**BEFORE THE**

**WORLD TRADE ORGANIZATION**

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

WT/DS285

**EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES**

**November 14, 2003**

## INTRODUCTION

1. Antigua and Barbuda ("Antigua") claims that one or more unspecified U.S. measure(s) within the scope of the Panel's terms of reference affect the remote supply of gambling services by Antiguan service suppliers to U.S. consumers in a manner inconsistent with certain alleged U.S. commitments or obligations relating to cross-border supply of those services under the *General Agreement on Trade in Services* ("GATS").

2. Antigua insists on targeting all its claims in this dispute exclusively against the notion of a "total prohibition" on cross-border supply of gambling. That notion has no legal status under U.S. law. Yet Antigua flatly refuses to explore the real measures that might give substance to that notion, and Antigua purposefully ignores anything those measures might say or mean.

3. The United States submits that Antigua thus fails to establish anything approaching a *prima facie* case that any specific U.S. measure applicable to the cross-border supply of gambling is inconsistent with U.S. WTO obligations. Antigua bears the burden of proving, through evidence and argumentation, the scope and meaning of specific U.S. measures. By flatly refusing to sustain that burden, it leaves the Panel with no choice but to reject Antigua's claims in their entirety.

4. The United States goes on to show, in as much detail as Antigua's vague allegations allow, that even if the Panel could set aside Antigua's overall failure of proof, Antigua fails in any event to make out claims as to the existence of relevant commitments or the inconsistency of specific U.S. measures with particular provisions of the GATS. But the United States stresses that Antigua's ill-conceived strategy of asking the Panel to ignore the actual content of U.S. law should prevent the Panel from reaching such issues.

## STATEMENT OF FACTS

5. **Recent growth in the remote supply of gambling raises serious regulatory concerns for the Government of the United States.** New technologies, including high-speed telecommunications and the Internet, have facilitated explosive growth in remote supply of gambling over the past decade. This dramatic increase, whatever its origin, has raised serious regulatory and law enforcement concerns in the United States.

6. <u>Gambling has been one of the staple activities of organized crime syndicates.</u> Law enforcement authorities in North America have seen evidence that organized crime plays a growing part in remote supply of gambling, including Internet gambling.

7. <u>Remote supply gambling businesses provide criminals with an easy vehicle for money laundering,</u> due in large part to the volume, speed, and international reach of the transactions involved, as well as the offshore locations of most remote suppliers.

8. <u>Gambling is also linked to other types of criminal activities, such as fraud schemes.</u> The potential for fraud is heightened when gambling opportunities are supplied from remote

locations. A prominent example is the problem of fraudulent lotteries, many of which are offered to remote purchasers.

9. The availability of commercial gambling in homes, schools, and other environments where it has traditionally been absent raises special concerns, including concerns relating to the protection of the young. Young people use the Internet more frequently than any other segment of the population, and make easy targets for remote suppliers of gambling. The American Psychiatric Association has also warned that "[y]oung people are at special risk for problem gambling and should be aware of the hazards of this activity, especially the danger of Internet gambling, which may pose an increased risk to high school and college-aged populations."

10. Supply of gambling into private homes, workplaces, and other environments creates additional health risks. The Council on Compulsive Gambling reports that five percent of all persons who engage in gambling become addicted to it. Dr. Howard J. Schaffer of the Harvard Medical School's Division on Addictive Studies compares Internet gambling to "new delivery forms for addictive narcotics," and a U.S. Senate committee has concluded that "Internet gambling threatens to expand the number of addicted gamblers."

11. **Antigua's statement of facts contains misleading statements, inaccuracies, and irrelevant material.** The statement of facts provided in Antigua's first submission is misleading, inaccurate, or irrelevant in numerous respects. Many of the disputable facts appear to have little bearing on the substance of this proceeding. For the sake of brevity and clarity, the United States focuses on the most broadly misleading elements of Antigua's statement.

12. The United States actively enforces its laws against illegal gambling. Antigua falsely asserts that the United States makes "little effort" to effectively restrain domestic illegal gambling. In fact, illegal gambling activity is in no way sanctioned by the United States, and arrest figures for illegal gambling remain impressive. Additionally, Antigua's data do not appear to include the many cases in which gambling was one of several charges, but not the main charge. For example, many cases against organized crime figures include gambling charges.

