

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

WT/DS285

**Opening Statement of the United States
at the Second Substantive Meeting of the Panel**

January 26, 2004

1. Mr. Chairman, members of the Panel, we are now at the second panel meeting, and nothing has changed since the last time we met. In the view of the United States, this dispute still begins and ends with two threshold issues.
2. The first is Antigua's failure to make its *prima facie* case as to the existence and meaning of measures that are the subject of its claims. The Panel has asked Antigua to identify all relevant U.S. legislative and regulatory provisions Antigua is challenging. Antigua has responded it is "in essence challenging every legislative provision that *could be construed* to form a piece of the United States' total prohibition on the cross-border supply of gambling and betting services."¹ Antigua then states that it has submitted statutory provisions that "are *most likely* to form part of the total ban."²
3. This response confirms Antigua's failure to make its *prima facie* case. Antigua cannot sustain its burden by merely identifying laws that "could be construed" as relevant, or are "most likely" relevant. In order for the Panel to consider whether hundreds of U.S. laws interact together so as to be inconsistent with the GATS, and for the United States to even defend its laws, it is both reasonable and necessary for Antigua to first be very precise about the specific U.S. measures it is challenging, and their relevance, meaning, interaction, and interpretation under U.S. domestic law. Antigua has not done any of this.
4. The second threshold issue is the absence of any U.S. commitment for gambling services under the GATS. There are four key points to keep in mind on this issue:
 - First, on an ordinary meaning interpretation, for a service that is supposedly both "entertainment" and "recreation," as Antigua alleges, it is really neither. In fact, gambling is something else entirely. It is a *sui generis* activity that, if it belongs anywhere in sector 10, logically belongs in the "10.E. Other" subsector, where the United States made no commitment.
 - Second, Antigua would like to place gambling in sector 10.D, but the ordinary meaning of the "except sporting" notation in that subsector of the U.S. schedule

¹ Responses of Antigua and Barbuda to the Panel's First Questions to the Parties, 9 January 2004, response to question 10 ("Antigua Responses to Panel Questions") (emphasis added).

² *Id.* (emphasis added).

confirms that the United States has made no commitment for gambling under 10.D.

- Third, Antigua tries to use the UN provisional Central Product Classification (“CPC”) to override these ordinary meanings, but cannot do so because the United States chose not to use the CPC as the basis for its schedule.
- Fourth, the Appellate Body in *EC-LAN* made it clear that if Antigua or any third party desires addition of CPC references to the U.S. schedule, that is a matter for negotiations.³

5. In spite of its failure to meet its burden on these two threshold issues, Antigua goes on to assert a violation of Article XVI of the GATS. There are three key points to bear in mind on that issue:

- First, Antigua’s “zero quota” argument would convert Article XVI:2 into a *per se* rule against prohibitions, and that result is inconsistent with its text.
- Second, Antigua has overstated the scope of U.S. restrictions on cross border gambling services – they are not a “blanket” or “total” prohibition. Moreover, even a “blanket” prohibition does not violate Article XVI unless it takes one of the specified forms under Article XVI.
- Third, Antigua’s new argument that prohibiting any fraction of a service in a committed sector automatically violates Article XVI:2 is also inconsistent with the text, and would undermine Members’ rights to regulate services in committed sectors.

6. Antigua further asserts a violation of Article XVII of the GATS. Two important legal issues to bear in mind there are:

- First, the importance of regulatory concerns to likeness of services, especially in the heavily regulated field of gambling services; and
- Second, the fact that the text of the GATS refers to likeness of both “services and suppliers,” and indeed the two are deeply intertwined. It is Antigua’s burden to prove likeness of both.

³ See First Written Submission of the United States, paras. 65-66 (“U.S. First Submission”); Oral Statement of the United States, December 10, 2003, para. 31, 37 (“U.S. First Oral Statement”).

There are also numerous disputed issues of fact regarding Antigua’s failure to prove likeness and less favorable treatment under Article XVII. We will elaborate on some of those issues later in our presentation.

7. Most of our remarks today will be devoted to exploring particular aspects of the points I have just mentioned. The United States will also offer some very brief comments on Articles VI, XI, and XIV of the GATS. And we can further elaborate on these and other issues in response to the Panel’s questions, if the Panel so wishes.

Existence and Meaning of “Measures” at Issue

8. The United States has already explained the legal requirements for a *prima facie* case, and we will not repeat that discussion here. We do, however, wish to respond to a few of Antigua’s arguments on this issue, starting with its arguments based on the Appellate Body’s recent report in *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*.⁴

9. As we already know, Antigua asserts that it may challenge the alleged U.S. “total prohibition” on cross-border supply of gambling services “as a measure in and of itself, composed of specific legislative and regulatory provisions, applications and practices.”⁵ In support of this view, Antigua cites the Appellate Body’s report in *U.S.-Sunset (Japan)* for the propositions that it is “legally possible to challenge such a total ban,” and that a panel “is not obliged ... to examine *all* domestic laws, regulations, applications and practices that may contribute” to the alleged total prohibition.⁶

