Before the Panel of the World Trade Organisation on

UNITED STATES - MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

WT/DS285

FIRST SUBMISSION OF ANTIGUA AND BARBUDA

1 OCTOBER 2003
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ATTACHMENT OF EXHIBITS

A large number of often lengthy exhibits is attached to this Submission in three separate files. To avoid creating an even more voluminous exhibits bundle, Antigua and Barbuda has not attached all documents referred to in this Submission but only those that it considers most interesting or most important. The documents that are not attached are publicly available and often published on the internet (in which case a link to the document is included in this Submission). If the Panel or any of the Parties would nevertheless find it difficult to obtain access to such a document, Antigua and Barbuda will provide a copy thereof on first request.
1. INTRODUCTION

1. This is a dispute about trade in services brought by the government of Antigua and Barbuda (“Antigua”) against the United States of America (the “United States”). The United States is the world’s largest consumer of gambling and betting services, with a massive domestic industry responsible for generating gross revenues of approximately US $68.7 billion in 2002.¹ To assist in the improvement of its small and developing economy, Antigua has sought to provide gambling and betting services to the United States, primarily through private Antiguan companies offering the services telephonically and by the internet. The United States has taken the unequivocal position that the provision of gambling and betting services by operators in Antigua to persons located in the United States is illegal in all instances under United States law.² The United States, acting through its federal government as well as certain state governments, has adopted a series of measures and taken a number of actions to prevent operators in Antigua from offering these services to persons in the United States (including imprisonment of at least one person related to an Antiguan service supplier). These actions by the United States, consistent with its formal governmental position that the offering of gambling and betting services into the United States from Antigua is illegal, are directly and clearly in violation of the United States’ commitments under the General Agreement on Trade in Services (the “GATS”).

2. Antigua has brought this proceeding before the World Trade Organisation (the “WTO”) to require the United States to recognise its commitments under the GATS and to cause the United States to remove or amend the protectionist measures adopted by it in order that Antiguan service suppliers may compete fairly in the offering of gambling and betting services in the United States.

Basis of the claim and structure of this Submission

3. The basis of Antigua’s claim in this case is simple. In its Schedule of Specific Commitments adopted under the GATS the United States has made a full commitment to market access and national treatment for gambling and betting services. The United States allows numerous operators of domestic origin to offer such services throughout its territory. Simultaneously, it prohibits all cross-border supply of gambling and betting services. In doing so it violates its obligations under the GATS.

4. The structure of this Submission is as follows:

- This introduction (Section 1) provides general background on Antigua, on the GATS, on the reasons why Antigua has raised this matter in the context of the WTO and on the lack of any constructive dialogue with the United States.

- Section 2 provides a short overview of the procedure in this case.

¹ Joe Weintert, “U.S. Gambling Losses Hit $68.7B. Last Year,” The Press of Atlantic City (New Jersey) (17 August 2003), G3 (attached as Exhibit 1, found at Antigua Exhibits, file 1, tab 1), citing Christiansen Capital Advisors, The 2002 Gross Annual Wager (as reprinted in International Gaming & Wagering Business (September 2003 edition)).

² The United States has made this statement publicly on a number of occasions, including at meetings of the Dispute Settlement Body (the “DSB”) of the WTO on 24 June and 21 July 2003. See WT/DSB/M/151, para. 47 and WT/DSB/M/153, para. 47.
• Section 3 explains the factual background to this case in detail. It describes Antigua’s gambling and betting industry and relevant regulation as well as the existing market for gambling and betting services in the United States.
• Section 4 describes the United States’ measures that are the subject of Antigua’s complaint and addresses certain procedural issues.
• Section 5 describes Antigua’s substantive legal arguments.
• Section 6 contains some general considerations regarding Article XIV of the GATS.

The factual background at Section 3 has been provided, *inter alia*:

• To show that Antigua has made considerable efforts to regulate its gaming industry and has taken substantial steps to avoid abuse of its services industries for improper purposes such as money laundering. The international community has recognised the effectiveness of this regulation.

• To show that the United States has a large, officially sanctioned gambling industry of domestic origin offering extensive gambling services throughout the United States and in other countries (and further to show that the United States makes little effort to effectively restrain its large scale domestic non-sanctioned, “illegal” gambling market).

• To assist the Panel in determining that the service offerings of Antiguan service suppliers are “like services” to those of United States service suppliers operating in the gambling market.

**Antigua and Barbuda**

5. Antigua is a twin-island nation-state located among a chain of primarily north-south running islands in the eastern edge of the Caribbean Sea commonly known as the British West Indies. It has a history of human occupation dating back at least 4,000 years, but was first visited by Europeans in 1493 when Christopher Columbus landed on the islands and named the largest “Santa Maria de la Antigua.” Antigua was a British colony until full independence was achieved in 1981. The current population according to the most recent census is 65,840.

6. In 1764, Sir Christopher Codrington established the first large sugar cane estate in Antigua and in a few years, virtually the entire island was cleared of its thick tropical vegetation and all arable land dedicated to the production of sugar cane for almost 200 years. The early sugar producers imported slave labour from Africa to man the plantations and while slaves were emancipated in 1834, economic realities and practices in Antigua left the freed slaves in little better economic or social circumstances.

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3 The island of Antigua is about 281 square kilometers in size, or 108 square miles. Barbuda, a sparsely populated island approximately 40 kilometers to the northwest of Antigua, is 161 square kilometers in size, or 62 square miles.
7. Successive protests led to the formation of a trade union movement in the early part of the 20th century, which ultimately led to increasing local autonomy. In 1967 Antigua achieved home rule status and on 1 November 1981 it obtained full independence as a member of the Commonwealth.