13. Legalized gambling in the United States is confined to particular locations and operates under the most rigorous regulatory constraints. Gambling in the United States is permitted only within particular locations and facilities designated by law, and only in forms that the United States believes can be effectively regulated. Where it exists, it operates under the most rigorous regulatory constraints. As the National Gambling Impact Study Commission ("NGISC") observed, "nowhere is gambling regarded as merely another business, free to offer its wares to the public." Instead, gambling "is the target of special scrutiny by governments in every jurisdiction where it exists."

14. The United States is puzzled by the breadth of Antigua's description of the gambling market in the United States. Antigua states that it licenses only two types of cross-border gambling and betting – "virtual casinos" and sports betting ("sportsbook") operators, with the

former supplied by Internet and the latter by Internet and telephone. These would therefore appear to be the only Antiguan services and service suppliers at issue in this dispute.

15. Casino gambling. Antigua highlights two locations where regulated casino gambling is available – Nevada and Atlantic City – but fails to acknowledge the extreme stringency with which officials in these and other U.S. locations exercise regulatory control over gambling. Antigua also fails to cite any example of a "virtual casino" operating legally anywhere in the United States.

16. Lotteries. Antigua's description of lotteries in the United States is misleading. There is no nationwide lottery industry; rather, there are 39 state-operated and -controlled lotteries, each of which offers services solely within the borders of the state that authorized it. All are controlled by stringent legislation, rules and procedures. While there are some lottery games that are offered by lottery authorities of more than one state, they are not offered by remote supply.

17. Parimutuel wagering. Antigua's description of parimutuel wagering mistakenly states that the Interstate Horseracing Act ("IHA") permits betting on horse races over the Internet. The IHA does not provide legal authority for any form of Internet gambling. The Department of Justice has repeatedly affirmed the view that the IHA does not override preexisting criminal laws applicable to Internet gambling and other forms of remote gambling.

18. Sports wagering. Antigua identifies no examples of the legal offering of sportsbook services outside Nevada. Nevada regulators have imposed stringent precautions to ensure that sportsbook services offered by computer and telephone in southern Nevada are provided only within the immediate vicinity, and not through Internet gateways accessible to the general public.

19. Antigua's attempts to regulate gambling and money laundering cannot address basic concerns relating to remote supply of gambling. In fact, such regulation is infeasible. Children have ready access to payment instruments, and no technology has yet been developed to enable constraints on Internet gambling even approaching those that are possible in other settings where gambling can be confined and access to it strictly controlled.

## ARGUMENT

20. **Antigua has failed to make a *prima facie* case that any specific U.S. measure is inconsistent with WTO obligations.** The United States recalls the Appellate Body's observation that "...we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof." Rather than providing an analysis of specific U.S. laws as they relate to gambling, Antigua is asking this Panel to accept a *mere assertion* as to the effect of such laws – that they represent a "total prohibition" on cross-border gambling – as proof that the United States is in violation of its WTO obligations.

21. Antigua has refused to provide the Panel with the text of actual laws or regulations, and the reasons for why it views such laws and regulations to be inconsistent with the GATS. Simply put, Antigua has not provided evidence and argumentation regarding specific measures at issue. As the United States pointed out in its request for a preliminary ruling, a party cannot advance a *prima facie* case without linking its evidence and argumentation to some specific measure(s), and a mere assertion is not itself a measure.

22. As the complainant, Antigua bears the burden of establishing a *prima facie* case demonstrating that the United States has adopted specific measure(s) and that the measure(s) are inconsistent with obligations that the United States has assumed as a Member of the WTO. As the Appellate Body has consistently found, the burden of proof in WTO dispute settlement proceedings generally rests on the complainant, which must make out a *prima facie* case by presenting sufficient evidence and argumentation to create a presumption in support of its claim. A respondent's measures – such as the gambling-related measures of the United States at issue in this proceeding – must be treated as WTO-consistent until proven otherwise.

23. In *U.S. – German Steel*, the Appellate Body found that a party making a claim regarding another party's municipal law "bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion." The Appellate Body went on to state that "[s]uch evidence will typically be produced in the form of the text of the relevant legislation or legal instruments," and "may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars." Antigua has failed to provide such evidence.

24. Ignoring the most basic burden of proof requirements, Antigua goes so far as to insist that it is under no obligation to adduce evidence as to specific U.S. laws or regulations. Antigua is mistaken. As the Appellate Body found in *India - Patents,* where the measure alleged to be in breach took the form of domestic legislation, an examination of relevant provisions of such a law is essential to determining whether a Member has complied with its obligations. Conducting such an examination necessarily means that a panel or the Appellate Body "must look at *the specific provisions"* of domestic law. Antigua, however, has flatly refused to say exactly which provisions it views as relevant. Indeed, it has neither provided the text of, nor offered evidence or argumentation as to the meaning of, a single word of any U.S. law or regulation restricting gambling. This represents a total failure of proof.