10. Antigua’s discussion of *U.S.-Sunset (Japan)* misreads that report. That report was addressing the question of whether an actual document issued by the U.S. Department of Commerce could be considered a “measure.” Here, however, Antigua is seeking to challenge its own creation – its alleged “total prohibition.” This alleged “total prohibition” is not a document issued by the U.S. Government and it embodies no act or omission of the United States Government – it is nothing more than verbiage that Antigua attaches without basis to a large group of “specific legislative and regulatory provisions” of the United States.⁷

11. On this point, *U.S.-Sunset (Japan)* affirmatively contradicts Antigua’s assertion that this Panel need not examine all the relevant specific provisions that make up the alleged “total

⁴ *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Appellate Body Report, WT/DS244/AB/R (“*U.S.-Sunset (Japan)*”)

⁵ Antigua Responses to Panel Questions, response to question 10.

⁶ See *id.*; Second Written Submission of Antigua and Barbuda, paras. 13-15 (“Antigua Second Submission”) (original emphasis).

⁷ See Antigua Responses to Panel Questions, response to question 10.

prohibition.” Indeed, the Appellate Body in *U.S.-Sunset (Japan)* faulted the panel in that dispute because it “had not conducted any in-depth consideration of the impugned provisions of the” U.S. Department of Commerce document at issue.⁸ Moreover, the Appellate Body referred at paragraph 168 to its statement in its recent report on *US - Carbon Steel* that a party asserting that another party’s municipal law is inconsistent with a WTO obligation must introduce evidence as to the scope and meaning of that municipal law.

12. Thus, *U.S.-Sunset (Japan)* if anything confirms the U.S. view that the assessment of claims regarding domestic law requires an examination of relevant “specific provisions” of domestic law.⁹ Consistent with this principle, Antigua has the burden of providing evidence and argumentation sufficient to enable the Panel to examine all of the “specific provisions” relevant to Antigua’s claims individually and in terms of their interaction under domestic law. To the extent that Antigua fails to say precisely what provisions are or are not relevant, or offer argumentation on specific provisions, it does not even meet the most basic elements of a *prima facie* case.

13. Antigua’s second submission also makes assertions about state law that require a brief rebuttal. The United States submits that Antigua still has not sustained its burden of proof regarding the existence and meaning of any state law individually, much less all of them collectively.

14. Antigua asserts that “State law generally prohibits all gambling within the territory of a state that has not been specifically authorised by that state,” yet the language of the statutes provided by Antigua varies widely, as do their meaning, operation, application and interpretation. And, as the United States has previously observed, many seem patently irrelevant. It is Antigua’s burden to confront those issues – something it again still has not done.

15. In paragraphs 24 through 29 of its second submission, Antigua for the first time cites specific state measures that allegedly “prohibit all cross-border supply.” In particular, Antigua cites alleged restrictions on the physical location of gambling in Colorado, Connecticut, Indiana, Mississippi, and South Dakota; alleged limits on the number of licenses for riverboat casinos in Illinois and Louisiana, alleged limits on the number of parimutuel operators and casino operators in Iowa; alleged physical presence requirements for gambling service providers in Iowa and Nevada; and alleged physical presence requirements for bettors in Connecticut, Indiana, and Iowa.

16. The United States has examined footnotes 28 through 42 of Antigua’s second submission, in which it identifies sources for each of these alleged restrictions. The United States is not able

⁸ *U.S.-Sunset (Japan)*, Appellate Body Report, para. 95.

⁹ See Second Submission of the United States, para. 6; First Submission of the United States, para. 48 (citing *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, paras. 66-69 (“*India – Patents*”)).

to locate any of the cited sources among the items listed in the Annex to Antigua’s panel request. It therefore appears that these alleged restrictions are outside this Panel’s terms of reference. In any event, Antigua does not explain how these alleged restrictions affect, much less “prohibit,” cross-border supply. Based on Antigua’s descriptions, all of them appear to relate exclusively to supply of gambling services by physical presence within a state.

17. Antigua further argues that the United States has somehow made a “concession” in this dispute regarding the existence of a “total prohibition” on cross-border supply of gambling services, and that this somehow relieves Antigua of its fundamental responsibility to make a *prima facie* case regarding specific provisions of U.S. law. The United States has addressed this issue in some detail. We have very forthrightly told both the DSB and this Panel that the United States does not permit certain services, such as Internet betting, either domestically or on a cross-border basis. We have clarified that the United States does permit certain other gambling services on a cross-border basis. And we have stated that there is no overarching measure apart from U.S. laws themselves that embodies these restrictions.

18. The “total prohibition” is simply a baseless label created by Antigua. It does not embody, or even accurately describe, the actual provisions of U.S. law, and it is nothing more than another attempt by Antigua to avoid its burden of establishing its *prima facie* case regarding the actual text and meaning of U.S. law.

