact that they did not confirms that there is no such requirement in Article XIV(a) and XIV(c).

144. Under customary rules of interpretation of international law reflected in Article 32 of the *Vienna Convention*, preparatory work may be used to confirm the interpretation gleaned from an analysis of the text of an agreement pursuant to Article 31 of the *Vienna Convention*. The preparatory work for the GATS confirms the interpretation advanced by the United States that the ordinary meaning of the word “necessary” does not impose a consultation requirement.

145. The participants in the Uruguay Round negotiations considered the issue of the relationship between a Member’s schedule and existing measures falling within Article XIV

²¹⁶ See also *Agreement on Safeguards*, Art. 12.3 (“A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to ... exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.”)

exceptions. If, as the Panel contended, Article XIV(a) and XIV(c) in conjunction with the inscription of a commitment were intended to create an obligation to consult with Antigua or other Members, one can imagine that the negotiators would have so noted. In fact, they did not. 146. On the contrary, the preparatory work for the negotiations included development of a scheduling guideline stating that “[a]ll measures falling under Article XIV (General Exceptions) are excepted from all obligations and commitments under the Agreement, and therefore need not be scheduled. Clearly, such exceptions cannot be negotiated under Part III of the Agreement.”²¹⁷ This guideline reflects concern that preexisting measures that would fall within Article XIV exceptions would not be subject to ongoing negotiations – precisely the opposite of the conclusion reached by the Panel in this dispute.

b. The Panel’s finding of a U.S. obligation to consult or negotiate with Antigua was inconsistent with the legal analysis that the Panel was purporting to apply.

147. In assessing whether the U.S. statutes in question were “necessary,” the Panel determined that it would apply the three-factor “weighing and balancing” approach used in certain past disputes under Article XX of GATT 1994, including *Korea – Beef*.²¹⁸ One of the factors “weighed and balanced” under that approach is “the trade impact of the challenged measure.” In connection with that factor, the Panel stated that “[t]he Appellate Body has ... indicated that whether a reasonably available WTO-consistent alternative measure exists must be taken into consideration” in weighing and balancing the “trade impact” of the challenged measure.²¹⁹

148. This inquiry, which the United States will refer to as a “reasonably available alternative” analysis, rests on the premise that, all other things being equal, if a Member has reasonably available to it two paths to a given objective, one of which is WTO-consistent and the other of which is not, the WTO-inconsistent path is not strictly “necessary.” The Panel in this dispute relied on the reasonably available alternative analysis as its legal basis for asserting the existence

²¹⁷ 1993 Scheduling Guidelines, para. 13.

²¹⁸ Panel Report, paras. 6.475-6.477, 6.488, 6.532, and 6.563.

²¹⁹ Panel Report, para. 6.477.

of a requirement for the United States to “explore and exhaust reasonably available WTO-consistent alternatives” and to consult and/or negotiate with Antigua to that end.²²⁰

149. The United States notes that the reasonably available alternative analysis has, in some disputes, gone well beyond the ordinary meaning of the word “necessary” and imported into Article XX of the GATT 1994 a requirement that the measure selected by the responding party pursuant to a general exception be the least WTO-inconsistent alternative. This approach, aside from having no basis in the text, has proven unworkable in practice because it involves measuring a property (WTO inconsistency) that does not admit of degrees. Such an analysis is especially inappropriate in light of the object and purpose of the GATS recognizing the “right of Members to regulate” services. At most, the reasonably available alternative analysis should examine the question of whether an alternative measure that is not inconsistent with the GATS is in fact reasonably available.

150. The reasonably available alternative analysis that the Panel was purporting to apply does not support the Panel’s finding of a procedural requirement for the United States to consult or negotiate with Antigua in this dispute. Prior to the Panel’s findings in this dispute, no WTO panel, nor the Appellate Body, has ever found such a requirement.

151. *Korea – Beef* and other past disputes using a reasonably available alternative analysis under individual exceptions of Article XX of the GATT 1994 have involved an objective analysis of whether an alternative measure to achieve the same level of protection was reasonably available.²²¹ The requirement of a reasonably available alternative has been satisfied, for example, on the basis of other measures actually applied by the responding party to achieve

²²⁰ Panel report, paras. 6.528-6.531.

²²¹ See Panel Report, *Canada – Wheat*, WT/DS276/R, paras. 6.229-239, 6.308-316 (finding that Canada could have adopted an alternative measure of allowing foreign grain to be received into elevators subject to a segregation requirement); Panel Report, *EC – Asbestos*, paras. 8.204-8.212 (finding that alternative measures of controlled use or reliance on existing international standards were not reasonably available); Appellate Body Report, *EC – Asbestos*, para. 174 (finding that “controlled use” alternative would not allow France to achieve its chosen level of health protection); Panel Report, *Korea – Beef*, paras. 659-674 (finding that alternative measures existed for dealing with misrepresentation of origin); Appellate Body Report, *Korea – Beef*, paras. 168-172 (upholding *Korea – Beef* panel finding).

the same objective.²²² Whether the defending Member made particular efforts to look for an alternative has not been a significant factor in these disputes, and none of them have articulated a procedural requirement to consult and/or negotiate with other Members.

152. On the contrary, these past disputes clarified that alternatives that are merely theoretical do not meet the test of being “reasonably available.” For example, the Appellate Body confirmed in *EC – Asbestos* that an alternative measure that is “impossible to implement” or that would “prevent [the Member] from achieving its chosen level of ... protection” is not reasonably available.²²³ Similarly, the Panel in *Canada – Wheat* found that “the availability of a measure should not be examined theoretically or in absolute terms” but in the light of “economic and administrative realities.”²²⁴ These observations confirm that the mere possibility of finding a theoretical alternative through consultations does not render a responding party’s Article XIV measure objectively unnecessary.

153. The Panel in this dispute did not in fact find that an alternative measure was reasonably available, as required under the analysis that the Panel was purporting to apply. The Panel noted that Antigua had “asserted that it has in place a regulatory regime that is sufficient to address the specific concerns identified by the United States,”²²⁵ but did not find that Antigua’s assertion was true or represented an alternative that would meet the desired level of protection in the United States.²²⁶ Similarly, the Panel correctly rejected the argument that measures concerning non-

²²² See Appellate Body Report, *Korea – Beef*, paras. 168-172.

²²³ Appellate Body Report, *EC – Asbestos*, para. 169, 174.

²²⁴ See Panel Report, *Canada – Wheat*, para. 8.207.

²²⁵ Panel Report, para. 6.522 (original emphasis omitted).

²²⁶ The assertion is implausible because it involves an assumption about the ability of Antigua’s regulatory regime to meet U.S. concerns that lacks any evidentiary support. Even in the domestic context, where the United States is theoretically capable of exercising regulatory supervision over all participants in a remote gambling transaction, the United States has not found a regulatory model that provides its desired level of protection. It is therefore unlikely that an alternative under which the United States does not exercise direct regulatory supervision could provide the desired level of protection. See Second submission of the United States, para. 122.

remote gambling could be considered a reasonably available alternatives for problems that were specific to gambling by remote supply.²²⁷

154. The Panel’s own statements confirm that the possible existence of an alternative in this dispute was a matter of mere speculation. The Panel stated that “[t]hrough bilateral and multilateral consultations and negotiations, Members *may be able to determine* whether their concerns can be adequately addressed in a WTO-consistent manner.”²²⁸ Based on this speculation, the Panel asserted that even if the United States takes the view that its concerns cannot be adequately addressed through consultations or negotiations, it “cannot prejudge that the situation will remain unchanged *in the future*.”²²⁹ The Panel therefore concluded that, by allegedly rejecting Antigua’s invitation to engage in bilateral or multilateral consultations or negotiations,²³⁰ 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.”²³¹ The Panel’s use of such words as “may be able to determine,” “in the future,” and “explore the possibility of finding” confirms that the Panel in this dispute was only speculating about the theoretical possibility of the responding party finding a “reasonably available” alternative – not finding that there actually was such an alternative.