25. Antigua misunderstands the U.S. position on this failure of proof, calling it an "argument that the Panel cannot investigate in the aggregate the impact of a series of individual laws." In fact, panels have often examined claims based on the combined effect of two or more measures, but have correctly approached such claims by first examining each specific measure that allegedly contributes to a combined effect.

26. The panel in *U.S.–Export Restraints* confronted a similar claim regarding the combined effect of several U.S. measures. Noting that Canada's argument related to measures "taken together," the panel concluded that it would "first analyse them separately, both in respect of the status and the effect of each under US domestic law, and in respect of whatever each says concerning export restraints." Antigua thus bears the burden of detailing precisely how each individual measure at issue operates under U.S. municipal law.

27. Antigua then bears the further burden of detailing how, under U.S. municipal law, these individual measures operate together to give rise to the cumulative effect that Antigua is alleging is inconsistent with the GATS. For example, the *Japan – Film* panel found that, "to the extent that the United States claims that various 'measures' . . . set in motion policies which are said to have a complementary and cumulative effect . . . we consider that it is for the United States to provide this Panel with a detailed showing of how these alleged 'measures' interact with one another in their implementation so as to cause effects different from, and additional to, those effects which are alleged to be caused by each 'measure' acting individually."

28. Antigua's staunch refusal in this dispute to provide evidence and argumentation relating to each relevant individual measure, as well as to the interaction between the measures under municipal law that supposedly results in Antigua's claimed collective effect, makes it impossible for Antigua to credibly assert that it has sustained its burden of proof in this dispute.

29. Antigua explicitly seeks to shift its burden of proof onto the United States. It offers no basis for doing so except the complexity of U.S. law – an excuse that the Appellate Body has already rejected as a ground for allocating the burden of proof.

30. **Antigua has failed to prove the existence of a U.S. commitment relating to gambling measures.** Antigua has failed to explain why any particular U.S. gambling measure(s) that might be relevant in this dispute apply to services or service suppliers operating in a specific services sector inscribed in the U.S. schedule to the GATS. Instead, Antigua simply asserts that all gambling falls within "other recreational services," or possibly within "entertainment services," and that the United States has made commitments in its schedule under "other recreational services" and "entertainment services." By refusing to offer argumentation as to specific measures, however, Antigua has denied the Panel any means to examine whether the United States has made any relevant sectoral commitments under the GATS.

31. <u>Antigua has incorrectly interpreted the U.S. schedule to the GATS.</u> Antigua alleges that a U.S. commitment for gambling can be found within sector 10 of the U.S. Schedule (Recreational, Cultural, and Sporting Services). Even assuming *arguendo* the possible relevance of sector 10, Antigua's claims to find there a U.S. commitment for cross-border supply of gambling services rely on the Services Sectoral Classification List ("W/120") and its references to the UN Provisional Central Product Classification ("CPC"). These arguments improperly treat W/120 as an agreement or instrument made in connection with the conclusion of the GATS under the customary rules of interpretation of public international law reflected in Article 31(2)(a) or

31(2)(b) of the *Vienna Convention on the Law of Treaties*. In fact W/120 is part of the negotiating history of the GATS, which is at best a supplementary means of interpretation.

32. The context for the U.S. schedule includes other Members' schedules. Accordingly, the proper context for the U.S. schedule includes the fact that some Members based their schedules, or parts of them, on the CPC, while others did not. The negotiating history of the GATS confirms that while Members were encouraged to follow the broad structure of W/120, it was never meant to bind Members to the CPC definitions, nor to any other "specific nomenclature." Because the United States did not bind itself to, or reference or rely on, the CPC in the text of its schedule, the CPC definitions cannot control the interpretation of the U.S. schedule.

33. The question of whether to tie commitments of the United States or any other Member to CPC definitions was a matter for negotiations, the answer to which should not be imposed *post hoc* through dispute settlement. To do so would contradict the principles relied upon by the Appellate Body in *EC–LAN,* where it found, with respect to a GATT schedule, that "any clarification of the scope of tariff concessions that may be required during the negotiations is a task for all interested parties." The reasoning in *EC–LAN* is equally applicable to negotiations over services schedules. The terms of the U.S. offer, and of certain other Members' offers, were defined without reference to the CPC. All Members agreed to those schedules, and did so with full awareness that some parties had explicitly chosen to bind themselves to the CPC and others had not.