19. Nothing that the United States has said to the DSB or in the course of this dispute relieves Antigua of its burden to say exactly what measures it is challenging and how it alleges that those measures, individually or in combination, violate the GATS. Antigua asserts that the *U.S.–Section 301* panel report somehow suggests that it need not examine the U.S. laws and regulations at issue in this dispute, but the *Section 301* panel could not be clearer in opposing this position. In fact, the *Section 301* panel emphasized at paragraphs 7.17-18 of its report that it is an indispensable first step in any dispute to determine the meaning of the domestic laws at issue in order to then analyze whether those laws breach the Member’s obligations. In this dispute, Antigua acknowledges that its alleged total prohibition is “composed of specific legislative and regulatory provisions.”¹⁰ Yet Antigua refuses to examine those “specific” instruments, as called for in *Section 301* and numerous other Panel and Appellate Body reports.

20. Finally, Antigua’s lengthy assertions about U.S. law governing stipulations, estoppel, and the like are all irrelevant, and need not be addressed at length. Antigua has acknowledged that U.S. law does not govern such issues in this forum,¹¹ and we agree on that point even though we disagree with Antigua’s hypothesis about how a U.S. court would deal with these issues given the particular facts of this dispute.

¹⁰ See Antigua Responses to Panel Questions, response to question 10.

¹¹ See Antigua Responses to Panel Questions, response to question 9.

Non-existence of a U.S. GATS commitment for gambling services

21. The United States has already explained that it made no GATS commitment for gambling services. Antigua obviously disagrees. Both parties appear to agree, however, that the U.S. commitments are part of the text of the GATS, and thus the issue is one of treaty interpretation.

22. As a matter of ordinary meaning, Antigua has argued that gambling services are both “other recreational services” and “entertainment services.” The United States has already discussed the ordinary meaning of these terms, and Antigua’s arguments to date only confirm our view that gambling services do not fit properly within the plain meaning of either category. Some sources may refer to gambling casually as “entertainment” or “recreation,” yet gambling services also involve considerations of financial gain and other considerations not typically associated with recreational or entertainment services. Indeed, the Solicitor General of Antigua has himself described remote gambling service suppliers as “financial institutions.”¹² All of this taken together indicates that this *sui generis* service at most belongs in the residual “E. Other” subsector, where the United States made no commitment.

23. Additionally, focusing on “other recreational services,” the ordinary meaning of the “except sporting” notation in the U.S. schedule confirms that the United States has made no commitment for gambling under 10.D “other recreational services (except sporting).” In response to the U.S. point that the ordinary meaning of “sporting” includes gambling, Antigua has referred solely to the arguments of a third party to this dispute, the European Communities (“EC”). However,

- The EC states that “sporting” is not “commonly used” to refer to gambling. But it provides no evidence to support that assertion; indeed, a stack of dictionaries would seem to contradict it.
- The EC states that the use of “sporting” in the sense of gambling refers to persons rather than services. If “sporting” means gambling when used to describe the consumer or supplier, it could hardly be said to lose that meaning entirely in reference to the service they consume or supply. Other dictionary definitions provided by the United States imply no such limitation.
- The EC states that the use of “sporting” in reference to gambling is referred to in one dictionary as an “Americanism,” and therefore not within the “ordinary meaning” of a term used in the U.S. schedule of specific commitments. The *New Shorter Oxford English Dictionary*, which is usually scrupulous in such matters, places no such qualification on the use of sporting to refer to gambling. And, all

¹² See Canadian Broadcasting Corporation, “The Big Gamble,” broadcast on *The Fifth Estate*, October 31, 2001, Exhibit U.S.-39 (“The Big Gamble”).

linguistic prejudices aside, no rule of treaty interpretation provides that the “ordinary meaning” of a word in the English language cannot originate in the United States. Indeed, the fact that the schedule at issue is that of the United States makes it all the more absurd to exclude any meaning *a priori* on the basis that one dictionary calls it an “Americanism.”

The United States therefore submits once again that the ordinary meaning of the term “sporting” includes gambling services.

24. Against the U.S. arguments based on ordinary meaning, Antigua offers an interpretation based on the CPC. Let us examine that approach. The text of the U.S. schedule, viewed in context, shows an affirmative choice on the part of the United States not to refer to the CPC. The negotiating history confirms that parties following W/120 did not intend to be bound by the CPC or any other nomenclature absent explicit references to such nomenclature.¹³

25. The EC itself has subsequently confirmed that “[d]issatisfaction with [CPC] descriptions was certainly one of the reasons why certain Members had chosen not to use the CPC as the basis for their schedules.”¹⁴ This statement by the EC undermines the credibility of assertions in the present dispute that Members are somehow bound by the CPC notwithstanding having chosen not to use it.

26. Seeking another way to make the CPC binding on the United States, Antigua has seized on the United States International Trade Commission (“USITC”) document in Exhibit AB-65. Let us imagine for a moment – contrary to fact – that this document stated that “the United States has no GATS commitment for gambling services.” Would it have interpretive value in a WTO dispute settlement proceeding? Of course not. A Member may not unilaterally adopt a multilaterally binding interpretation of any provision of a WTO agreement, and such statements by themselves do not constitute subsequent practice under the customary international rules of treaty interpretation as embodied in Article 31 of the Vienna Convention.