155. The Panel also disregarded the fact that, under the legal analysis that the Panel was purporting to apply, a mere “possibility of finding a reasonably available WTO-consistent alternative”²³² is not itself an “alternative” because it does not achieve the objectives of the

²²⁷ Panel Report, paras. 6.497-6.498. The Panel, in a footnote, alluded to the fact that “suggestions have been made in US literature as to how the concerns that have been raised in the United States regarding the remote supply of gambling and betting services may be addressed.” Panel Report, para. 6.531, n. 986. The Panel did not find that any of these possible alternatives was reasonably available. On the contrary, by stating that these possible alternatives “may” address U.S. concerns, it implicitly recognized that they may not address U.S. concerns.

²²⁸ Panel Report, para. 6.529.

²²⁹ Panel Report, para. 6.531 (emphasis added).

²³⁰ The United States disputes the Panel’s factual premise that the United States rejected Antigua’s invitation to engage in bilateral or multilateral consultations or negotiations. This point is addressed in Section D.1.f below.

²³¹ Panel Report, para. 6.531 (emphasis added).

²³² Panel Report, para. 6.531.

United States to protect Americans from the specific risks associated with remote supply of gambling services. The Appellate Body found in *EC–Asbestos* that a measure that would involve the continuation of the very risk that the defending Member seeks to prevent is not reasonably available.²³³ In this dispute, if the United States were to withdraw the relevant gambling-related measures and replace them with efforts to find a WTO-consistent alternative through consultations or negotiations, the risks that it seeks to eliminate would continue with no assurance of addressing those risks through efforts to find some future alternative that might, as the Panel recognized, ultimately bear no fruit.²³⁴

156. The Panel in this dispute alluded in a footnote to the fact that “a number” of other jurisdictions have legalized Internet gambling.²³⁵ This fact reveals nothing about whether the level of protection in those countries meets U.S. concerns regarding the remote supply of gambling. On the contrary, the evidence shows that the United States has extensively considered whether and to what extent it should legalize Internet gambling.²³⁶ To date, the United States has not found a regulatory alternative that provides its desired level of protection. The Appellate Body has confirmed that choosing the desired level of protection is a matter that lies within the sole discretion of the Member.²³⁷ The fact that other jurisdictions have made different judgments based on their own desired levels of protection is therefore irrelevant.

157. In the absence of any finding by the Panel in this dispute that an alternative measure was reasonably available, the Panel had no legal basis under the alternative measure analysis used in some past disputes under individual exceptions of Article XX of the GATT 1994 to find that the relevant United States measures concerning gambling were not “necessary.” The United States argued that its explorations had revealed no alternative measure,²³⁸ and the Panel did not find

²³³ Appellate Body Report, *EC – Asbestos*, para. 174.

²³⁴ See Panel Report, para. 6.530.

²³⁵ Panel Report, para. 6.531, n. 986.

²³⁶ See Second submission of the United States, para. 122.

²³⁷ See Appellate Body Report, *EC – Asbestos*, para. 168.

²³⁸ The United States provided evidence and argumentation in this dispute showing that it has explored, through extensive study and debate, possible ways of permitting remote supply of gambling services. See U.S. Second Submission, para. 122. In spite of these efforts, the United

that there was a “reasonably available” alternative measure. Against this background, the Panel erred by failing to conclude that the U.S. measures in question were “necessary” for the purposes that they were correctly found to serve under Article XIV(a) and XIV(c) of the GATS.

c. The past disputes cited by the Panel did not find that a responding party must explore and exhaust consultations and/or negotiations to discover an alternative measure.

158. The past disputes under Article XX of the GATT cited by the Panel in no way indicate the existence of a procedural requirement for the responding party to “explore and exhaust” consultations and/or negotiations as a means to try to discover an alternative measure, which may or may not exist, “before imposing a WTO inconsistent measure.”

i. The GATT *Section 337* panel report did not find a Member must explore and exhaust alternatives that might or might not exist.

159. Close examination of the Panel’s legal reasoning reveals that the purported requirement to consult and/or negotiate in search of possible alternative measures that might or might not exist was an erroneous extrapolation by the Panel from the reasoning in the *Section 337* GATT panel report. The Panel asserted that the *Section 337* panel “made clear that a Member must first explore and exhaust all GATT/WTO compatible alternatives before resorting to WTO-inconsistent alternatives.”²³⁹ But the *Section 337* panel never identified such an obligation. It stated that

a contracting party cannot justify a measure inconsistent with another GATT provision as ‘necessary’ in terms of Article XX(d) if an alternative measure which

States has been unable to discover an alternative that would permit remote supply of gambling, either on a domestic basis or a cross-border basis, without reducing the levels of protection that the United States has chosen. *See id.*

²³⁹ Panel Report, para. 6.496.

it could reasonably be expected to employ and which is not inconsistent with other GATT provisions *is available to it*.²⁴⁰

The obligation, in the view of the *Section 337* panel, was thus simply to employ a WTO-consistent alternative if one “is available” – not if it might or might not become available through consultations and/or negotiations. The *Section 337* panel made no findings concerning the efforts that a contracting party should undertake to “explore” possible alternatives that may or may not be available. The key fact for the *Section 337* panel, as for subsequent panels and the Appellate Body, was whether the alternative was in fact reasonably available.

ii. The Appellate Body reports in *Shrimp Turtle* and *Shrimp Turtle (21.5)* do not support the Panel’s approach.

160. The Panel cited the Appellate Body report in *Shrimp Turtle (21.5)* in support of its analysis of the necessity test in this dispute.²⁴¹ In fact, the Appellate Body reports in *Shrimp Turtle (21.5)* and *Shrimp Turtle* do not support the Panel’s creation of a new procedural requirement in this dispute.

161. The issue of a possible negotiation alternative in *Shrimp Turtle (21.5)* and *Shrimp Turtle* arose in the very different context of determining whether there was discrimination under the chapeau of Article XX of GATT 1994. Because discrimination was the issue, the Appellate Body considered it significant in *Shrimp Turtle* that, rather than banning all imports, the United States had entered into agreements with some trading partners and imposed an import ban on others. It therefore looked to the issue of consultation with some Members but not others as an indication of unjustifiable discrimination.²⁴² In this dispute, by contrast, the Panel created a procedural requirement for international consultations and/or negotiations under the necessity test for specific exceptions of Article XIV, where discrimination is not an issue. Moreover,

²⁴⁰ GATT Panel Report, *United States – Section 337*, para. 5.26 (emphasis added).

²⁴¹ See Panel Report, para. 6.526 and n.982.

²⁴² Appellate Body Report, *Shrimp Turtle*, para. 172; Appellate Body Report, *Shrimp Turtle (21.5)*, para. 128.

unlike *Shrimp Turtle*, there is no evidence in this dispute that the United States has entered into agreements with any trading partner to regulate the remote supply of gambling services, and no finding by the Panel that doing so is a “reasonably available” alternative (as opposed to a procedure for exploring the mere “possibility of finding” an alternative).²⁴³

162. Another significant distinction lies in the fact that the policy objective being pursued in *Shrimp Turtle* and *Shrimp Turtle (21.5)* consisted of the protection and conservation of “highly migratory species” – an issue that the Appellate Body found “demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations.”²⁴⁴ This dispute, by contrast, concerns inherently domestic judgments by the United States about the level of protection to afford, within its own borders and to its own people, from the pernicious effects of having gambling opportunities channeled into their homes, schools, and workplaces by remote means of supply. This is an issue that demands, first and foremost, judgments by legislators in the United States about the required level of protection. The GATS does not impose a requirement that the United States consult internationally before making or while maintaining such judgments about the level of public order, public morals, and law enforcement that the United States chooses to pursue.²⁴⁵

iii. The unadopted GATT panel report in *Tuna Dolphin I* does not support the Panel’s approach.