8. Until the early 1960s, Antigua’s economy was dominated by the production and export of cane sugar. The sharp decline in world sugar prices during the 1960s made sugar production in Antigua economically unviable and by the early 1970s sugar production had largely disappeared. The centuries of land clearance for the sugar crops, however, have rendered the islands drought-ridden and as a consequence the country cannot produce agriculture for export or even to satisfy domestic needs. Since the end of sugar production, Antigua has become highly dependent on tourism for its economic survival. Unfortunately Antigua is also subject to devastating hurricanes that have on occasion had a disastrous impact on tourism through the destruction of hotels and other tourist infrastructure. In the five years between 1995 and 2000 Antigua endured six hurricanes, two of them in one year. To reduce its dependence on tourism as well as to provide higher skilled and better paying jobs for its citizens, Antigua has tried to diversify its economy by developing trade in services, including trade in gambling and betting services.4

9. Antigua has a history of active membership and participation in regional and multinational bodies, including the United Nations, the Organization of American States, the Organization of Eastern Caribbean States, the Eastern Caribbean Regional Security System, the Caribbean Community and Common Market, the International Monetary Fund, the World Bank, the Financial Action Task Force and the Caribbean Financial Action Task Force. Antigua is also a charter member of the World Trade Organisation, having entered as a member on 1 January 1995.

The United States and United States’ business interests are at the origin of the GATS

10. As of the mid-1970s United States services industries (such as insurance, financial services, travel and tourism) began to press their government for negotiations aimed at removing restrictions to international trade in services. The United States government responded positively to this request and proposed negotiations on trade in services in the context of the General Agreement on Tariffs and Trade 1947 (the “GATT 1947”). Many developing countries opposed this but the United States threatened to abandon the GATT and pursue its own trade programme through regional and bilateral agreements if trade in services was not placed on the negotiating table.5

11. The United States succeeded in bringing about the GATS and has used it to further the economic interests of United States businesses. For instance, in 2002 the United States complained to Antigua that its delay in promptly granting a licence for mobile telecommunications to the United States company AT&T violated the obligations of Antigua

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4 Due to its small size and limited natural resources, Antigua imports substantially all common goods, resulting in an annual trade deficit in excess of US $300 million. Approximately US $100 million of this deficit is attributable to the United States.

under the GATS. As a result of the complaint, Antigua respected its obligations under the GATS and fast-tracked the grant of the requested licence. AT&T now operates in Antigua but employs very few people there because its installations in Antigua are mainly operated from within the United States. The low prices that this gigantic company charges for its services in Antigua can not be matched by the competing indigenous operator. As a consequence the indigenous company (which does provide local employment) is slowly being driven out of the market, resulting in domestic unemployment, a loss of revenue to the government and the risk that AT&T may raise prices once local competition has disappeared. Further, while AT&T does not generate foreign exchange earnings for Antigua, it must convert the local currency into foreign exchange in settlement of its payments from subscribers in Antigua, fostering a drain on the country’s scarce foreign exchange earnings.

Encouragement to develop cross-border trade in services

12. Developing countries have been encouraged to develop trade in services and exploit the opportunities offered by electronic commerce, amongst others by the WTO and the United States.

13. Paragraph 34 of the Doha Declaration provides as follows on electronic commerce:

“(…) electronic commerce creates new challenges and opportunities for trade for members at all stages of development, and we recognize the importance of creating and maintaining an environment which is favourable to the future development of electronic commerce.”

14. In a communication circulated to WTO Members on 31 March 2003 the United States pointed out that further liberalisation of trade in services will benefit developing countries, inter alia because:

“developing economies’ participation in this market has increased in recent years due, in part, to the new cross-border delivery options made possible by innovations in information and communication technology”6, and

“an increase in cross-border services trade could alleviate poverty and increase wealth in developing countries.”7

15. However, there is a clear contradiction between United States rhetoric and United States practice, as evidenced by its failure to meet its commitments under the GATS in respect of this dispute with Antigua.

Competition from developed countries

16. Remote access gambling and betting services such as those offered from Antigua are not a marginal industry. The United Kingdom, for instance, has a number of large companies providing these services both domestically and internationally. The United Kingdom allows and regulates remote gambling and betting services with the hope that:

“Britain will come to be a world leader in all fields of gambling activity.”8

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7 Id., para. 50.
17. In a paper on the reform of gambling regulation the United Kingdom’s government stated that:

“There is a potentially vast international market for which gambling operators based in this country will be encouraged to compete. Consumers, both here and abroad, will be able to access a full range of gambling sites licensed and located here, safe in the knowledge that the probity and integrity of the gambling operators and the products they offer are assured by the Gambling Commission.”

18. In a more detailed paper that exclusively concerns remote access gambling the United Kingdom’s authorities stated that:

“In taking the decision to accept the Gambling Review body’s recommendation to allow British based online gaming, the Government took the view that continued prohibition was neither desirable nor practical. All of the evidence pointed towards a growing global market for online gambling where national boundaries had come to have little meaning. Nowhere is this better illustrated than in the USA where, despite the apparent illegality of cross border gambling, more of its citizens gamble online than anywhere else in the world (it is estimated that they still constitute over half of the online gaming market).

To deny this appears in many ways to fly in the face of the reality of international banking and the inherently international nature of 21st Century telecommunications.”