27. In any event, the USITC explanatory materials make it clear that they are not purporting to interpret the U.S. schedule. The document itself confirms that the USITC has only been delegated the responsibility to undertake ministerial duties – to “maintain” and “compile” the U.S. schedule, not to interpret the U.S. schedule on behalf of the U.S. Government. Indeed, given that a Member may not unilaterally adopt a multilaterally binding interpretation of any provision of a WTO agreement, a delegation of unilateral interpretive authority would make no sense with respect to provisions of the WTO agreements.

¹³ See U.S. First Submission, para. 64 & n. 88.

¹⁴ See Second Written Submission of the United States, para. 12 & n. 14 (“U.S. Second Submission”) (citing Committee on Specific Commitments, Report of the Meeting Held on 2 April 1998, Note by the Secretariat, S/CSC/M/5 (6 May 1998)).

28. One third party has asserted that the USITC document may have probative value for the “purpose of throwing light on a disputed question of fact.”¹⁵ This statement might be correct if the issue under discussion were factual in nature. It is not. The issue here is the legal interpretation of an annex to the GATS pursuant to the customary rules of treaty interpretation of international law – an area in which the USITC’s unilateral document carries no weight in this dispute.

29. Given that this is an issue of treaty interpretation, Antigua’s arguments comparing the USITC document to the U.S. Statement of Administrative Action are off point. The SAA has been referenced in WTO dispute settlement to help interpret U.S. domestic law, not WTO agreements. Antigua’s various arguments for giving independent force to the USITC document are untenable, but also unpersuasive for the simple reason that obligations in a GATS schedule must be based on the schedule itself, not on some extrinsic, unilateral document.

30. Turning now to Antigua’s assertions regarding the cover note to draft versions of the U.S. schedule, Antigua states that the cover note was not included in the final U.S. schedule annexed to the GATS “simply because such a cover note is not formally part of a GATS schedule as it is attached to the GATS by Article XX:3.”¹⁶ The United States disagrees. Several Members included such notes in their schedules. For example, Australia’s schedule begins with a note stating that:

The classification of sectors is based on the 1991 provisional Central Product Classification (CPC) of the United Nations Statistical Office, while the ordering reflects the Services Sectoral Classification List (MTN.GNS/W/120 of 10 July 1991).

31. Needless to say, the final U.S. schedule includes no such statement. The United States has already confirmed in this proceeding that it used W/120 for the ordering of the U.S. schedule. That is consistent with the note accompanying drafts of the U.S. schedule. However, unlike Australia and a number of other Members, the United States never adopted the CPC nomenclature. The cover note to draft U.S. schedules does not indicate otherwise and, as Australia’s note further confirms, these were understood to be distinct issues.

32. Turning now to the 1993 and 2001 Scheduling Guidelines, Antigua lacks any basis for its assertion that “the 2001 Scheduling Guidelines comprise a subsequent agreement between the parties (as per Article 31(3) of the Vienna Convention) regarding the interpretation of existing schedules in the light of the 1993 Scheduling Guidelines.”¹⁷ The 2001 document, like its 1993 predecessor, explicitly states that it “should not be considered as a legal interpretation of the

¹⁵ Canada’s Answers to Questions of the Panel, para. 20.

¹⁶ Antigua Responses to Panel Questions, response to question 3.

¹⁷ See Antigua Responses to Panel Questions, response to question 1.

GATS.” Indeed, both documents were adopted by the Council for Trade in Services, not the General Council or the Ministerial Conference, which have the “exclusive authority” to adopt legal interpretations of the WTO agreements under Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization*.

33. Moreover, Antigua’s assertion that the 1993 Scheduling Guidelines and W/120 are context within the meaning of Article 31(2)(b) of the Vienna Convention fails for the simple reason that neither document was “made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty,” as required under that Article. The United States and Antigua seem to agree that these documents were not made by any party, and insofar as they refer to the CPC, the schedules to the GATS demonstrate that numerous parties accepted them only partially, or not at all, for that purpose.

34. Having gone into these details, let me step back now and speak to what the United States views as the overall theme of Antigua’s arguments on the issue of non-existence of a U.S. commitment. We see here a series of attempts to turn the rules of treaty interpretation on their head by using preparatory work and other extrinsic sources, which could never be more than secondary means of interpretation, to override text of the Agreement. Antigua even goes so far as to assert at one point that the text of a GATS commitment cannot diminish the interpretive value of preparatory work¹⁸ – a statement that is inconsistent with the fundamental principles of treaty interpretation.

35. Certainly the CPC was discussed in the preparatory work for the GATS. Some Members decided to use it always. Some decided to use it when it suited them. Some decided not to use it at all. The texts of the schedules reflect those choices, and show the United States to be in the third category.