²⁴³ In *Shrimp Turtle*, the Appellate Body found based on an existing agreement that “an alternative course of action based on cooperation and consensus was reasonably open to the United States.” See Appellate Body Report, *Shrimp Turtle (21.5)*, para. 128 (describing the findings in *Shrimp Turtle*). In the present dispute, by contrast, the Panel did not find that an alternative was reasonably available.

²⁴⁴ Appellate Body Report, *Shrimp Turtle*, para. 168; Appellate Body Report, *Shrimp Turtle (21.5)*, para. 124.

²⁴⁵ Cf. Appellate Body Report, *EC – Asbestos*, para. 168 (“[I]t is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.”).

163. Similar considerations distinguish this dispute from the situation addressed in the unadopted GATT panel report in *Tuna Dolphin I*, on which the Panel explicitly relied.²⁴⁶ The GATT panel stated that “the negotiation of international cooperative arrangements ... would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.” So here again, as in *Shrimp Turtle*, the desirability of an international alternative was premised on the fact that the interest to be protected wandered around the world, in contrast to the present case where the interest that the United States seeks to protect lies exclusively within the borders of the United States.²⁴⁷

164. The *Tuna Dolphin I* GATT panel described the option of an “international cooperative arrangement” as “reasonably available.”²⁴⁸ Although it did not explain the basis for this finding, the fact that this finding was made nonetheless distinguishes *Tuna Dolphin I* from the present dispute, where the Panel never found that the option of consultations or negotiations was a “reasonably available” alternative. The Panel instead described consultations or negotiations as merely a means “to explore the possibility of finding a reasonably available WTO-consistent alternative.”²⁴⁹

165. The legal value of *Tuna Dolphin I* is further limited by its status as an unadopted GATT panel report. In light of that fact, it is worth noting that the Appellate Body has not relied on the reasonably available alternative analysis in *Tuna Dolphin I* in disputes where that issue has been raised, such as *Korea – Beef* and *EC – Asbestos*.

d. The Panel’s creation of a consultation requirement reduces Article XIV to inutility.

166. The Appellate Body has observed that:

²⁴⁶ Panel Report, para. 6.526.

²⁴⁷ While other nations may have similar interests – in protecting their children, for example – the United States is not seeking to regulate the flow of gambling into other countries.

²⁴⁸ GATT Panel Report, *United States –Tuna Dolphin I*, para. 5.28.

²⁴⁹ Panel Report, para. 6.531.

One of the corollaries of the “general rule of interpretation” in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.²⁵⁰

In the specific context of the exceptions under Article XX of the GATT, the Appellate Body has further observed that “because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory.”²⁵¹

167. To deny Members the benefit of Article XIV exceptions (or, by analogy, exceptions under Article XX of GATT 1994) on the basis of “the possibility of finding a reasonably available WTO-consistent alternative”²⁵² would reduce those exceptions to inutility because there is no case in which a Member relying on an Article XIV exception would not have the abstract “possibility of finding” in the future, through some as-yet unexplored means, a way of achieving its objectives in a WTO-consistent manner. Thus, under the Panel’s approach to Article XIV, there would be no logical end to the obligation to explore alternatives. Given the importance of the interests served by Article XIV, this interpretation cannot stand.

e. The inscription of a market access commitment does not give rise to an obligation to consult prior to adopting measures within the scope of an Article XIV exception.

168. The Panel did not rely exclusively on the word “necessary” for its creation of an obligation to consult with Antigua. In paragraph 6.531 of its report, the Panel stated that this purported obligation “derives from” the inscription of a market access commitment in the relevant mode of supply.²⁵³

²⁵⁰ Appellate Body Report, *United States – Section 211*, para. 238.

²⁵¹ Appellate Body Report, *U.S. – Shrimp*, WT/DS58/AB/R, para. 156.

²⁵² Panel Report, para. 6.531.

²⁵³ The Panel’s error on this point again reflects its misunderstanding of market access under the GATS. As the United States has already pointed out, the making of a market access commitment under the GATS represents a commitment by the Member not to apply certain

169. The text of the commitment, as the Panel observed in paragraph 6.269 of its report, consists of the word “none” under the heading “limitations on market access.”²⁵⁴ The Panel never cited any textual evidence indicating that “none” in sector 10D of the U.S. Schedule means “the United States shall consult with Antigua before the adoption of, and while imposing, a gambling-related measure that falls within an Article XIV exception.” By imposing this additional requirement, the Panel again committed the error of impermissibly reading something into the GATS that is not there.²⁵⁵

170. Moreover, the Panel failed to recognize that nothing in a Member’s GATS schedule can limit the availability of Article XIV exceptions. This is clear from the express terms of the Article XIV chapeau, which states that “*nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures*” meeting the requirements of Article XIV(a)-(e) (emphasis added). These words confirm that the scope and meaning of Article XIV exceptions should be not broadened or restricted beyond what is required by the customary rules of interpretation of international law simply because a Member has made a commitment in its GATS schedule.

f. The Panel erred by finding that the United States rejected Antigua’s invitation to engage in consultations.

carefully-defined types of limitations on the service in question. It does not imply a broad guarantee of unlimited ability to supply a service.

²⁵⁴ The Panel concluded in paragraph 6.279 of its report that “none” refers to none of the six types of limitations and measures listed in the second paragraph of Article XVI.

²⁵⁵ See Appellate Body Report, *Japan – Hot-Rolled*, para. 166 (“[W]e see no reason to read into Article 2.1 [of the *Antidumping Agreement*] an additional condition that is not expressed.”). See also Appellate Body Report, *United States – Steel 201*, para. 471 (“[T]he United States is asking us to read something into the *Agreement on Safeguards* that is not there, and this we cannot do.”).

171. Article 11 of the DSU states that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case.”²⁵⁶ As the United States has observed, this is a serious allegation.²⁵⁷ The United States does not make it lightly.

172. The Panel in this dispute found that the United States rejected Antigua’s “invitation to engage in bilateral or multilateral consultation’s and/or negotiations.”²⁵⁸ The Panel’s factual basis for this finding appears to be Antigua’s assertion that “[i]n the consultations we held with the United States, Antigua and Barbuda expressed its willingness to cooperate with the United States on a mutually agreeable regulatory scheme,” but that the United States “showed no interest in doing so.”²⁵⁹ The factual premise that the United States had rejected consultations was the sole premise for the Panel’s legal finding that “the United States failed to explore 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.”²⁶⁰

173. As described above, the Panel’s extrapolation of a consultation requirement from the word “necessary” was in error; therefore the question of whether the United States engaged in consultations is of no consequence. Nonetheless, the United States wishes to point out that it is not true, as a factual matter, that the United States failed to engage in consultations with Antigua. The record in this dispute reflects the fact that Antigua requested consultations with the United States concerning the various U.S. gambling laws in its request for consultations.²⁶¹ The United States accepted that request, and consultations between the two governments took place on April 30, 2003.²⁶² At those consultations, Antigua had ample opportunity to, and did in fact, exchange

²⁵⁶ The legal standards governing appeals under Article 11 are further discussed below at section D.2.d.

²⁵⁷ See discussion above, Section A.10.

²⁵⁸ Panel Report, paras. 6.531, 6.533

²⁵⁹ First oral statement of Antigua and Barbuda, para. 4, cited in footnote 974 of the Panel Report.

²⁶⁰ The United States also notes that it engaged in several further rounds of high-level consultations with Antigua in Washington D.C. and in Antigua prior to circulation of the Panel Report.

