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

WT/DS285

Closing Statement of the United States at the Second Substantive Meeting of the Panel

January 27, 2004

1. Mr. Chairman, members of the Panel, before offering our very brief closing remarks, the United States would like to take a few minutes to rebut some of the assertions made yesterday by Antigua.

2. We begin with six points on the burden of proof:

- First, Antigua continues to insist that the United States has conceded or agreed to propositions with which the United States in fact disagrees.[1] 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.

- Second, Antigua pleads once again that the task of making its *prima facie* case in this dispute regarding specific measures is too onerous, and seems to suggest that the Panel should somehow waive this fundamental legal requirement for Antigua.[2] However, it is Antigua itself – not the United States – that established through its own panel request the terms of reference in this dispute, and thus the extent of its own burden of proof. If Antigua now finds it impossible to sustain this burden, it only has itself – not the United States – to blame.

- Third, on a related note, Antigua appears to assert that its status as a developing country should exempt it from having to make a *prima facie* case.[3] The United States has high regard and great sympathy for the concerns of developing countries, and welcomes their use of the dispute settlement mechanisms of the WTO. However, we question whether Antigua's developing country status has been responsible for its decision not to offer a *prima facie* case. Antigua has obtained the assistance in this dispute of a team of U.S. and European counsel who are experts on U.S. and WTO law, as well as a team of U.S. and European academic advisers. Moreover, since Antigua is an English-speaking

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[1] Antigua's second opening statement (January 26, 2004), paras. 11, 12, 15.

[2] *Id.*, para. 13.

[3] *Id.*, para. 14.

country, we fail to see the relevance of Antigua's concerns about language barriers for developing countries. And finally, and most fundamentally, we question whether basic notions of due process would ever permit a downward or upward adjustment in the burden of proof based on a Member's level of development.

- Fourth, Antigua criticizes the United States for allegedly offering U.S. assertions as proof "in and of themselves."[4] The United States has provided evidence to back its statements at every turn, and the record reflects that fact. Ironically, it is Antigua that is trying to evade its burden of proof by using U.S. statements as proof "in and of themselves" in this dispute – namely the USITC document and U.S. statements to the DSB.[5]

- Fifth, Antigua nonetheless claims to have met the standard for a *prima facie* case articulated in *German Steel* by merely providing the text of domestic laws – to the tune of a thousand pages or more – and short summaries of some of those laws.[6] But this is not enough. The standard as articulated in *German Steel* calls for information that is necessary to engage in an analysis of the meaning, application, interpretation, and interaction of specific provisions of domestic law. The Appellate Body has repeatedly confirmed – for example in *India–Patents* and *U.S.–Sunset (Japan)* – that this means an analysis of "specific provisions" of U.S. law – not merely provisions and short summaries of the laws.

- Sixth, in Antigua's view, a case built on generalizations about U.S. law meets the burden of proof because the purpose of dispute settlement is not to analyze domestic law or "remove specific 'measures' of the defendant."[7] Nothing could be more inaccurate. The DSU clearly states in Article 3.7 that, in the absence of a mutually agreed solution, "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." This just further confirms that Antigua's burden relates to specific measures of U.S. law, not generalizations about U.S. law.

3. Let me now offer two observations on Antigua's arguments regarding the U.S. Schedule:

- First, at paragraph 22 of its oral statement, Antigua quoted the U.S. argument in *Mexico–Telecom* that "the ordinary meaning of Mexico's Schedule speaks of itself and should control." That statement applies equally to the U.S. schedule – its ordinary meaning speaks for itself and should control. That ordinary meaning does not include gambling services, and does not include references to the CPC. The same text-based

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[4] *Id.*, para. 7.

[5] *See* Antigua responses to Panel questions, responses to questions 2 and 9.

[6] Antigua's second opening statement, para. 16.

[7] *Id.*, para. 18.

approach applies equally to sectors that were not inscribed in the U.S. schedule, such as 10.E "Other." Notwithstanding Antigua's arguments to the contrary,[8] the United States cannot be found to have made a commitment in subsector 10.E when it has declined to inscribe that subsector while simultaneously inscribing other subsectors under sector 10.

- Second, at paragraphs 26-28 of its second opening statement, Antigua appears to concede that the definition of "sporting" includes gambling. It argues, however, that this meaning is somehow not correct, apparently because Antigua intuits, without any basis, that "sporting" in the U.S. schedule is a gerund (or "verbal noun") rather than an adjective. Moreover, according to Antigua, a word used only once in a document can only have one meaning, and in this case that meaning cannot encompass gambling.[9] In the view of the United States, these unfounded assumptions represent nothing more than an attempt to artificially limit the ordinary meaning of "sporting."

4. On the issue of likeness of services, let me add four further observations on Antigua's remarks yesterday:

- First, Antigua is unable to persuasively rebut *its own evidence* on the differences in customers and customer experiences that distinguish remote and non-remote gambling. Bear Stearns has observed that Internet and land-based customers were not the same, to which Antigua replies, implausibly and without any basis, that this really means that the two services are competing for the same customers. Moreover, Antigua's argument that gambling is only about the "experience of winning or losing" without regard to the recreational impact of remote or non-remote settings contradicts the statements of its own consultants quoted at length in the U.S. second submission.