36. Mere preparatory work cannot override the text in this case. But the preparatory work can and does confirm the U.S. reading of the text in regard to the CPC. Specifically, it shows that the United States and other Members spoke explicitly of their desire that Members not be bound by any particular nomenclature.¹⁹

37. Finally, the United States reiterates that if some Members would prefer that all schedules be read according to the CPC, that is a matter for negotiations rather than dispute settlement. The Appellate Body report in *EC-LAN* confirms that principle.²⁰

¹⁸ See *id.* (“[w]hether or not a GATS schedule contains explicit references to the United Nations Provisional Central Product Classification ... has no impact on the interpretative value of the 1993 Scheduling Guidelines and W/120.”).

¹⁹ See U.S. First Submission, para. 64 & n. 88.

²⁰ See First Written Submission of the United States, paras. 65-66 (“U.S. First Submission”); Oral Statement of the United States, December 10, 2003, para. 31, 37 (“U.S. First Oral Statement”).

Article XVI

38. Without prejudice to any of the foregoing arguments, and with the proviso that the United States would under no circumstances concede the existence of a commitment, let me turn now to a discussion of Antigua’s failure to prove any violations of specific provisions of the GATS.

39. We would first invite the Panel to bear in mind that although the United States has raised Antigua’s failure to provide evidence and argumentation as a threshold matter in this dispute, we also raise it in relation to each of Antigua’s substantive claims. To the extent that Antigua makes claims of violation based on its alleged “total prohibition” and fails to relate those to particular U.S. laws and regulations, it also fails to meet its burden for those claims. Our previous arguments on these issues and the alleged effect of U.S. statements apply equally to the complaining party’s burden under Article XVI and the other substantive provisions at issue.

40. The United States has further addressed Article XVI issues in its second submission and answers to Panel questions. The main issue under Article XVI appears to be the question of Antigua’s “zero quota” argument. The United States has explained that such an argument cannot be reconciled with the text of Article XVI, which clearly refers to limitations in the “form” of quotas, and so on. Our comparison between Article XVI of the GATS and Article XI of the GATT shows that the GATT provision contains a “prohibition on prohibitions,” and the GATS provision does not. Antigua’s arguments are therefore inconsistent with the text of Article XVI.

41. Antigua also has its facts wrong. In its answer to one of the Panel’s questions, Antigua states that “during the final Panel meeting of the session the United States once more made clear its position that the cross-border provision of gambling and betting services from Antigua to the United States was illegal under United States law.” In fact, we stated at that time, and now repeat, that the United States in fact permits some cross-border supply of gambling services from Antigua. This is what we mean when we say that proving a “total prohibition” is an impossible task.

42. Previously, Antigua appeared to argue, based on its “zero quota” theory, that it would take an across-the-board prohibition of all cross-border gambling services to violate Article XVI – hence its misguided effort to try to show a “total” U.S. prohibition on cross-border gambling services. Since the United States in fact permits some cross-border gambling services, and since Antigua disregards the actual content of U.S. law, Antigua lacks a factual basis for arguing a “blanket” prohibition.

43. In its second submission, Antigua adds another, more sweeping, argument. It now asserts that a prohibition on any fraction of the services covered by a sector or subsector would amount to a “zero quota” and would therefore be inconsistent with Article XVI:2(a) under Antigua’s

“zero quota” theory.²¹ In other words, Antigua’s view is that a full market access commitment means that nothing whatsoever subject to that commitment may be prohibited. This is a significant step beyond the “blanket” prohibition theory previously discussed by Antigua and certain third parties.²²

44. Antigua’s new argument regarding fractional prohibitions fails on the same textual grounds as its blanket prohibition argument, that is, Article XVI only addresses limitations that take certain carefully-specified forms. Moreover, Antigua’s fractional prohibition argument does not withstand scrutiny in light of the objects and purposes of the GATS. Members cannot effectively exercise the “right to regulate” services that are the subject of a commitment if they lack any power to prohibit services within a sector or subsector that do not conform to the Member’s regulation. The right to regulate recognized in the GATS implies the power to set limitations on the scope of permissible activity, as the United States has done with gambling services.

Article XVII

45. The legal issues surrounding Article XVII require little elaboration at this point. Again, the United States does not concede the threshold issue of a commitment. Beyond that, however, Antigua has failed to sustain its burden on the key issues of likeness of services and less favorable treatment.

46. On likeness, Antigua argues for a likeness analysis closely following the goods model, yet at the same time argues that likeness is not important. The United States maintains that likeness is a crucial component of the Article XVII inquiry, and supports an analysis in this case that looks at regulatory concerns, such as those identified by the United States, which have a significant impact on likeness in the particular context of gambling services. A number of third parties also appear to support examination of regulatory concerns on a case-by-case basis.²³

47. The United States disagrees with Antigua’s disjunctive reading of “services and service suppliers.” If the text were intended to mean that likeness could be proven with respect to one or the other, but not both, it would have said services “or” service suppliers. Instead, the drafters chose the word “and,” reflecting an intent to require that likeness of both the services and their suppliers be shown. The parties to the GATS negotiations did not intend that likeness with respect to suppliers only, or with respect to services only, without regard to one another, would be sufficient – the two are intertwined. A contrary reading would lead to absurd results – such as finding likeness of suppliers even though they supply different services.

²¹ Antigua Second Submission, para. 38.