²⁶¹ See Panel Report, para. 1.1.

²⁶² See Panel Report, para. 1.2.

views with senior officials of the Office of the U.S. Trade Representative and the U.S. Department of Justice in an effort to seek a resolution to Antigua's concerns relating to U.S. gambling laws.²⁶³

174. The Panel's finding that the United States rejected bilateral or multilateral consultations and/or negotiations with Antigua to seek a WTO-consistent resolution of Antigua's concerns is patently at odds with the fact that consultations on Antigua's concerns relating to U.S. gambling laws did take place pursuant to Article 4 of the DSU.²⁶⁴ Indeed, Antigua's own statement, cited by the Panel, expressly acknowledges that "consultations" took place.²⁶⁵ The Panel's finding to the contrary thus represents a failure on its part to make an "objective assessment of the facts of the case."

175. Furthermore, as a legal matter, any obligation on the part of the United States to engage in consultations with Antigua pursuant to the Article XIV necessity test was fully met by the consultations held on April 30, 2003. (However, the United States adheres to the view that there is no such obligation under Article XIV.) The duration of those consultations is irrelevant. Having afforded sympathetic consideration to Antigua's representations at the initial meeting,

²⁶³ Consistent with Article 4.3 of the DSU, the United States entered into consultations with Antigua "in good faith ... with a view to reaching a mutually satisfactory solution." Consistent with Article 4:2 of the DSU, the United States afforded "sympathetic consideration" to the representations by Antigua at that meeting. And consistent with Article 4.10 of the DSU, the United States gave special attention to the particular problems and interests of Antigua. At no time has Antigua alleged that the United States violated its obligations under these provisions of the DSU.

²⁶⁴ The United States pointed out the lack of a factual basis for this finding in its comments on the interim report. Comments of the United States on the Interim Report, para. 32.

²⁶⁵ First oral statement of Antigua and Barbuda, para. 4, cited in n. 974 of the Panel Report ("In the consultations we held with the United States, Antigua and Barbuda expressed its willingness to cooperate with the United States on a mutually agreeable regulatory scheme. The United States showed no interest in doing so, saying only that Internet-based gaming cannot be regulated—period."). The Panel also appears to have misconstrued a statement by the United States about cooperation regarding international requests for law enforcement assistance as a rejection of "consultations." See Panel Report, para. 6.530 and n. 985.

the United States was within its rights to conclude that the divergence of views between the two governments was such that further consultations would not be productive.²⁶⁶

g. The Panel should have found the U.S. measures provisionally justified under Articles XIV(a) and XIV(c).

176. The Panel's only ground for finding that the that the United States did not provisionally justify the Wire Act, the Travel Act (in conjunction with relevant state laws), and the Illegal Gambling Business statute (in conjunction with relevant state laws) as "necessary" measures under Articles XIV(a) and XIV(c) of the GATS was an alleged failure to consult and/or negotiate.²⁶⁷ The United States has explained why this ground was in error. In view of this error, the United States respectfully requests that, in the event that the Appellate Body reaches the Article XIV issues in this dispute, it complete the Panel's analysis and find that the U.S. measures are provisionally justified under Articles XIV(a) and XIV(c). Specifically, the Panel's findings of fact that the measures in question serve important interests of the United States, together with the absence of any finding by the Panel of a reasonably available alternative measure (aside from the Panel's erroneous findings relating failure to consult and/or negotiate), provide an ample basis on which to conclude that the measures in question are "necessary" measures to serve important interests within the scope of Articles XIV(a) and XIV(c).

2. The Panel erred in its interpretation and application of the Article XIV chapeau.

²⁶⁶ Recalling that the sole factual basis for the Panel's finding of failure to consult was Antigua's assertion in its first oral statement regarding an response by the United States in consultations pursuant to Article 4 of the DSU, the Panel's finding that the United States rejected an invitation to consult with Antigua also violates the requirements of Article 4.6 of the DSU. For the consultations to be "without prejudice," as that term is ordinarily understood, they must not result in loss of, or create an obstacle to, the exercise of rights in further proceedings. The Panel in this dispute erred by construing a U.S. response in consultations as barring invocation by the United States of an Article XIV exception.

²⁶⁷ See Panel Report, paras. 6.532-6.535, 6.563-6.565. (As explained above, there is no such consultation requirement, and even if there were such a requirement, it was satisfied by the consultations held between the United States and Antigua pursuant to Article 4 of the DSU.)

177. The chapeau of Article XIV imposes an additional requirement that any measure provisionally justifiable under Article XIV (a) through (e) not be “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.” The Appellate Body has noted that the similar language of the chapeau to GATT 1994 Article XX serves to avoid abuse or misuse of the particular exceptions set forth in Article XIV(a) through (e).²⁶⁸

178. The Panel did not find that any U.S. measure met the requirements of the chapeau of Article XIV. However, its findings against the United States in this regard were factually limited to the field of parimutuel betting on horseracing.²⁶⁹ The United States appeals the Panel’s legal and factual findings under the Article XIV chapeau.

a. The Panel applied the wrong legal standard under the Article XIV chapeau.

179. The Panel applied the wrong legal standard under the Article XIV chapeau. The text of the chapeau subjects a Member’s invocation of the individual exceptions of Article XIV to the general condition “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.”

180. The Panel articulated the legal standard that it applied in paragraph 6.584 of its report. The Panel stated that:

we consider that [Antigua’s factual arguments under Article XVII] are relevant in determining whether or not the United States is consistent in prohibiting the remote supply of gambling and betting services. In our view, the absence of

²⁶⁸ See Appellate Body Report, *United States – Gasoline*, pp. 22 and 25.

²⁶⁹ In its comments on the Panel’s interim report, the United States pointed out that the findings of the interim report concerning discrimination under the Article XIV chapeau were limited to parimutuel betting on horse racing. Comments of the United States on the Interim Report, para. 40. Those limited findings (with which the United States disagrees) “do not in any event support an adverse determination under the Article XIV chapeau with respect to gambling services other than those involving horse racing.” *Id.* The United States therefore urged that “[a]s to Internet casinos, sportsbook services, and other gambling and betting services, the Panel should find that U.S. measures do not discriminate against foreign suppliers.” *Id.*

consistency in this regard may lead to a conclusion that the measures in question are applied in a manner that constitutes “arbitrary and unjustifiable discrimination between countries where like conditions prevail” and/or a “disguised restriction on trade”.²⁷⁰

181. The Panel thus reasoned that “absence of consistency” in the application of a prohibition provides a sufficient basis on which to conclude that the application of the measures constitutes “arbitrary and unjustifiable discrimination between countries where like conditions prevail” and/or a “disguised restriction on trade.”

182. The Panel’s conclusion confirms that it in fact applied this standard. The Panel stated that:

we believe 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.²⁷¹

183. The Panel’s own words thus reveal that the Panel required the United States to demonstrate “consistent” treatment of foreign and domestic supply of services. The Panel overlooked the fact that treatment that is “inconsistent” as between services supplied domestically and services supplied from other Members is not necessarily “arbitrary”, “unjustifiable”, or a “disguised restriction on trade in services”.²⁷² The Panel erred by failing to apply these further requirements of the Article XIV chapeau, and by consequently holding the United States to a higher standard than the actual requirements of the Article XIV chapeau.

²⁷⁰ Panel Report, para. 6.584.

²⁷¹ Panel Report, para. 6.607.

²⁷² Cf. Appellate Body Report, *United States – Gasoline*, WT/DS2/AB/R, p. 23 (finding in the goods context that these terms must be given a meaning independent of other GATT 1994 obligations).

b. Non-enforcement against three companies did not constitute “arbitrary or unjustifiable discrimination” or a “disguised restriction on trade.”