34. <u>A proper interpretation of the U.S. schedule, without recourse to the CPC, would show that the United States made no commitment for measures affecting gambling services.</u> Because of the absence of a textual basis for referring to the CPC, the legal definition of the scope of a non-CPC commitment must be deduced through application of customary rules of treaty interpretation. Antigua's allegations regarding a possible U.S. commitment for gambling services rely on sectors 10.A and 10.D of the U.S. schedule to the GATS. The relevant text makes no explicit reference to gambling services. It reads as follows:

| 10. | RECREATIONAL, CULTURAL, & SPORTING SERVICES | | | | |
|---|---|---|---|---|---|
| A. | ENTERTAINMENT SERVICES (INCLUDING THEATRE, LIVE BANDS AND CIRCUS SERVICES) | 1)<br>2)<br>3)<br>4) | None<br>None<br>None<br>Unbound, except as indicated in the horizontal section | 1)<br>2)<br>3)<br>4) | None<br>None<br>None<br>None |
| . . . | | | | | |
| D. | OTHER RECREATIONAL SERVICES (except sporting) | 1)<br>2)<br>3)<br>4) | None<br>None<br>The number of concessions available for commercial operations in federal, state and local facilities is limited<br>Unbound, except as indicated in the horizontal section | 1)<br>2)<br>3)<br>4) | None<br>None<br>None<br>None |

35. The ordinary meaning of "recreational" is "[o]f or pertaining to recreation; used for or as a form of recreation; concerned with recreation." Recreation is "[a]n activity or pastime pursued,

esp. habitually, for the pleasure or interest it gives." The ordinary meaning of "entertainment" is "[t]he action of occupying a person's attention agreeably; amusement" or "[a] thing which entertains or amuses someone."

36. With regard to the "except sporting" notation in sector 10.D of the U.S. schedule, the ordinary meaning of "sporting" according to the *New Shorter Oxford English Dictionary* is "[t]he action of sport," as well as "participation in sport; amusement; recreation;" and "[i]nterested in or concerned in sport; . . . a person interested in sport from purely mercenary motives . . . [n]ow *esp[ecially]* pertaining to or interested in betting or gambling" (original emphasis). "Sporting" is defined in *Merriam-Webster's Collegiate Dictionary* as "of, relating to, used, or suitable for sport" or "of or relating to dissipation *and esp[ecially] gambling*" (emphasis added). The ordinary meaning of "sporting" in "except sporting" thus encompasses gambling.

37. Based on the ordinary meaning of the words "recreational," "entertainment," and "sporting," it is impossible to conclude that gambling and betting services must be considered to fall within sector 10.A "entertainment" or sector 10.D "recreational" services in the U.S. schedule. Moreover, Antigua has not explained why it thinks gambling services should fall within the "ordinary meaning" of those terms.

38. The U.S. schedule's context – in particular, other Members' schedules – also fails to demonstrate that the United States undertook a commitment with regard to gambling services. Some Members inscribed gambling-related limitations and restrictions under sector 10.D "recreational services." However, notwithstanding references to the CPC, others included gambling restrictions under sector 10.A "entertainment services," others inscribed them under tourism services, and at least one Member scheduled such restrictions under sector 10.E "other."

39. Significantly, other Members' schedules confirm the existence of a residual "other" category that is within sector 10, but not captured by the text of its other subcategories (sector 10.E). Without textual evidence placing gambling services elsewhere in sector 10 (and still assuming *arguendo* that such services belong somewhere in that sector), the United States could only have a commitment for gambling services if it had scheduled the 10.E residual category. By not doing so, the United States made no commitment for gambling services.

40. Thus, in the event that the Panel, in spite of Antigua's failure to make a *prima facie* case, addresses the issue of whether the United States has recorded a commitment for cross-border gambling services in its GATS schedule, the Panel should find that Antigua has failed to prove that gambling services are covered under 10.D, 10.A, or any other commitment inscribed in the U.S. schedule.

41. **Assuming *arguendo* the existence of a relevant commitment, Antigua has failed to prove the inconsistency of any U.S. measure with any GATS obligation**. Even aside from the fact that the United States has no sectoral commitment with respect to some as-yet unspecified measure affecting the cross-border supply of gambling services, Antigua's nonspecific and often

cursory descriptions of alleged inconsistencies with the GATS fail to demonstrate any breach of U.S. obligations.