²² *See, e.g.*, Third Party Submission of the European Communities, para. 84 and accompanying heading.

²³ *See id.*, paras. 47-48; Mexico’s Responses to the Panel’s Questions, response to question 7; Replies of Japan, response to question 10.

48. Regarding the particular regulatory concerns surrounding remote supply of gambling services, much has already been stated by the United States. Rather than reviewing each of those concerns as we did in our second submission, the United States wishes to emphasize and elaborate on a few key points.

49. We have already pointed out that remote supply of gambling services presents additional regulatory risks that do not exist, or are not present to the same degree, in non-remote settings, such as casinos. In a casino, the gambler must be physically present. Therefore, he or she can be identified with a reasonable degree of certainty. Casinos are thus able to restrict access to minors, known criminals, persons who are known to be financially insolvent, and so on. However, due in large measure to the virtual anonymity of remote media such as the Internet, remote supply gambling operations cannot reliably identify their customers. Our evidence on age verification in the U.S. second submission illustrates this fact. Similarly, disreputable suppliers can exploit the anonymity of remote media in ways not possible with non-remote supply of gambling services.

50. Remote gambling also presents special health and youth protection risks in part because it is available to anyone, anywhere – including compulsive gamblers and children – who can gamble 24 hours a day with a mere “click of the mouse.” Isolation and anonymity compound the danger. In the words of a gambling addict interviewed on the videotape we have provided, “nobody has to see you do it” and “nobody has to know.”²⁴

51. With respect to Antigua’s continuous argument that the United States has not shown the link between Internet gambling and various forms of crime, the United States has already established that remote supply of gambling is particularly susceptible to organized crime, money laundering, and other forms of crime. We have also raised law enforcement concerns in connection with the Article XIV considerations that we discussed in our second submission.

52. While the United States remains unable to discuss pending law enforcement matters out of concern for compromising criminal investigations, we have located publicly available evidence of one case study that illustrates the link between criminal activity and Internet gambling.

53. Mr. William Scott describes himself as one of the persons responsible for bringing gambling to the island of Antigua.²⁵ Antigua licensed Mr. Scott to operate an Internet gambling site in spite of the fact that records available publicly show that Mr. Scott had been convicted of racketeering in the United States. In an October 2001 Canadian television broadcast, Mr. Scott

²⁴ See *The Big Gamble*, supra n. 12, Exhibit U.S.-39.

²⁵ See *The Big Gamble*, supra n. 12, Exhibit U.S.-39.

admitted that he was a felon and had spent three years in prison.²⁶ In an interview with the same Canadian program, the Solicitor General of Antigua, Mr. Lebrecht Hesse, stated that the Government of Antigua was not aware that this individual was a felon and that it had no indication of such during the “due diligence” process that led to the granting of a license to operate a gambling web site to a convicted felon.

54. If the Panel will bear with me, I would like to play a very short segment of that broadcast, which the United States has provided on videotape. The segment I’m going to play follows a long discussion of Mr. Scott’s background and a Canadian company with which he did business. It picks up with Mr. Scott’s release from prison and his decision to relocate his operations.

...

Reporter: Antigua has a law that you can’t – a licensee can’t – have a criminal record. You were sentenced to eight years for illegal bookmaking and extortion.

Mr. Scott: Illegal bookmaking and extortion, that’s correct.

...

Reporter: So how did, how did you get around the rule in Antigua?

Mr. Scott: Uh, I think it was grandfathered in. I mean, I just put down, and they licensed me.

...

Reporter: So how did Bill Scott slip through the cracks?

Solicitor General Hesse: How did he ... I don’t know what you mean by that. He has a criminal record?

...

Reporter: I spoke to him yesterday and he admits it.

Solicitor General Hesse: A due diligence was conducted on him and this did not come out.

Reporter: Not a very good due diligence. It is not difficult to find out. Forgive me sir.

Solicitor General Hesse: No. We have people who conduct it. We don’t do this due diligence ourselves.

Reporter: So what do you do now?

Solicitor General Hesse: You have raised a very important issue and I have to mount an investigation into it.²⁷

55. The report on this videotape states that convicted felon William Scott transferred his license to a relative. Notwithstanding that transfer, the tape showed him to be actively involved in the supply of gambling services. Mr. Scott still owned an Internet gambling concern based in

²⁶ *See id.*

²⁷ This is a transcription of selected excerpts from the videotape.

Antigua as recently as last year,²⁸ and to the best of our knowledge, he continues to provide gambling services by remote supply from Antigua.

56. Mr. Scott does in fact have a lengthy criminal history in the United States. Most notably, he received three concurrent eight year sentences entered in 1984 after his guilty plea to three counts of a six-count criminal indictment. The indictment included one count of violating the Racketeer Influenced and Corrupt Organizations Act based upon multiple predicate acts of bribery of police officials, the act of conducting an illegal bookmaking business, and multiple acts of extortion for the payment of gambling debts through the use of violence or other criminal means to cause harm to a person. The indictment also contained five counts of extortion for the payment of gambling debts through threats of the use of violence or other criminal means to cause harm to a person. In 1998, the United States issued an arrest warrant for Mr. Scott based on a criminal complaint for federal gambling violations. Mr. Scott is a fugitive from that complaint.