184. As a matter of law, the United States submits that non-enforcement against a mere three possible defendants domestically does not meet the standard of “arbitrary or unjustifiable discrimination” or a “disguised restriction on trade” under the GATS in a case where *overall* application of the relevant measures is non-discriminatory, including evidence that possible defendants based outside the United States have not been prosecuted.

185. Non-enforcement against three domestic possible defendants is not a means of “arbitrary or unjustifiable discrimination between countries where like conditions prevail.” Indeed, the facts found by the Panel and evidence on the record showed that in the application of the relevant measures, U.S. authorities have used the laws more frequently against remote supply of gambling within the United States.²⁷³ Thus there is no evidence of “less favourable treatment ... with respect to the way in which the [measures] are administered” by U.S. prosecutors.²⁷⁴ The fact that three domestic companies have not been prosecuted is also not a matter of “discrimination” because it is equally true based on facts in the record that there have been dozens – perhaps more than a hundred – Antigua-based suppliers that have not been prosecuted by U.S. authorities.²⁷⁵ This absence of discrimination against Antigua as a country is particularly striking since conditions in Antigua – namely the legality of Internet gambling – are unlike those in the United States, with the result that there are more suppliers of organized Internet gambling services in Antigua than in the United States. Thus, one would normally expect to see more prosecutions of Antigua-based suppliers, not fewer prosecutions. Moreover, non-prosecution in a small number of cases is not “unjustifiable”: Scarce resources and other neutral consideration

²⁷³ See Section D.2.d below.

²⁷⁴ Panel Report, *EC – Asbestos*, para. 8.228.

²⁷⁵ Antigua asserted that the number of companies licensed by Antigua to provide Internet gambling ranged from a low of 28 to a high of 119. First submission of Antigua and Barbuda, para. 37. Yet, even with so many licensees, and in spite of the fact that Antigua provided evidence suggesting that 50 to 60 percent of operator revenues came from U.S. customers (Exhibit AB-36, p. 5), the Panel found only one prosecution of an Antigua based supplier by the United States. Panel Report, para. 6.585.

do not permit prosecutors to pursue 100% of the possible cases that may exist at any given moment.²⁷⁶

186. Likewise, non-enforcement against three domestic companies does not constitute a “disguised restriction on trade.” The relevant prosecutions are literally undisguised in the sense that they are matters of public record and in no way concealed. These instances of non-prosecution are also undisguised in the sense used in the Appellate Body’s analysis of disguised restrictions in *United States – Gasoline*, because they do not stem from any concealed trade-restrictive objective. If the U.S. criminal prosecutors charged with enforcing these statutes were pursuing a hidden trade agenda, one would expect to see the relevant laws used more frequently against foreign defendants. In fact, protectionism has nothing to do with the law enforcement decisions made by U.S. prosecutors in these cases, as evidenced by the uncontroverted fact that they have pursued many more domestic than foreign defendants under relevant statutes.²⁷⁷ Unsurprisingly, it has not yet been possible for the United States to prosecute every potential domestic and foreign defendant (including the three domestic examples cited by the Panel, as well as many foreign suppliers). As explained below, however, the justifications for that circumstance are neutral and in no way aimed at restricting trade.

c. The Panel made the rebuttal for Antigua under the Article XIV chapeau.

187. Once the party asserting a defense makes out a *prima facie* case, the burden shifts to the opposing party to rebut that case. In this dispute, the United States rested its *prima facie* defense under the Article XIV chapeau on the proposition that “[n]one of these measures [i.e., §§ 1084, 1952, and 1955] introduces any discrimination on the basis of nationality” and made reference to its repeated prior observations that these measures “apply equally regardless of national origin.”²⁷⁸ These observations were backed by extensive evidence and argumentation by the

²⁷⁶ Cf. Award of the Arbitrators, *United States – Section 110(5)*, paras. 3.24-3.34 (finding it unreasonable to expect 100% enforcement by rightholders of laws protecting copyright).

²⁷⁷ See Panel Report, para. 6.587.

²⁷⁸ Second submission of the United States, para. 118.

United States under Article XVII.²⁷⁹ Significantly, that evidence and argumentation by the United States as to the *complete absence of discrimination* was equally relevant to Article XIV, since a complete absence of discrimination necessarily includes the absence of “arbitrary and unjustifiable discrimination.” The United States also relied on the legislative history of the relevant measures to demonstrate the absence of any protectionist motive that would suggest a “disguised restriction on trade in services.”²⁸⁰

188. In considering Antigua’s rebuttal arguments, the Panel observed that Antigua “did not advance much argumentation in response to the submissions made and evidence adduced by the United States in support of its defence under Article XIV.” The panel appears to have rejected all of the evidence and argumentation that Antigua did advance on this point.²⁸¹ The Panel then helped Antigua make its rebuttal 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.²⁸²

189. In doing so, the Panel overlooked the fact that Antigua’s evidence of a lack of national treatment was not equally relevant to an Article XIV chapeau inquiry. The Article XIV standard is different from the national treatment standard in a way that required *additional* evidence and argumentation from Antigua – specifically, evidence and argumentation that any U.S. discrimination was “arbitrary or unjustifiable” or that the United States maintained a “disguised restriction on trade”. (It did not require additional evidence from the United States relating to discrimination because a complete absence of national bias is sufficient to show that the United States did not violate Article XVII *and* to show that it did not violate the “arbitrary or unjustifiable” discrimination provision of the Article XIV chapeau). Recalling its observations earlier in this submission that a Panel may not make the case for a complaining party, the United

²⁷⁹ See *id.*, paras. 59-69; First Submission of the United States, paras. 101-102; Opening statement of the United States at the first Panel meeting, para. 52; Opening Statement of the United States at the second Panel meeting, paras. 61-67.

²⁸⁰ Second submission of the United States, para. 119.

²⁸¹ Compare Opening Statement of Antigua and Barbuda at the second Panel meeting, paras. 68-83, with Panel Report, paras. 6.584-6.606.

²⁸² See Panel Report, para. 6.584.

States respectfully requests the Appellate Body to find that, by recycling certain of Antigua's Article XVII national treatment evidence and argumentation for consideration as arguments under the higher legal standard of the Article XIV chapeau, despite Antigua's failure to refer in any way to this evidence and argumentation for that purpose, the Panel improperly made the rebuttal for the complaining party under the Article XIV chapeau.

d. The Panel failed to make an objective assessment of U.S. enforcement of its gambling restrictions and U.S. law in the field of horseracing.

190. Article 11 of the DSU states that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements[.]” Once again, the United States notes the seriousness of this allegation, and does not make it lightly.²⁸³

191. According to the Appellate Body, under Article 11 standard for “assessment of the facts” of the case, “a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.”²⁸⁴ Moreover, as the Appellate Body noted in *EC – Hormones*,

The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts.²⁸⁵

192. The Party appealing a Panel's assessment of facts under Article 11 must meet a high standard – but not an impossible one. For example, the standard has been met in circumstances where “the Panel's conclusion is at odds with its treatment and description of the evidence

²⁸³ See above, Section 10.A.

²⁸⁴ Appellate Body Report, *United States – Wheat Gluten*, para. 150 (quoting Appellate Body Report, *Korea – Dairy*, para. 137 n.29).

²⁸⁵ Appellate Body Report, *EC – Hormones*, para. 133; see also Appellate Body Report, *Australia – Salmon*, paras. 262-267; Appellate Body Report, *European Communities – Poultry*, paras. 131-136.

supporting that conclusion.”²⁸⁶ Unfortunately, aspects of the Panel’s assessment of facts in this dispute reflect egregious errors that meet the high Article 11 standard.