19. It is beyond doubt that cheaper and more advanced information and communication technologies such as the internet, digital television and telephone service will become important media for the selling of gambling and betting services in countries that allow gambling and have a developed telecommunications infrastructure. The convenience for the consumer and the possibility of huge cost savings for the operators makes such an evolution inevitable (similarly to what is happening with, for instance, distribution of recorded music and retail banking). Countries such as the United Kingdom have seen no insuperable public interest issues flowing from this move towards an on-line service, but have rather embraced it in a regulated context. Today, Antigua can be competitive in the sector of remote gambling and betting services and has a chance of retaining the operators that have invested in the country and provide sorely needed employment. However, if the United States is allowed to first destroy the industry in Antigua, operators may not return when this activity is ultimately “legalised” in the United States. Undoubtedly some of the operators will have left for jurisdictions such as the United Kingdom and others will find that the market that they pioneered has been taken over by companies operating in the United States.

20. In this context, the Government of Antigua believes it had no option but to request consultations with the United States under the Dispute Settlement Understanding (the “DSU”) of the WTO. The government of Antigua fully accepts the burdens of WTO membership and allows companies such as AT&T to operate at the expense of local employment. However, the government also owes a duty of care to the population to defend

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8 United Kingdom Department for Culture, Media & Sport, The future regulation of remote gambling: a DCMS position paper, April 2003, para. 16. (Attached as Exhibit 2, found at Antigua Exhibits, file 1, tab 2)

9 A safe bet for success – Modernising Britain’s gambling laws, para. 4.48 (Attached as Exhibit 3, found at Antigua Exhibits, file 1, tab 3).

10 United Kingdom Department for Culture, Media & Sport, The future regulation of remote gambling: a DCMS position paper, April 2003, paras. 102-103 (Antigua Exhibits, file 1, tab 2).
the country’s rights under international law and protect its peoples’ opportunities for development.

No constructive dialogue with the United States

21. During consultations Antigua:

- gave the United States a detailed explanation of its legal position, both orally and in writing;
- invited the United States, both orally and in writing, to explain its legal position and the reasons for its disagreement with Antigua on crucial points such as the interpretation of the United States schedule of commitments under the GATS;
- offered to provide a detailed explanation of the strict regulation of the gambling and betting industry in Antigua;
- indicated that it was willing to consider any proposals that would strengthen the regulatory process even further.

Antigua has received no answer or explanation from the United States other than a flat denial that it has made a commitment in respect of gambling and betting services under the GATS. Thus the United States left Antigua no choice but to request the establishment of this Panel.

2. PROCEDURAL BACKGROUND

22. On 13 March 2003 Antigua requested consultations with the United States pursuant to Article 4 of the DSU and Article XXIII of the GATS regarding measures applied by central, regional and local authorities of the United States that affect the cross-border supply of gambling and betting services. The request was circulated to Members on 27 March 2003. On 1 April 2003 Antigua submitted an addendum to its request for consultations. This was circulated to Members on 10 April 2003. Consultations were held on 30 April 2003 but failed to resolve the dispute.

23. On 12 June 2003, Antigua requested the DSB to establish a panel pursuant to Article 6 of the DSU. On 8 July 2003 Antigua requested the establishment of a panel for the second time. On 21 July 2003 the DSB established the Panel with the following terms of reference:

“To examine, in the light of the relevant provisions of the covered agreements cited by Antigua and Barbuda in document WT/DS285/2, the matter referred to the DSB by Antigua and Barbuda in that document, and to make such findings as will assist the

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11 Request for consultations by Antigua and Barbuda, Measures affecting the cross-border supply of gambling and betting services, 27 March 2003 (WT/DS285/1).
12 Request for consultations by Antigua and Barbuda, Measures affecting the cross-border supply of gambling and betting services, 10 April 2003 (WT/DS285/1/Add.1).
13 Request for the establishment of a panel by Antigua and Barbuda, Measures affecting the cross-border supply of gambling and betting services, 13 June 2003 (WT/DS285/2).
DSB in making the recommendations or in giving the rulings provided for in those agreements.\textsuperscript{14}

Canada, the European Communities, Japan, Mexico and Chinese Taipei have reserved their rights to participate in the Panel proceedings as third parties.\textsuperscript{15} On 15 August 2003, pursuant to Article 8.7 of the DSU, Antigua requested the Director-General of the WTO to determine the composition of the Panel. On 25 August 2003 the Director-General determined the composition of the Panel.\textsuperscript{16}

24. The Panel request lists Article VIII:1 and VIII:5 of the GATS among the provisions that are possibly violated by the United States’ measures at issue. Following further consideration of the factual background, Antigua takes the view that Article VIII:1 and VIII:5 are not relevant for this dispute. Consequently Antigua makes no claim under Article VIII:1 and VIII:5 in this Submission. Antigua does, however, reserve its right to bring a new complaint based on Article VIII:1 and VIII:5 of the GATS if facts were to come to light that indicate a possible violation thereof.

3. FACTUAL AND REGULATORY BACKGROUND

3.1 THE TERMINOLOGY OF THE GAMING INDUSTRY

3.1.1 Types of gambling and betting

25. A vast array of gambling and betting games and services are offered on a commercial basis in the United States and elsewhere. These games can typically be categorized into one of the following three broad categories:

* Betting* on the outcome of events in which the gamblers do not participate, such as sports contests (for example, horse races, soccer, American football, basketball, and cricket).

* Card games* involving monetary stakes (such as poker, black jack and baccarat).\textsuperscript{17}

* Random selection games* which are games of chance based on the random selection of numbers or other signs and where the random selection is performed by a machine or the casting of dice. This type of gambling includes, *inter alia*,

- Lotto, keno and bingo: players choose (or are given) a selection of numbers from a larger pool of numbers and win if their selection matches the random selection performed by a machine. These kinds of games are played in various formats such as “six from 49” (lotto) or “12 of 20 drawn from a pool of 80” (keno).