57. William Scott is by no means the only supplier of remote gambling services. There are many others operating from Antigua and other locations. The United States has already discussed its views on organized crime involvement in remote supply of gambling, and provided the views of the U.S. Federal Bureau of Investigation, and we will not repeat ourselves on those points. Mr. Scott is, in our view, the tip of the iceberg.

58. On the related issue of money laundering, Antigua has stated that there is essentially no difference in the relative threat between remote and land-based casino gambling. On the contrary, we would like to stress again that the differences are significant, and explain exactly how they differ.

59. Unlike casino gambling in which the gambler is physically present, Internet gambling allows for virtually anonymous and instantaneous communications that are difficult to trace to a particular individual or account. While it is true that casino gambling can be used, among other things, to launder the cash proceeds of crime during the placement stage of money laundering, remote supply of gambling is a convenient vehicle for money launderers to conceal the ownership and nature of the proceeds through layering and integration, the second and third stages of money laundering.

60. Due in part to the virtual anonymity available to Internet gamblers, remote supply gambling operations are not susceptible to effective anti-money laundering and “know your customer” requirements. The volume and speed of remote transactions, combined with the virtual anonymity of such transactions, makes remote supply of gambling a prime mechanism for the money launderer to conceal and disguise the proceeds of illicit activity by creating a

²⁸ See Prospectus – Consolidated Gaming Corporation Limited, January 31, 2003, p. 33. Excerpt at Exhibit U.S.-40.

deceptive “paper trail” that makes the money appear to be legitimate. In the layering stage, money launderers conceal transactions by burying them in huge volumes of transactions daily and by creating records and “audit trails” that conceal and disguise the true nature, source and ownership of the ill-gotten gains of crime. Remote supply of gambling is especially well-suited to facilitate money laundering in the layering stage.

61. Turning away from the subject of crime, let us move on to the next step in the Article XVII analysis, which is the element of less favorable treatment. The U.S. second submission addresses Antigua’s *de jure* arguments on horseracing and lotteries, and its broader *de facto* argument. Antigua has raised a few additional arguments on which we would like to comment briefly.

62. Antigua has asserted a lack of prosecution of violators of U.S. laws restricting remote supply of gambling, and horseracing in particular.²⁹ In our first submission, we provided statistics and individual cases attesting to robust enforcement of such laws. To add to that information, the Organized Crime and Racketeering Section of the Department of Justice has compiled statistics concerning the number of racketeering prosecutions approved by the RICO Review Unit from 1992 to 2002 alleging predicate violations of federal gambling statutes 18 U.S.C. § 1084, 18 U.S.C. § 1955, or both. In other words, we are talking about federal racketeering cases that were premised on two federal gambling laws. Over that period, the Department of Justice approved 90 of those cases.³⁰

63. The United States does not keep statistics on the number of cases in which the fact pattern alleged involved international as opposed to purely domestic gambling activity. However, my colleague on this delegation has confirmed based on his many years of personal experience that the vast majority of these 90 cases involved purely domestic betting activity, not cross-border gambling.

64. In fact, that is only a fraction of all the gambling cases pursued by the federal government. In all, our statistics show 125 cases filed under Section 1084 and 951 cases filed under Section 1955 between 1992 and September 2003. Many of those cases involve multiple defendants, so the number of individuals involved would be substantially higher. The majority of these cases involve the activities of organized crime syndicates. In addition there were cases filed under Section 1952 involving illegal gambling, but those statistics would include other kinds of cases as well, since Section 1952 is not limited to gambling. As these numbers reflect, illegal gambling continues to be a primary enforcement program in the 24 Organized Crime Strike Force Units in U.S. Attorneys’ offices around the United States. All but a very few of these cases involve purely domestic illegal gambling activity. There have only been a handful of

²⁹ See Antigua Responses to Panel Questions, response to question 19.

³⁰ See Exhibit U.S.-41.

cases (some of them with multiple defendants) that involved supply of gambling from outside the United States.

65. Regarding horseracing in particular, Antigua asserts in its response to the Panel’s question 19 that the United States fails to prosecute providers of remote gambling on horseracing. In fact there have been many reported court cases (representing just a small fraction of all prosecutions) in which the Department of Justice used federal gambling laws challenged by Antigua to prosecute illegal wagering on horseracing.³¹

66. Regarding the activities of entities such as Youbet.com, this issue came to prominence well after 1998, when the United States took action against Mr. Jay Cohen, Mr. Scott, and other Antigua-based remote suppliers. It was not until December 2000 that amendments to the Interstate Horseracing Act created what some now cite, incorrectly, as the statutory basis for Internet gambling on horseracing. As the United States has pointed out, we are aware of these activities and U.S. law enforcement officials do not agree with assertions made by the service providers who rely on this alleged justification.