- Second, Antigua implies in paragraph 27 of its oral statement that the United States somehow endorses statements by Antigua's consultants that the Internet poses a lesser health risk than other forms of gambling. That is incorrect. In line with the views of the respected American Psychiatric Association, the United States continues to view Internet gambling as posing a greater health risk. And a reasonable observer could hardly deny that the Internet and other remote media propagate this risk to large new populations of potential victims.

- Third, Antigua continues to make assertions about lotteries and other distinct U.S. gambling services without having proven likeness between these particular services and suppliers and any Antiguan services and suppliers. For example, yesterday Antigua asserted that lotteries target underage players, citing the example of an Iowa lottery

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[8] *See id.*, para. 20.

[9] *Id.*, para. 28.

form.[10] In fact, the Iowa lottery, like other U.S. lotteries, is age-restricted (in Iowa players must be 21). Had Antigua examined Iowa law, it would have found that Iowa regulations require a seven-day suspension of the license of any retailer that sells a ticket to an underage player, followed by 30 days for the second offense within one year, followed by one year for the third offense within one year.[11] U.S. state lotteries enforce age restrictions, and in many cases offer special programs to curb underage gambling.[12] Moreover, members of the National Association of State and Provincial Lotteries subscribe to advertising restrictions designed to ensure that lottery advertising does not appeal to persons under the legal purchase age,[13] all of which is far more than Antigua could possibly do to limit underage Internet gambling, given the lack of effective age verification technologies.

- Fourth, Antigua insists that it does not ask that its services and suppliers be treated more favorably than U.S. services and suppliers.[14] Yet at the same time, Antigua asks that the United States allow remote services and suppliers to operate cross-border from Antigua when they are not allowed to do so domestically.[15] It also asks that the United States engage in the development of international standards to permit remote supply[16] when no such standard permits such activity domestically. In short, these requests by Antigua make clear that it is in fact asking that its services and suppliers be allowed to do things that domestic services and suppliers cannot do.

5. At this time, I'd like to add one more point. With regard to the Canadian Broadcasting Corporation program that the United States provided on video tape, to paraphrase Shakespear, Antigua doth protest too much.[17] Antigua has submitted dozens of journalistic reports as evidence, and this one submitted by the United States is no different; it is entitled to the same evidentiary weight. If anything, it has greater probative value because in the video the actors speak for themselves.

6. Having made those points, I would like to hand the floor over to my colleague from the Department of Justice to comment on some of Antigua's statements about U.S. criminal law enforcement.

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[10] *Id.*, para. 59.

[11] Iowa Admin. Code Sec. 531–12.12(4), *available at* http://www.legis.state.ia.us/Rules/Current/iac/531/53112/53112.pdf.

[12] *See* http://www.naspl.org/support.html; http://www.naspl.org/programs.html.

[13] *See* http://www.naspl.org/nasplad.html.

[14] Antigua's second opening statement, para 5.

[15] *See id.*, para. 67.

[16] *See id.*, para. 82.

[17] *See* Antigua's second closing statement (January 27, 2004), paras. 1 and 2.

7. Mr. Chairman and distinguished Panel members, thank you for the opportunity to set the record straight regarding certain statements that have been made by Antigua.

8. As career prosecutors with the U.S. Department of Justice, we are strangers to the WTO forum. The issues under discussion are, however, of vital importance to the Justice Department and all of U.S. law enforcement. Enforcement of our gambling laws is a vital component in our battle against organized crime. For us, the issue is not an economic one. We are generally unfamiliar with trade and the vocabulary of the WTO agreements. Instead, what matters to us is developing evidence and prosecuting those who violate U.S. criminal laws.

9. Let me address four general areas:

- First, in various paragraphs of its second opening statement yesterday, including paragraphs 52, 61, 78, and 83, Antigua states that we enforce our laws selectively, prosecuting only some criminals so as to protect a domestic gambling industry. Paragraph 52 is particularly troubling – suggesting that despite clear evidence of money laundering, organized criminal activity and fraud involved in domestic gambling, the United States does not prosecute domestic illegal gamblers. Nothing could be further from the truth. Yesterday, we described the hundreds of prosecutions involving illegal gambling. However, only a handful of illegal gamblers based outside the United States have been prosecuted, such as Jay Cohen who, as the Panel knows, is currently in prison.

- Second, in response to Antigua's statements about international cooperation, we would welcome Antigua's continued assistance in the investigation and prosecution of money launderers and others who violate U.S. law. In particular, we would note the assistance provided by Antiguan law enforcement in turning over records of EuroFed Bank, which Pavel Ivanovich Lazarenko and others used to launder funds. While it is not true that the United States has "refused" to pursue international requests for assistance as suggested in paragraphs 47 and 82 of Antigua's statement, there is a basis for a reluctance to do so if the case involves Internet gamblers. For example, Antigua publically took a position contrary to the United States in the prosecution of Jay Cohen by filing an amicus brief in support of Mr. Cohen in the U.S. Supreme Court. In addition, in its licensing of William Scott, a convicted felon, the procedures that apparently were not followed is troubling. These matters suggest that requests for assistance would not be fruitful if the investigation involves or is related to an Internet gambler.