193. The Panel in this dispute did not live up to the mandate of DSU Article 11 in its findings relating to enforcement of U.S. gambling restrictions. The Panel found that U.S. evidence of nondiscrimination with respect to enforcement of its relevant gambling laws was “inconclusive,” and on that basis found that the United States “failed to demonstrate that the manner in which it enforced its prohibition” against three domestic suppliers of parimutuel betting on horseracing was consistent with the Article XIV chapeau.²⁸⁷ This factual finding did not reflect an objective approach to assessing the available evidence of U.S. law enforcement activity relating to remote supply of gambling and betting services, and was inconsistent with the Panel’s own treatment and description of the relevant evidence.

194. The United States presented uncontroverted evidence, cited in the Panel Report, of enforcement of its relevant gambling-related measures against domestic suppliers, including evidence that 125 cases were filed under the Wire Act and 951 cases were filed under the Illegal Gambling Business statute between 1992 and September 2003, of which only a handful involved supply of gambling from outside the United States.²⁸⁸ The United States also provided evidence that a domestic U.S. supplier of Internet gambling on horseracing had admitted that the United States was “in the process of taking action against selected companies” and that it faced a risk of prosecution, as well as evidence of the enforcement of U.S. gambling laws to in multiple domestic cases of illegal gambling on horseracing.²⁸⁹ Against this evidence of domestic enforcement, the Panel found evidence of *one prosecution* of an Antiguan supplier by the United States. The evidence discussed and evaluated by the Panel thus showed many examples of domestic enforcement, against a finding of one case of enforcement against suppliers from other Members.

²⁸⁶ Appellate Body Report, *United States – Wheat Gluten*, para. 161.

²⁸⁷ Panel Report, para. 6.589.

²⁸⁸ Oral statement of the United States at the second Panel meeting, paras. 62-66. The Panel acknowledged this evidence in para. 6.586 of the Panel Report in response to a request by the United States. *See* Comments of the United States on the Interim Report, paras. 36-37.

²⁸⁹ Panel Report, para. 6.587.

195. The sole ground identified by the Panel for finding that the evidence concerning U.S. enforcement was inconclusive was a lack of evidence of enforcement action against three U.S. companies. By focusing on the treatment of these three individual companies in comparison to one Antiguan supplier and disregarding uncontroverted statistical evidence as to the *overall* treatment of domestic suppliers of remote gambling services, as compared to that of foreign suppliers, the Panel introduced a sampling bias. For a variety of reasons, prosecutors seldom pursue 100% of potential cases.²⁹⁰ The fact of some non-prosecution does not suggest discrimination, let alone arbitrary and unjustifiable discrimination, unless non-prosecution systematically favors domestic over foreign suppliers. Antigua focused its arguments on these few cases. The overall statistics submitted by the United States, however, strongly indicated that the United States did not systematically favor domestic suppliers. Indeed, they showed that even though foreign suppliers were very active in illegally pursuing the U.S. market, the United States enforced its measures restricting remote supply of gambling much more frequently against domestic suppliers.

196. This Panel's conclusion of discrimination reflected a failure by the Panel to discharge its responsibility under 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." An objective assessment of the evidence before the Panel could only have led to the conclusion that the United States made a *prima facie* case based on data that it was enforcing its measures against remote supply of gambling against domestic suppliers no less actively than against foreign suppliers, and that Antigua failed to adduce evidence to rebut that case.²⁹¹

²⁹⁰ For example, the United States pointed out to the Panel that "U.S. authorities have limited resources to investigate and prosecute crime, including terrorism and other grave threats" but that "[i]n spite of these competing priorities, the Department of Justice continues to consider illegal gambling a serious crime meriting active investigation and prosecution." First submission of the United States, para. 24.

²⁹¹ *Cf.* Appellate Body Report, *Argentina – Footwear*, para. 61 (in which the Appellate Body recounted the panel's statement that the United States had provided reliable statistical data, and Argentina had not submitted "any affirmative evidence to the contrary." Thus, Argentina had not been able to rebut the *prima facie* case that had been established by the statistics).

197. The Panel similarly failed to make an objective assessment of U.S. law governing remote supply of gambling on horseracing when it found that “the evidence presented to the panel is inconclusive and that the United States has not demonstrated that the [Interstate Horseracing Act (IHA)], 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.”²⁹²

198. The United States conclusively showed that it was the consistent position of the U.S. Government, clearly and officially articulated by the President of the United States upon signing the IHA into law, and consistently maintained since then by the nation’s chief law enforcement agency, that the December 2000 amendments to the IHA did not repeal or amend pre-existing criminal statutes restricting such activity.²⁹³ The United States also showed that it was a “cardinal principle of construction” under U.S. law, as articulated by our Supreme Court, that “repeals by implication are not favored” and that “[t]he intention of the legislature to repeal must be clear and manifest.”²⁹⁴ Antigua did not rebut the U.S. evidence that the IHA did not and could not repeal preexisting criminal laws.²⁹⁵

199. There was thus incontrovertible evidence before the Panel that (1) following the consistent position of the U.S. government, the chief law enforcement agency of the United States (The U.S. Department of Justice) does not regard the IHA as repealing or amending pre-

²⁹² Panel Report, para. 6.600. *See also* Comments of the United States on the Interim Report, paras. 38-39 (commenting on this aspect of the interim report).

²⁹³ *See* First submission of the United States, paras. 33-35; Second submission of the United States, para. 63; Response by the United States to Panel question 21. This interpretation was also confirmed by evidence submitted by Antigua. First submission of the United States, para. 35.

²⁹⁴ *See United States v. Borden*, 308 U.S. 188 (1939) (cited in U.S. Response to Panel Question 21 at n. 18.)

²⁹⁵ In response to U.S. comments on the interim report, Antigua submitted that it had provided contrary evidence on the IHA. *See* Comments of Antigua and Barbuda on U.S. request for review of the interim report, para. 19. However, the evidence cited by Antigua only related to the language of the IHA viewed in isolation; Antigua never rebutted U.S. evidence on the critical issue of whether it is possible under U.S. law for the IHA, as a later-enacted civil statute, to repeal earlier-enacted criminal statutes applicable to the same activity. The evidence submitted by the United States confirms that such an interpretation is neither followed by the U.S. Department of Justice nor possible under prevailing U.S. law.

existing criminal statutes restricting remote supply of gambling services, and (2) as a matter of settled U.S. law regarding statutory construction, any uncertainty about the relationship between the IHA and preexisting federal criminal laws relating to gambling would be resolved in favor of the preexisting laws because of the rule against repeals by implication unless intent to repeal is “clear and manifest.”²⁹⁶

200. Given this evidence of U.S. law and interpretation relating to the IHA, an objective finder of fact would have no alternative but to conclude that the IHA, as amended, did not repeal or amend preexisting laws restricting remote supply of gambling, and therefore cannot be construed as permitting interstate pari-mutuel wagering for horseracing over the telephone or using other modes of electronic communication. The Panel’s finding that the evidence was “inconclusive” reflected a failure by the Panel to discharge its responsibility under 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.”

e. The Appellate Body should find that the relevant U.S. measures meet the requirements of the Article XIV chapeau.