67. While the United States is not at liberty to discuss pending investigations or prosecutions, we can point to the fact that Youbet.com itself disclosed in its 2002 annual report that “the United States Justice Department is in the process of taking action against selected companies that it deems to be operating without proper licensing and regulatory approval.”³² The company added that, while it “believes that its activities conform” to applicable laws, “this conclusion is not free from doubt.”³³ The annual report went on to acknowledge that Youbet.com “faces the risk” of criminal proceedings and penalties brought by the government, and the United States agrees with that risk assessment.³⁴

68. Finally, Antigua has raised the issue of restrictions on advertising for gambling services. Antigua, however, has again failed to identify what laws or regulations on this subject, if any, within the scope of the Panel’s terms of reference allegedly embody this restriction. The same is

³¹ See e.g., Erlenbaugh v. United States, 409 U.S. 239 (1972); United States v. Southard, 700 F.2d 1 (1st Cir. 1983), cert. denied, 464 U.S. 823 (1987); United States v. Denton, 556 F.2d 811 (6th Cir.), cert. denied, 434 U.S. 892 (1977); United States v. O’Neill, 497 F.2d 1020 (6th Cir. 1974); United States v. Sacco, 491 F.2d 995 (9th Cir. 1974); United States v. Swank, 441 F.2d 264 (9th Cir. 1971); United States v. Bergland, 318 F.2d 159 (7th Cir. 1963), cert. denied, 375 U.S. 861 (1963); United States v. Athanas, 362 F. Supp. 411 (E.D. Mo. 1973); United States v. Yaquinta, 204 F. Supp. 276 (N.D.W.Va. 1962).

³² See Youbet.com, Inc., U.S. Securities and Exchange Commission Form 10-K Annual Report under Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal Year Ended December 31, 2001, Commission File Number: 33-13789LA (April 15, 2002), available at <http://www.sec.gov/Archives/edgar/data/814055/000102140802005310/0001021408-02-005310.txt>.

³³ See *id.*

³⁴ See *id.*

true of Antigua’s new assertions about the Indian Gaming Regulatory Act (“IGRA”). The IGRA is outside the Panel’s terms of reference.

Article VI

69. The United States has little to add on Article VI. Antigua appears to be unable to cite any instance in which “authorisation to supply” a gambling service in the United States was refused.³⁵ Moreover, Antigua states that it “has not been able to investigate all the criteria that all states apply to authorise a domestic operator to offer gambling and betting services,” making it difficult for the United States to understand how Antigua can credibly assert that such procedures “by their very terms exclude Antiguan suppliers.” In any event, an examination of such procedures would seem to lie outside the Panel’s terms of reference, since they were not identified in Antigua’s panel request.

Article XI

70. The United States also has little to add on Article XI. Antigua’s claim still rests exclusively on the Paypal agreement, which is not a measure at issue in this dispute.³⁶

71. Insofar as Antigua is citing this agreement as evidence of the application of other measures, its arguments are misplaced. The Paypal agreement discusses New York gambling laws, but it does not say that such laws bar international payments and transfers for gambling services.

72. The agreement itself is not an application of those laws as such; rather, it is a mutual settlement of a disputed matter entered into in the exercise of the settlement authority possessed by both parties.³⁷ Such settlements reflect only the parties’ anticipation that one or more criminal penalties might be applied, and the crafting of an alternative solution agreed to by them – a solution that often does not resemble the actual application of the criminal penalties. The United States therefore submits that the voluntary remedies settled upon in the Paypal agreement are not probative of the meaning or application of the laws that gave rise to that dispute.

73. Moreover, both the Paypal agreement and the underlying laws are neutral regarding the destination of payments. The fact that Paypal is permitted under the agreement to make transfers for forms of gambling that are lawful in New York does not indicate otherwise. Such transfers can be to domestic or international destinations, as can transfers for unlawful gambling.

Article XIV

³⁵ See Antigua Responses to Panel Questions, response to question 11.

³⁶ See Antigua Responses to Panel Questions, response to question 29.

³⁷ See Exhibit AB-56, para. 10.

74. Finally, the United States does not intend to recapitulate the Article XIV concerns discussed in its second submission. We will be happy to address questions on that subject, but we maintain our view that the Panel need not reach the issue.

75. We would, however, invite the Panel to reflect on the Article XIV implications of some of our earlier discussion – including the discussion of Mr. Scott, money laundering and other dangers, and the statistics on federal prosecutions in gambling cases. These observations further support the law enforcement arguments and the public order and public morals arguments discussed in our second submission.

76. We also invite the Panel to view at its leisure the rest of the Canadian television program we have provided on videotape. Among other things, it includes an on-camera interview with a Canadian police official commenting – before September 11, 2001 – on the concern that money from Internet gambling could flow to “organized terrorist groups.” He calls it a “very real scenario that could be occurring now and that could certainly develop in the future.”³⁸ Clearly these are matters to be taken seriously.

77. Mr. Chairman, I will conclude the statement of the United States by once again requesting, for all of the foregoing reasons and all those that we have previously expressed, that the Panel reject Antigua’s claims in their entirety. Our delegation would be pleased to respond to any questions that the Panel may have.

³⁸ See Exhibit U.S.-39.