- Third, Antigua suggests in paragraph 50 that it effectively screens persons before granting them a license to operate an Internet gambling site. The lack of due diligence displayed before granting William Scott a license indicates otherwise. While the due diligence requirement may be the law in theory, Antigua's practice has sometimes diverged from this theory. This is a similar type of problem that was observed in the 1990s, when some of Antigua's offshore banks were found to be engaged in money laundering and persons

of questionable character – some of whom were later convicted of fraud and money laundering in U.S. courts – had been granted licenses to operate Antiguan banks. There is a similar concern regarding Antigua's money laundering laws, which I understand have resulted in no convictions since they were enacted and the advisory issued by the U.S. Treasury was withdrawn.

- Mr. Chairman, the delegate from Antigua referenced the report issued by the U.S. Department of State in March 2003 as evidence that the U.S. government has no concerns with Antigua.[18] The delegate summarized the report. However, I'll read a quote from the first sentence of that report on page 209 under the heading of Antigua and Barbuda: "Antigua and Barbuda has comprehensive legislation in place to regulate its financial sector, but it remains susceptible to money laundering because of its loosely regulated offshore financial sectors and its Internet gaming industry." As reflected in the State Department report, the issue is not whether Antigua has laws on the books, the question is whether those laws are adequately enforced.

- We are also encouraged by the statement of the delegate of Antigua that Mr. Scott may no longer be operating an internet gambling site in Antigua.[19] Our understanding that he operated the business as late as 2003 was based upon a document in the public record cited in footnote 28 of our second opening statement. We would, of course, be interested in Antigua's views on how he got licensed in the first place. We continue to be concerned about the operation of gambling businesses through third parties as those cases have been prosecuted in the United States where a person who cannot be licensed continues to run a gambling operation through third parties.

- Fourth and finally, the *Cabazon* case cited at paragraph 73 of Antigua's second opening statement affords no support for Antigua's attempts to downplay the threat of organized crime. That case rests on the principle that "Indian tribes retain attributes of sovereignty over both their members and their territory and that tribal authority is dependent on, and subordinate to only the Federal Government, not the States." It was in that narrow context of limited state power that the Court held that the State of California's interest in keeping charitable bingo games from being infiltrated by organized crime was not sufficient to override the Federal and tribal interests in promoting self-sufficiency by the tribe. The court did not in any way conclude that organized crime is not a serious problem in relation to gambling – and certainly not in relation to forms of gambling more serious than charitable bingo. On the contrary, the United States already cited Supreme Court precedent in its first submission confirming the dangers of organized crime in

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[18] *Id.*, para. 4.

[19] *Id.*, para. 5.

relation to gambling.

10. Mr. Chairman, as the U.S. opening statement made clear, remote gambling presents substantial risks of money laundering, primarily in the layering and integration stages. My office is very concerned about this activity. And I can assure you that our prosecution decisions are made based on the evidence – not on considerations of restricting cross-border trade.

11. Mr. Chairman, members of the Panel, now that we have shared our views on particular issues in Antigua's statement yesterday, the United States offers a few closing remarks.

12. We have said all we need to say about the "total prohibition" and Antigua's failure to make its *prima facie* case in this dispute.

13. The legal issues in this dispute boil down to questions of treaty interpretation. Over and over again, the United States has argued that these issues must be resolved through a textual analysis of the text of the GATS.

- Most obviously, we have asked that the Panel scrutinize the ordinary meaning of the text of U.S. commitments, while Antigua has called upon extrinsic sources in an effort to read extrinsic meanings into those commitments.

- We have also asked that the Panel examine the text of Article XVI, while Antigua has asked that the Panel read in concepts that are simply not there in the text of the Agreement, such as a guarantee of market access under Article XVI:1 and a "prohibition on prohibitions" under Article XVI:2. Antigua's one concession to the text of Article XVI:2 is an improper reading of "whether" that is plainly inconsistent with the use of the term in the analogous provision of Article XI of the GATT 1994.

- We have asked that the Panel examine the text of Article XVII, which refers to services *and* suppliers, as well as the contrast in the text of footnote 10 to the same Article, which refers to services *or* suppliers. Ignoring the text, however, Antigua asks that the Panel read these two provisions in exactly the same way.

14. On these and other issues, Antigua is asking the Panel to deviate from a textual analysis of the GATS, and import meanings and concepts not found in the Agreement. What Antigua is proposing is not a proper application of the customary rules of treaty interpretation, as required by Article 3.2 of the DSU. Those rules, properly applied, support the interpretations advanced by the United States throughout this dispute. The meaning of every provision of the GATS lies there in the text, even if Antigua refuses to acknowledge it.

15. With that observation, the United States would like to thank the Panel again for its time and consideration of our arguments.