- Instant lotteries or “scratch card games”: this is a relatively new format for the traditional “passive” lottery, which is now little used in its

\textsuperscript{14} Note by the Secretariat, United States - Measures affecting the cross-border supply of gambling and betting services, 26 August 2003 (WT/DS285/3).
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} In the context of a casino these will often be referred to as part of a wider group of “table games” also including random selection games such as roulette or craps.
traditional form. A large number of tickets are randomly distributed among which there are a limited number of winning tickets. Tickets are generally partially covered with a latex covering that hides whether or not and to what extent a ticket is a winner. Players scratch away this covering to discover whether and what they win.\footnote{For examples, see Exhibit 4, found at Antigua Exhibits, file 1, tab 4. Examples of online promotions and instructions on how to play scratch-off instant games can be viewed at \url{www.oregonlottery.org/scratch/}.}

- Gambling machines: these perform a “random selection” each time they are asked to do so by a gambler. This includes not only traditional mechanical slot machines, but also electronic video lottery terminals (“VLTs”) and other electronic gambling devices (“EGDs”).

- “Table games” such as roulette or “craps” in which the random selection is determined by a spin of a wheel or the casting of dice.

3.1.2 “Gambling,” “gaming,” “wagering” or “betting?”

26. “Gambling,” “gaming,” “wagering” and “betting” are different terms for the same basic activity. While these terms are generally used interchangeably by the industry and by Antigua in this Submission, the industry typically refers to itself as the “gaming industry” and terms such as “gambling and betting” more often refer to the activity.

3.1.3 Gaming industry financial terminology

27. This Submission refers on a number of occasions to financial terms commonly used in the gaming industry. These include:

- \textit{total amount wagered}: the total amount that gamblers have entered as a stake in gambling and betting games;

- \textit{gross gambling revenue}: the total amount wagered, less the money paid out as prizes. This amount is what gamblers collectively lose to the gaming operator;

- \textit{hold percentage}: the quotient of gross gambling revenue divided by total amount wagered.

3.2 THE REMOTE ACCESS GAMING INDUSTRY IN ANTIGUA

3.2.1 Development of cross-border gambling and betting services in Antigua

28. As part of its economic development and diversification strategy, the Antiguan government took a series of steps commencing in 1994 to provide a framework for the development of a primarily internet-based gaming industry on the island. The first step was the adoption of the Free Trade and Processing Zone Area Act 1994\footnote{Acts of Antigua and Barbuda, Act No. 12 of 1994.} (the “FTZ Act”) in November of 1994. While the FTZ Act itself does not specifically mention the conduct of cross-border gambling and betting services, the government intended that cross border gaming would be one of the principal industries generated by the FTZ Act, and by 1997 there were more than 20 of these businesses operating in Antigua.
29. Effective 25 August 1997, Antigua enacted a more comprehensive regulatory scheme for companies providing cross-border gambling and betting services. A new set of regulations represented an industry-directed approach to regulation, requiring the provision of more information in connection with obtaining a licence than previously and including a set of standards for due diligence in connection with the approval process. These regulations also required licensees to be organized under Antigua’s International Business Companies Act of 1982 (the “IBC Act”).

30. By 1999, a combination of promotion of Antigua as a well-regulated jurisdiction for providers of cross-border gambling and betting services, natural industry forces and an advantageous taxation scheme led to a dramatic growth in the gaming industry. Employment in the gaming industry in Antigua reached an estimated 3,000 persons and there were up to 119 licensed operators on the island. The government estimated that these businesses accounted for approximately ten percent of the country’s gross domestic product in 1999, generating wages and salaries in excess of US $12.9 million. Licensing fees to the government in 1999 were over US $7.4 million.

31. Alongside the cross-border gambling and betting services sector, other “offshore” services were developing in Antigua at the same time, particularly financial institutions and trust companies. Although the Antiguan government had adopted significant money laundering legislation in 1996 (the “Money Laundering Act”), the United Kingdom and the United States issued financial advisories in 1999 against financial transactions involving financial institutions located in Antigua (the “Advisories”), primarily because their governments felt that legislation introduced in Antigua in 1998 had weakened the anti-money laundering framework. While the Antiguan government disagreed with this assessment, it nonetheless worked closely with the authorities in London and Washington to introduce legal and enforcement machinery that met or exceeded international standards. The aggressive steps taken by the government to strengthen the regulation of the financial sector in Antigua included:

- amendments to the Money Laundering Act;
- adoption of general anti-money laundering regulations (the “Money Laundering Regulations”);
- strengthening the powers of an independent commission with oversight responsibility over international and offshore financial institutions, as well as domestic trusts, insurance companies and companies organized under the IBC Act.