201. In addition to reversing the Panel’s finding against the United States under the Article XIV chapeau for the reasons stated above, the United States respectfully requests the Appellate Body to complete the Panel’s analysis by finding that the Wire Act, the Travel Act (in conjunction with relevant state laws), and the Illegal Gambling Business statute (in conjunction

²⁹⁶ The rule against repeals by implication specifically addresses and resolves the Panel’s concern about “ambiguity as to the relationship between, on the one hand, the amendment to the IHA, and, on the other, the Wire Act, the Travel Act and the Illegal Gambling Business Act.” Panel Report at 6.599. Under that rule, the later statute does not override the earlier law unless there is “clear and manifest” intent that it do so. This means that any ambiguity in the relationship between the later- and earlier-enacted laws would be resolved in favor of the earlier-enacted law (*i.e.*, if there were “clear and manifest” intent there would be no ambiguity). In the words of Mr. Justice Story (a respected early member of the U.S. Supreme Court), there must be “a positive repugnancy between the provisions of the new law, and those of the old.” *Wood v. United States*, 16 Pet. 342, 363 (1842) (quoted in *United States v. Borden*, 308 U.S. 188 (1939) (cited in U.S. Response to Panel Question 21 at n. 18). Since there is none in this case, the earlier enacted statute remains unaffected.

with relevant state laws) meet the requirements of the Article XIV chapeau and are therefore justified under Article XIV.

202. The United States again recalls that the chapeau of Article XIV imposes a requirement that any measure provisionally justifiable under (a) through (e) not be “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.” The purpose of the chapeau of Article XIV is to avoid abuse or misuse of the particular exceptions set forth in Article XIV(a) through (e). Under a proper analysis, the restrictions in the Wire Act, the Travel Act (in conjunction with relevant state laws), and the Illegal Gambling Business statute (in conjunction with relevant state laws) meet both of the key requirements of the chapeau.

i. The U.S. measures are not a means of “arbitrary or unjustifiable discrimination between countries where like conditions prevail”.

203. The United States submitted ample evidence that its relevant measures did not involve any discrimination.²⁹⁷ In addition, the United States provided uncontroverted evidence, discussed above, that U.S. authorities have applied relevant laws more frequently against remote supply of gambling within the United States. Thus there is no evidence of “less favourable treatment ... with respect to the way in which the [measures] are administered” by U.S. prosecutors.²⁹⁸ While it is not possible for prosecutors to pursue 100% of the possible cases that may exist at any given moment, the uncontroverted evidence that relevant measures have been applied against domestic suppliers in the vast majority of cases confirms the absence of “arbitrary and unjustifiable discrimination” against non-U.S. suppliers.

ii. The U.S. measures are not “disguised restrictions on trade in services.”

²⁹⁷ See Second submission of the United States, paras. 59-69, 118; First Submission of the United States, paras. 101-102; Opening statement of the United States at the first Panel meeting, para. 52; Opening Statement of the United States at the second Panel meeting, paras. 61-67.

²⁹⁸ Panel Report, *EC – Asbestos*, para. 8.228.

204. The relevant measures are also not “disguised restrictions on trade in services.” They are, as described above, criminal laws applied by prosecutors for reasons that have nothing to do with protectionism. As the United States emphasized to the Panel, the relevant measures were enacted long before Internet gambling was even thought possible, and for reasons having nothing to do with protection of domestic industry.²⁹⁹ They are applied to protect society from the continuing threats to public order, public morals, and legitimate law enforcement interests (such as the suppression of money laundering and organized crime) posed by remote supply of gambling.³⁰⁰ There is no evidence of a protectionist agenda behind these laws, and the Panel properly rejected that assertion by Antigua in all respects except in the narrow field of horse racing, where its findings and conclusions were erroneous and should be reversed for the reasons described above.

E. The Panel erred in making any finding concerning “practice” as a measure and in concluding that “practice” is a measure that can be challenged “in and of itself.”

205. The Panel in its report engaged in an analysis of what “practice” is “under WT law,” defining it as “a repeated pattern of similar responses to a set of circumstances,” and ended by concluding that: “we consider that ‘practice’ can be considered as an autonomous measure that can be challenged in and of itself.”³⁰¹ In so doing, the Panel erred in two areas.

206. First, the Panel erred in conducting such an analysis at all. As the Panel expressly acknowledged,³⁰² Antigua had not challenged any of the items that the Panel indicated could be considered U.S. “practices.”³⁰³ Indeed, the term “practice” does not appear in Antigua’s request

²⁹⁹ Second submission of the United States, para. 119.

³⁰⁰ Second submission of the United States, para. 119.

³⁰¹ Panel Report, paras. 6.196 -6.197.

³⁰² See Panel Report, para. 6.198 (“Antigua is not challenging these practices ‘as such.’”)

³⁰³ The Panel confirmed that Antigua had only “referred to these practices in its submissions to support its allegations and argumentation that certain laws are inconsistent with the United States’ obligations under the GATS.” Panel Report, para. 6.198. For this reason, the Panel stated that it would “not consider and examine [the items that the Panel indicated could constitute U.S. ‘practice’] as separate, autonomous measures.” Panel Report, para. 6.193.

for a panel, nor does Antigua refer to any “repeated pattern.” The Panel decision to nonetheless conduct an analysis of whether so-called “practice” could constitute a measure subject to challenge as such was therefore not only unnecessary, it was beyond the Panel’s terms of reference. For this reason alone, the Panel’s finding should be reversed.

207. As the Appellate Body has recognized in prior disputes, the DSU does not authorize panels to “make law” by clarifying the obligations of Members “outside the context of resolving a particular dispute.”³⁰⁴ By making findings of law as to a matter not before it, the Panel committed an error.

208. The second area in which the Panel erred was in its conclusion that “practice” is “an autonomous measure that can be challenged in and of itself.”³⁰⁵ Simply said, repeating a response to a particular set of circumstances, or repeatedly applying the same measure, does not somehow create a new and separate “autonomous measure.” Rather, it is just what the definition implies – it is a repeated application of a measure. The United States does not see how applying a measure more than once would somehow give rise to a new, autonomous measure, nor does the Panel provide any explanation at all of its reasoning in this regard.

209. Instead, the Panel simply indicated that its conclusion was based on allegedly similar findings made by the Appellate Body in three prior disputes. However, the Panel has misunderstood or mischaracterized those findings, and they therefore do not support the Panel’s conclusion.³⁰⁶ For example, in *United States – Japan Sunset*, the question before the Appellate Body was whether a policy bulletin issued by U.S. Department of Commerce – which the

³⁰⁴ Appellate Body Report, *United States - Shirts and Blouses*, p. 19. See also Appellate Body Report, *United States - Wheat Gluten*, para. 179 (citing to the *United States - Shirts and Blouses* Appellate Body report for the proposition that panels and the Appellate Body should not “make law” but should only “address those claims which must be addressed in order to resolve the matter in issue in the dispute.”);

³⁰⁵ Panel Report, para. 6.197.

³⁰⁶ The United States notes that while adopted panel and Appellate Body reports are often considered and taken into account by subsequent panels, “they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.” Appellate Body Report, *Japan - Alcoholic Beverages*, p. 14. A panel is therefore not excused from undertaking an “objective assessment” of the factual and legal issues before it simply because a prior panel or the Appellate Body may have considered the same or similar issues in a prior dispute.

Appellate Body termed an “administrative instrument” – could be considered a “measure” for WTO purposes.³⁰⁷ The Appellate Body did *not* have before it – and therefore properly did not address – the question of whether any such thing as a “practice” could be found to be a “measure” subject to challenge “in and of itself.” The same is true of the two other disputes – *United States - Countervailing Measures* and *United States - German Steel* – to which the Panel refers.³⁰⁸

210. In fact, when panels *have* been asked to find that a “practice” of the type described by the Panel – *i.e.* “a repeated pattern of similar responses to a set of circumstances” – constitutes a measure that can be challenged as such, they have uniformly declined.³⁰⁹ As the panel in *US - Steel Plate* correctly noted:

That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a

³⁰⁷ Appellate Body Report, *United States - Japan Sunset*, para. 84.