42. Antigua fails to prove the inconsistency of any U.S. measure(s) with Article XVI of the GATS. Article XVI does not enshrine a general rule prohibiting measures that impede "market access" in whole or part. Instead, it prohibits Members that have inscribed commitments from maintaining or adopting six types of measures referred to in its paragraph 2, sub-paragraphs (a) to (f). Therefore the Panel should restrict its Article XVI inquiry in this dispute to an examination of whether Antigua has proven that any specific U.S. measure(s) fall within the particular types of measures listed in Article XVI:2.

43. Antigua's failure to cite specific measures makes it impossible for the Panel to examine exactly what types of activity are or are not restricted under U.S. law. Without some evidence – aside from the mere assertion of a "total prohibition" – as to the scope and meaning of U.S. law, Antigua's argument fails. Antigua specifically argues that the alleged "complete ban" violates Articles XVI:2(a) and XVI:2(c). The United States submits that these provisions require a Panel to examine the "form" of the U.S. measure(s) at issue and the way in which such measure(s) are "expressed" – something it cannot do without evidence from Antigua as to the specific measure(s) alleged to be inconsistent with Article XVI:2.

44. Even if Antigua had attempted to make a *prima facie* case as to how any U.S. measure is inconsistent with Article XVI, which it has not, it could not have done so. The United States can find no U.S. measure listed in Antigua's panel request that takes the form of "numerical quotas" or is expressed as "designated numerical units in the form of quotas." Nor is the United States aware of any measure within the scope Antigua's panel request the form or manner of expression of which matches any of the other forms identified in Article XVI:2(a) and XVI:2(c). Indeed, Antigua has pointed to no such measures.

45. Antigua has failed to demonstrate that any U.S. measure is inconsistent with GATS Article XVII (national treatment). The United States has already demonstrated Antigua's failure to prove the existence of a specific commitment in a relevant sector. Furthermore, Antigua has proven neither how its services and service suppliers are "like" U.S. services and service suppliers nor how specific U.S. measures accord Antiguan services and service suppliers less favorable treatment.

46. The burden rests on Antigua to provide evidence demonstrating that Antiguan services and service suppliers are "like" particular U.S. services and suppliers for purposes of GATS Article XVII. Antigua's cursory and baseless assertions of likeness ignore the important distinctions between different gambling and betting services, as well as relevant differences in service suppliers. Nor has Antigua addressed distinctions that may be relevant in decisions regarding how to regulate various types of gambling services. In fact, far from proving that Internet virtual casinos are like real casinos, Antigua has actually shown the opposite to be true – in terms of consumer perceptions, a virtual casino is nothing like a real casino.

47. Antigua further disregards significant differences in scope of availability of different services, particularly availability to minors. Likewise, Antigua fails to address the law enforcement, addiction, and other risks associated with remote supply of gambling. Antigua has thus failed to meet its burden to show that its remotely supplied gambling services are "like" services in the United States in spite of obvious differences, including, for instance, those relating to law enforcement and consumer protection, protection of youth, and health.

48. On the "less favorable treatment" prong of Article XVII, Antigua again offers no argumentation at all; it merely asserts that this issue "needs no further explanation." The United States has pointed out from the earliest stages of consultations that its restrictions applicable to Internet gambling (and other forms of gambling services that Antiguan firms seek to supply on a cross-border basis) apply equally within the United States. Antigua fails to provide evidence or argumentation pointing to any U.S. law or regulation restricting supply of services or service suppliers from outside the United States that is not accompanied by an equal or greater restriction on services originating inside the United States. Its claim therefore must fail.

49. <u>Antigua has failed to prove the inconsistency of any U.S. measure with GATS Article VI (domestic regulation).</u> Here again, Antigua's claim fails both because of Antigua's failure to prove the existence of relevant U.S. commitments and because Antigua fails to meet its burden of proof, with respect to any particular measure(s), that such measure(s) are not "administered in a reasonable, objective, and impartial manner." Antigua has provided no evidence at all about the *administration* of any of the measures identified in its panel request. In fact, such measures apply equally to all services and service providers, regardless of origin, and are routinely applied against domestic as well as foreign lawbreakers.

50. <u>Antigua has failed to prove the inconsistency of any U.S. measure with GATS Article XI:1.</u> Antigua asserts, again without any argument, that U.S. measures to prohibit money transfers relating to gambling violate Article XI:1 of GATS. Antigua's claim fails first of all because of Antigua's failure to prove the existence of a relevant specific commitment. Moreover, even if such a commitment had been proven, Antigua has made no attempt to explain how or why any specific measure violates Article XI:1, and thus fails to make a *prima facie* case.

## CONCLUSION

51. For the reasons set forth above, the United States requests that the Panel reject Antigua's claims in their entirety.