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20 Statutory Instruments Antigua and Barbuda, 1997 No. 20, the “Virtual Casino Wagering and Sports Book Wagering Regulations 1997.”
21 Acts of Antigua and Barbuda, No. 9 of 1996.
23 Statutory Instruments Antigua and Barbuda, 1999 No. 35. The “Money Laundering (Prevention) Regulations 1999.”
24 This was completed in 2002. The new commission is called the “Financial Sector Regulatory Commission” (the “FSRC”).
25 Domestic financial institutions are regulated by the Eastern Caribbean Central Bank, a financial oversight body created by eight member states in the Eastern Caribbean, including Antigua.
• strengthening of the Office of National Drug and Money Laundering Control Policy (the “ONDCP”) to enhance its capacity as the “supervisory authority” of financial institutions under the Money Laundering Act\(^\text{26}\) and to increase its capacity for gathering financial intelligence and enforcing the law;

• adoption of legislation criminalising terrorist financing activities;\(^\text{27}\)

• adoption of money laundering guidelines for financial institutions (the “Money Laundering Guidelines”);\(^\text{28}\)

• adoption of a tax information exchange act;\(^\text{29}\) and

• adoption of completely new regulations for the gambling and betting industry (the “Gaming Regulations”).\(^\text{30}\)

3.2.2 Impact of legislative and regulatory initiatives

32. All of these new measures, in combination with existing legislation,\(^\text{31}\) resulted in both the United Kingdom and the United States lifting the Advisories in 2001. Antigua is now recognised as a member of the international community committed to the prevention and detection of money laundering and other financial crimes. As a member state of the Caribbean Financial Action Task Force (the “CFATF”) created under the auspices of the Financial Action Task Force on Money Laundering established by the G-7 Summit held in Paris in 1989 (the “FATF”),\(^\text{32}\) Antigua is subject to periodic independent review and audit by the CFATF\(^\text{33}\) for compliance with certain standards including:

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\(^{26}\) The ONDCP was initially organized in 1996.


\(^{28}\) Issued on 9 September 2002 by the ONDCP as Supervisory Authority under Section 10 of the MLPA. The “Money Laundering Guidelines for Financial Institutions.” A copy is attached as Exhibit 5, found at Antigua Exhibits, file 1, tab 5.


\(^{30}\) Statutory Instruments Antigua and Barbuda, 2001 No. 16. The “Interactive Gaming and Interactive Wagering Regulations of 2001.” A copy of the Gaming Regulations is attached as Exhibit 6, found at Antigua Exhibits, file 1, tab 6.


\(^{32}\) In its Annual Report 1999-2000, Annex A at para. 11, the FATF noted “[t]he authorities of Antigua and Barbuda have achieved impressive results, especially since 1999, in revising the anti-money laundering framework, in accordance with the FATF 40 Recommendations.”

\(^{33}\) Memorandum of Understanding Among Member Governments of the Caribbean Financial Action Task Force, Article XV. These reviews are called “mutual evaluations” by the CFATF. The last review of Antigua was completed on 18 March 2003: CFATF, Mutual Evaluation Report on Antigua & Barbuda, Second Round September 2002 (the “CFATF Report”). The CFATF Report was endorsed by the CFATF Plenary XVII on 18 March 2003. A copy is attached as Exhibit 8, found at Antigua Exhibits, file 1, tab 8. The previous assessment of Antigua was conducted in 1998.
33. In 2002 the CFATF conducted a review of Antigua resulting in a report that was completed in March 2003. The CFATF Report is a comprehensive analysis of the financial sector of Antigua, the country’s legislation and efforts in the area of preventing and detecting illegal drug trafficking, money laundering and other financial crimes. Due to the classification by Antigua of cross-border gaming operators as “financial institutions” under its laws, the CFATF Report directly addresses the gaming industry in Antigua in several respects. The CFATF Report found Antigua:

- compliant with all of the 40 Recommendations;
- compliant with 17 of the 19 Recommendations; and
- compliant with the 25 Point Criteria.

34. The CFATF Report concluded that:

“[d]uring the last two years, the government of Antigua and Barbuda has shown a clear commitment to a regulatory anti-money laundering regime that meets international standards. It has devoted a considerable amount of resources to combating money laundering and terrorist financing. The implementation and enforcement of this anti-money laundering framework is starting to show results at this point in time.”

34 The 40 Recommendations were first adopted by the FATF in 1990. In 1996 the 40 Recommendations were revised to reflect evolving money laundering typologies, and were revised again by publication on 20 June 2003, primarily to address issues relating to financing of international terrorism. The 40 Recommendations are listed on page 40 of the CFATF Report (cited above at footnote 33). The 20 June 2003 version of the 40 Recommendations can be found at http://www1.oecd.org/fatf/pdf/40Recs-2003_en.pdf. The 20 June 2003 version of the 40 Recommendations expressly refers to “internet casinos” with regard to the customer due diligence and record keeping provisions (See Interpretative Notes, Recommendations 5, 12 and 16).

35 The 19 Recommendations were adopted by the CFATF in 1990 and were revised in 1999 (they are listed on p. 41 of the CFATF Report (cited above at footnote 33)).

36 The 25 Point Criteria were established by the FATF in its 14 February 2000 “Report on Non-Cooperative Countries and Territories” (they are listed on p. 42 of the CFATF Report (cited above at footnote 33)).

37 CFATF Report, cited above at footnote 33.
38 See Money Laundering Act, First Schedule.
39 Under the 40 Recommendations, as well as the 19 Recommendations, a country can be found “compliant,” “partially compliant” or “non-compliant” with respect to each recommendation. A particular recommendation can also be determined to be “not applicable” to a particular country.
40 Antigua was found partially compliant with the scope of its confiscation powers in the area of drug trafficking, and the recommendation of signing and ratifying the OAS Convention on Extradition was determined to not be applicable to Antigua.
41 Unlike the 40 Recommendations and the 19 Recommendations, the 25 Point Criteria are presented in a negative context. If a criterion is “not met,” it means that the country is compliant in the applicable area. If it is “met,” the country is not compliant. A particular point may also be “partially met.”
42 CFATF Report, cited above at footnote 33, page 4, para. 8.
35. The authors of the Report were clearly impressed in particular by the ONDCP, which they considered to be “the most powerful tool” of the anti-money laundering efforts of Antigua and a “powerful and effective organization.”\(^{43}\) The CFATF Report was able to find, in its three conclusions, that:

“Antigua and Barbuda’s new institutional anti-money laundering framework is adequate and compliant with international standards and is being enforced.”\(^{44}\)

36. The initiatives undertaken by Antigua in the wake of the Advisories had an immediate impact both in the regular financial sector and in the cross-border gambling and betting industry. From 1999 to the present, 35 banks licensed in Antigua have closed either as a result of government action or the inability to comply with the new regulatory scheme. While costly in terms of jobs, licensing fees and local economic activity, the government of Antigua clearly manifested a willingness to see the end of these institutions to ensure compliance with international standards and to effectively curtail illegal activity.