³⁰⁸ In *United States - Countervailing Measures*, the panel characterized as “methodologies” certain analytical approaches taken by U.S. investigating authorities in twelve specific countervailing duty investigations. See Panel Report, *United States - Countervailing Measures*, para. 2.55. This characterization was not appealed, and the Appellate Body did no more than accept the panel’s characterization. See Appellate Body Report, *United States - Countervailing Measures*, paras. 12-16 (accepting Panel’s characterization but using the term “method” instead of “methodology.”) Moreover, at the panel stage, this issue was also not disputed as the United States focused its argumentation on the substantive issues. Thus, the fact that the panel referred to the analytical approach in this manner, as did the Appellate Body thereafter, provides no guidance as to how either a panel or the Appellate Body should answer the question of whether there is any such thing as a “practice” that can independently be challenged as a measure, and whether, if it can be so challenged, it can mandate a breach of a particular obligation.

With respect to *United States - German Steel*, the Panel appears to concede that the Appellate Body merely recognized that complaining parties challenging another party’s *municipal law* as such could submit evidence, including “the pronouncements of domestic courts on the meaning of such as laws, the opinions of legal experts and the writings of recognized scholars,” to establish the scope and meaning of the law. Appellate Body Report, *United States - German Steel*, para. 157. The Appellate Body was not asked to find, and did not find, that any alleged “practice” was subject to challenge as such.

³⁰⁹ See Panel Report, *United States - Steel Plate*, para. 7.22; Panel Report, *United States - Export Restraints*, para. 8.126.

conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice.³¹⁰

211. Thus, in reaching a conclusion that “practice” can be considered an “autonomous measure that can be challenged in and of itself,”³¹¹ the Panel relied on erroneous characterizations of prior findings with respect to what constitutes a “measure” for WTO purposes. Thus, even if the Panel had before it a challenge to a “practice” – which it did not – the Panel’s legal conclusion would have been in error.

212. For the foregoing reasons, the United States respectfully requests that the Appellate Body reverse the Panel’s finding that so-called “practice” is an autonomous measure that is subject to challenge as such.

III. CONCLUSION

213. For all of the reasons discussed above, the United States respectfully requests that the Appellate Body find that the findings and conclusions of the Panel listed in the U.S. Notice of Appeal and further discussed herein are in error.

³¹⁰ Panel Report, *United States - Steel Plate*, para. 7.22.

³¹¹ Panel Report, paras. 6.196 -6.197.

ANNEX I

Antigua's minimal discussion of U.S. federal and state laws as to which the Panel made adverse findings

Antigua's submissions contained only minimal references to the three federal laws and four state laws as to which the Panel made adverse findings. To show the extent to which Antigua failed to provide argumentation concerning these measures, the following summary lists instances where Antigua *explicitly* referred to the statute in question. Unlike the Panel's summary,¹ this summary does not credit Antigua with having "discussed" a statute when it made only a vague reference to many laws, or referred to an exhibit that happened to refer to a particular law. Rather, this summary shows instances where Antigua explicitly mentioned the specific law as it was presenting its argumentation to the Panel.

As shown below, Antigua's explicit references to the federal laws in its submissions were rare and scattered, and Antigua made no explicit references to state laws. Moreover, examination of these references reveals no point at which Antigua argued that any of these specific laws violated Article XVI of the GATS.

Wire Act

First Submission:	Mentioned once (in a quotation) ² in 66 pages
Opening Statement (1st Panel Meeting):	Mentioned four times ³ in 35 pages
Closing Statement (1st Panel Meeting):	Never mentioned
Second Submission:	Never mentioned
Responses to Questions (1st Meeting):	Mentioned in three responses ⁴
Opening Statement (2d Meeting):	Mentioned twice ⁵ in 27 pages
Closing Statement (2d Meeting):	Never mentioned
Responses to Questions (2d Meeting):	Never mentioned

¹ Panel Report, para. 6.209 and Annex E.

² First submission of Antigua and Barbuda, para. 134.

³ Opening statement of Antigua and Barbuda at the first panel meeting, paras. 21-22.

⁴ Responses of Antigua and Barbuda to Panel questions 12, 19 (n. 127), and 29.

⁵ Opening statement of Antigua and Barbuda at the second Panel meeting, paras. 64, 69 (asserting, without explanation, that the Wire Act would forbid placing gambling computers in bars and mentioning the U.S. defense of the Wire Act under Article XIV).

Travel Act

First Submission:	Mentioned once (in a quotation) ⁶ in 66 pages
Opening Statement (1st Panel Meeting):	Mentioned once ⁷ in 35 pages
Closing Statement (1st Panel Meeting):	Never mentioned
Second Submission:	Never mentioned
Responses to Questions (1st Meeting):	Mentioned in one response ⁸
Opening Statement (2d Meeting):	Mentioned once ⁹ in 27 pages
Closing Statement (2d Meeting):	Never mentioned
Responses to Questions (2d Meeting):	Never mentioned

IGB Statute

First Submission:	Mentioned once (in a quotation) ¹⁰ in 66 pages
Opening Statement (1st Panel Meeting):	Mentioned once ¹¹ in 35 pages
Closing Statement (1st Panel Meeting):	Never mentioned
Second Submission:	Never mentioned
Responses to Questions (1st Meeting):	Mentioned in one response ¹²
Opening Statement (2d Meeting):	Mentioned once ¹³ in 27 pages
Closing Statement (2d Meeting):	Never mentioned
Responses to Questions (2d Meeting):	Never mentioned

La. Rev. Stat. Ann. § 14:90.3

First Submission:	Never mentioned
Opening Statement (1st Panel Meeting):	Never mentioned
Closing Statement (1st Panel Meeting):	Never mentioned
Second Submission:	Never mentioned
Responses to Questions (1st Meeting):	Never mentioned
Opening Statement (2d Meeting):	Never mentioned

⁶ First submission of Antigua and Barbuda, para. 134.

⁷ Opening statement of Antigua and Barbuda at the first panel meeting, para. 21.

⁸ Response of Antigua and Barbuda to Panel question 12.

⁹ Opening statement of Antigua and Barbuda at the second Panel meeting, paras. 69 (mentioning the U.S. defense of the Travel Act under Article XIV).

¹⁰ First submission of Antigua and Barbuda, para. 134.

¹¹ Opening statement of Antigua and Barbuda at the first panel meeting, para. 21.

¹² Response of Antigua and Barbuda to Panel question 12.

¹³ Opening statement of Antigua and Barbuda at the second Panel meeting, paras. 69 (mentioning the U.S. defense of the IGB statute under Article XIV).

Closing Statement (2d Meeting): Never mentioned
Responses to Questions (2d Meeting): Never mentioned

Mass. Ann. Laws, chapter 271,§ 17A

First Submission: Never mentioned
Opening Statement (1st Panel Meeting): Never mentioned
Closing Statement (1st Panel Meeting): Never mentioned
Second Submission: Never mentioned
Responses to Questions (1st Meeting): Never mentioned
Opening Statement (2d Meeting): Never mentioned
Closing Statement (2d Meeting): Never mentioned
Responses to Questions (2d Meeting): Never mentioned

S.D. Codified Laws, § 22-25A-8

First Submission: Never mentioned
Opening Statement (1st Panel Meeting): Never mentioned
Closing Statement (1st Panel Meeting): Never mentioned
Second Submission: Never mentioned
Responses to Questions (1st Meeting): Never mentioned
Opening Statement (2d Meeting): Never mentioned
Closing Statement (2d Meeting): Never mentioned
Responses to Questions (2d Meeting): Never mentioned

Utah Code Ann. § 76-10-1102(b)

First Submission: Never mentioned
Opening Statement (1st Panel Meeting): Never mentioned
Closing Statement (1st Panel Meeting): Never mentioned
Second Submission: Never mentioned
Responses to Questions (1st Meeting): Never mentioned
Opening Statement (2d Meeting): Never mentioned
Closing Statement (2d Meeting): Never mentioned
Responses to Questions (2d Meeting): Never mentioned