37. Even more significant changes have occurred in the gaming industry. From the 1999 high of 119 licensed operators the number had declined to 28 by 2003. The government estimates that current employment in the sector is under 500 and in the most recent fiscal period licensing fee revenue had declined to approximately US $1.8 million. The government believes that a number of the discontinued operations ceased doing business in Antigua due to the increased standards of Antigua’s regulatory scheme, the existence of other jurisdictions where regulation is non-existent or exists in name only and low licensing or registration fees and no-tax schemes in other jurisdictions.\(^{45}\) However, the government also believes that an increasingly aggressive strategy of the United States to impede the operation of gaming companies in Antigua was and remains a material factor in the decline of the industry in Antigua.

3.2.3. Cross-border gaming operations in Antigua

38. As the cross-border gaming industry in Antigua has developed and matured, the government believes that a standard business model has evolved that successful operators more or less conform to.\(^{46}\) This business model is comprised principally of (i) product offerings; (ii) methods of establishing accounts and performing due diligence on players; (iii) fraud prevention; (iv) prevention of under-age gambling; (v) avoidance of problem gamblers; and (v) receipt and payment of funds.

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\(^{43}\) Id., para. 70 at page 15.

\(^{44}\) Id., para. 1 at page 38.

\(^{45}\) In 2001, the Antiguan government introduced a modified three percent tax on gross winnings of gaming operators. Although this tax is cited anecdotally as a factor in the loss of some operators to jurisdictions with no taxes, it was adopted by the government primarily in response to one of the demands made by the Organisation for Economic Co-operation and Development (the “OECD”) in connection with its “harmful tax competition” initiative. See OECD, Harmful Tax Competition—An Emerging Global Issue (1998). As a result of negotiations with developing countries, including Antigua, the OECD dropped the applicable demand and accordingly, this tax was repealed in 2003.

\(^{46}\) The discussion in this part of the Submission is based upon the experience and the records of the Antiguan Directorate of Offshore Gaming. See the discussion at paragraphs 49-62 below.
(A) Product offerings

39. Antiguan regulation provides for two kinds of gambling and betting licences — interactive gaming and interactive wagering. The gaming licence is for casino-type, random selection and card games and the wagering licence is for sports betting. Some operators possess both licences and players can access either type of service from one internet site, while other operators offer only one service. Casino game operators create “virtual casinos” on their web sites with detailed graphics and enhancements designed to mimic land-based casino settings. These sites offer a variety of card and dice games such as poker, black jack, craps and keno, as well as arcade-type games that provide virtual imitations of video poker terminals, slot machines and other gambling machines. Because of the highly visual aspect of the casino-type games, these services are operated exclusively through internet connection.

40. The sports betting operators offer the chance to wager on the outcome of sporting contests in a number of different ways, such as straight wagers on match results, transacting in futures markets in player performances, team performances and outcomes of political campaigns and other uncertain future events, and other forms of traditional as well as inventive methods of wagering. All Antiguan sports book operators maintain an internet web site on which players may place wagers, but many operators also make extensive use of telephone betting, as betting on contests or performances to occur in the future does not need to be visual and the events are independent of the operator’s web site.

(B) Player accounts and player due diligence

41. The gambling and betting service providers in Antigua offer what is called “account betting” where a player must fund an account with money before being able to enter into wagers. The amount of a wager cannot exceed the funds on deposit in the account and players are not offered credit on which to gamble. If a wager is lost, the amount of the bet is taken from the player’s account for the benefit of the operator. If the player wins, the winnings are credited to the account. To realise on their winnings players may request that all or any portion of the funds in their account are directed back to them. In practice as well as by requirement of Antiguan law, winnings and the balance of deposits are transmitted back to the account from which the initial deposit came or, if the deposit was by credit card, sometimes by credit back to the same credit card. In some cases, amounts are paid to players by cheque.

42. To open an account with an operator, prospective players typically fill in a form and submit information directly on-line. The precise information requested at the time of establishing a new account differs from site to site, but the basic objective is to obtain enough information regarding the new player to allow the operator to perform its own due diligence into the identity of a player. While almost every operator will let a person open an account without the operator having gone through the due diligence process, funding an account and commencing gambling or betting on the account cannot be done without the completion of the process. There are several common methods used by players to fund accounts with

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48 See, e.g., www.gamebookers.com; www.bingomania.net.
49 This is unlike many land-based casinos in the United States, which will offer some customers the ability to gamble on credit with funds advanced by the casino. Advancing of credit for gaming transactions is against Antiguan law. See the discussion at paragraph 55 below.
50 See the discussion at paragraph 55 below.
Antiguan gaming operators. These include payment by cheque drawn on a bank account or a bank certified or cashier’s cheque, wire transfer, electronic transfer to money remittance service providers and credit card.

43. The methods used by operators to perform due diligence on players differ from site to site, but all operators undertake some form of identity verification to come to a reasonable assurance of the identity of the player. In addition to satisfying Antigua’s regulatory requirements for identity verification,\textsuperscript{51} anti-fraud prevention motivates operators to ensure identification. A number of operators use commercially available databases where large amounts of information on persons can be found, including dates of birth and employment, criminal records, credit history and residential addresses. Operators can also easily determine the location of a player through the tracing of the internet service provider number generated by the person’s computer.

(C) Fraud prevention

44. Each Antiguan operator maintains an “anti-fraud” department with the objective of preventing abuses of the gaming systems, collusion among players, financial fraud and credit card abuse, under-age playing and other occurrences which can result in financial losses to the operator. In general, anti-fraud departments perform the identity checks on prospective players, investigate suspicious conduct and develop strategies to deal with illegal or dishonest practices. It is obvious to the government through its oversight of the industry that with experience, operators have become extremely capable of discerning potentially fraudulent or dishonest players or conduct in a number of ways and mostly by recognisable patterns that have built up over the years.

(D) Under-age and problem gambling

45. Under-age gambling is expressly prohibited by Antiguan law.\textsuperscript{52} Experience has shown that under-age gambling with Antiguan operators is relatively rare for several reasons. The first obstacle to gambling and betting by minors is the age verification that forms a part of the identification process. A second material obstacle is the need to fund an account before any wagering can commence, which requires access to financial instruments such as cheques and a funded bank account, the ability to send funds by wire transfer from a funded bank account or access to a valid credit card. This is a significant barrier which most minors are unable to overcome, particularly given the practice in the industry to either send winnings and deposits directly back to the account from which deposits were received or crediting winnings directly back to the applicable credit card—in essence denying the minor the ability to access any gaming rewards. Another obstacle to play by minors is market driven—in the rare cases where minors have been able to gamble the result has almost invariably been a refund to the parent or a credit back on a credit card.

46. Another method of restricting the ability of minors to wager on operator web sites can be imposed at the user’s end. In practice, many Antiguan operators provide direct links from their web sites to parental control providers such as “Cybersitter,” “Net Nanny” and “Surf Watch.” Some specifically register themselves with these parental control providers to ensure that access to their sites will be automatically blocked to subscribers.

\textsuperscript{51} See the discussion at paragraph 55 below.
\textsuperscript{52} See the discussion at paragraph 55 below.
47. It is a requirement of Antiguan law that operators display on their sites a warning of the addiction possibilities of gambling and information to assist compulsive gamblers.\textsuperscript{53} In practice, this is usually done by a reference and link to organizations such as “Gamblers Anonymous.” Furthermore, the government has found that the cross-border gaming industry in Antigua is generally adverse to gambling and betting by problem gamblers. Not only do these people tend to be more problematic for operators—demanding credit and refunds and occupying a disproportionate amount of personnel attention—but their conduct also frequently results in charge-backs on credit cards and reversals of financial transactions. Most operators appear to be able to detect patterns of problem gamblers either at the sign-up stage (where the operators refuse to authorise funding of or playing on an account) or later on during the course of the relationship with the player, in which event the person’s account will often be closed and the balance returned to the player.

3.2.4. The current regulatory scheme

48. There are two components of government regulation of the cross-border gaming industry in Antigua—the direct regulatory scheme of the Gaming Regulations and the requirements imposed upon the industry under the anti-money laundering scheme as a result of the classification of cross-border gambling and betting service providers as “financial institutions” under the Money Laundering Act.

(A) The Gaming Regulations

49. The Gaming Regulations were adopted on 22 May 2001, and represent a comprehensive, forward-looking approach to the regulation of the gaming industry in Antigua. Developed with the assistance of American gaming law experts by the Antiguan Directorate of Offshore Gaming (the “Directorate”),\textsuperscript{54} the Gaming Regulations span 58 pages and 207 numbered paragraphs. Included as addenda to the text of the Gaming Regulations are five separately lettered schedules which comprise the forms required to be completed in connection with the acquisition or, as applicable, renewal of a licence under the Gaming Regulations.\textsuperscript{55} The Gaming Regulations themselves provide for further rulemaking and development of certain procedures.\textsuperscript{56}

50. The Gaming Regulations open with a general prohibition against the conduct or provision of cross-border gambling and betting services unless the operator possesses a licence issued under the Gaming Regulations and provide for a detailed application process. A licence is valid for one year only, and must be renewed on time or the operator’s authority to conduct cross-border gambling and betting services terminates. The Directorate requires

\textsuperscript{53} See the discussion at paragraph 55 below.

\textsuperscript{54} A division of the FSRC, the Directorate currently has 17 full time personnel working in three departments, regulatory, licensing and administration. It is overseen by a Director of Offshore Gaming who reports to the Administrator of the FSRC. The Directorate maintains a frequently updated internet web site providing information on obtaining a licence, on existing licence holders, on legislation and on other topical matters. See www.antiguagaming.gov.ag.

\textsuperscript{55} A copy of each of these schedules, lettered “A” through “E,” is attached to this Submission as Exhibit 7, found at Antigua Exhibits, file 1, tab 7.

\textsuperscript{56} Some of the additional rulemaking and procedures have been developed and are in place, others are in various stages of development. The Directorate does not consider any of its responsibilities and obligations of licensees under the Gaming Regulations to be beyond the capabilities of current technology or the resources of the Directorate.
the submission of full and complete application forms in each circumstance. If an application omits information or is otherwise incomplete, the Directorate will notify the applicant of the omissions or other insufficiencies of the submitted materials and require compliance before finally considering the application. The nature and extent of the due diligence process varies depending upon the circumstances of the applicant, but the Directorate routinely performs due diligence on the principals or “key persons” of each applicant, in many cases through engaging the services of private investigation agencies with international capabilities. The Directorate also performs ongoing due diligence when circumstances warrant, and will frequently request further investigation of key persons in connection with renewal applications. Completed applications for each licensed operator, as well as due diligence information and reports from private investigators, are maintained in files in the office of the Directorate. Historical information, including information pertaining to holders of expired or terminated licences, is retained by the Directorate at offsite facilities.

51. The Gaming Regulations contain additional provisions regarding licensing, including an affirmative obligation of licensees to inform the Directorate of certain material changes in their circumstances including changes in key personnel, officers or directors, acts that might reasonably give rise to a negative implication regarding the reputation of a licensee or its ability to successfully operate its business and a reduction in a licensee’s financial resources. Renewal applications also are subject to strict scrutiny, and the Directorate may grant, deny or return renewal applications for additional information. The Directorate also has the unilateral power to amend a licence as it sees fit and to suspend or revoke a licence under a number of circumstances.

52. An administrative procedure is provided under the Gaming Regulations for affected persons to contest a proposed suspension or revocation of a licence, with ultimate recourse to the Antiguan judicial system in the event of an adverse determination. However, in extraordinary situations the Directorate maintains the ability to immediately and without hearing suspend or revoke a licence.

53. The Directorate has used its powers to revoke, suspend or amend the terms of licences on a number of occasions. In the past 18 months alone, 12 licences have been revoked by the Directorate for a variety of reasons under the Gaming Regulations. Additionally, the Directorate has suspended licences pending further capitalisation, rejected or revoked key person applications where it appeared that the person submitted was not in fact a true

*Key persons* are subject to an application process and to due diligence, qualification, suspension and revocation provisions of the Gaming Regulations similar to those for the licensee itself. See Gaming Regulations, paras. 57 – 80 (Antigua Exhibits, file 1, tab 6). In addition, certain contractors of licensees are required to go through an application and due diligence process if the contractor receives a portion of winnings as part of its fees. See Gaming Regulations, paras. 81 and 82. Historically, these have been software developers, providers or licensors.

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57 “Key persons” are subject to an application process and to due diligence, qualification, suspension and revocation provisions of the Gaming Regulations similar to those for the licensee itself. See Gaming Regulations, paras. 57 – 80 (Antigua Exhibits, file 1, tab 6). In addition, certain contractors of licensees are required to go through an application and due diligence process if the contractor receives a portion of winnings as part of its fees. See Gaming Regulations, paras. 81 and 82. Historically, these have been software developers, providers or licensors.

58 Gaming Regulations, paras. 19 – 21 (Antigua Exhibits, file 1, tab 6).

59 Id., para. 28.

60 Id., paras. 33 - 36.

61 Id., para. 38.

62 Id., paras. 39 - 55.

63 Id., para. 56.

64 Id., paras. 44 and 45. Generally, if the Directorate believes (i) that sufficient ground to suspend or revoke the licence exists and (ii) immediate action is required to protect the public interest, protect the integrity of a licensee’s activities or prevent potential money laundering, fraud or other suspicious activities.
principal or did not pass a due diligence inquiry favourably, and has undertaken a number of investigations with respect to the financial condition or operations of certain licence holders.\textsuperscript{65}

54. The Directorate also issues directives to the compliance officers of each licensee\textsuperscript{66} and conducts periodic seminars at which attendance of licensee compliance officers is mandatory. At these seminars, the panel of speakers will include representatives of the Directorate and the ONDCP, as well as industry experts on banking issues, money laundering and other financial crimes, representatives of software providers and other industry professionals.

55. A significant portion of the Gaming Regulations is directed at addressing certain social issues routinely associated with gambling in general as well as preventing illegal conduct. Among the requirements are those relating to:

- \textit{Age Limitations.} Operators are not permitted to allow persons under the age of 18 to either participate in the conduct of the gaming operations or to participate as players or contestants in games. Any prize determined to be won by a person under the age of 18 years is to be forfeited to the Directorate.\textsuperscript{67}

- \textit{Responsible Gaming.} Operators are required to display on their web sites a warning of the addiction possibilities of gambling and information on sites to assist compulsive gamblers.\textsuperscript{68} Operators are also required to exclude players from website access upon the player’s request.\textsuperscript{69}

- \textit{Player Registration.} Licensees must fully register and verify the identities of players before allowing participation in wagering. Licensees are to confirm the name, date of birth and place of residence of registering players.\textsuperscript{70}

- \textit{Player Accounts.} Regulations governing the operation and maintenance of player accounts include (i) the terms under which licensees must permit players access to their accounts; (ii) a requirement that controls be maintained such that no wager may be placed without sufficient funds on hand in the account to cover the full amount of the wager; (iii) a prohibition on receiving cash from a player and delineating acceptable methods for funding accounts;\textsuperscript{71} (iv) funds are to come only from properly verified accounts in regulated financial institutions; (v) players are limited to one account with a licensee;
(vi) no payment in excess of US $5,000 is to be made from a player’s account without proper reverification of identity; (vii) if possible, winnings withdrawn from a player’s account are to be sent back to the account from which the player’s deposit was made; (viii) if not possible to credit back the account from which the player made the deposit, withdrawals from a player’s account are to be sent to a verified physical address for the player; (ix) payments from a player’s account in excess of US $25,000 must be reported to the ONDCP; (x) unless fraudulent activity or suspicious activity is suspected (in which event a suspicious activity report, or “SAR,” must be filed with the Directorate) a licensee must deliver funds from a player’s account within five days of request; (xi) a licensee must not provide or facilitate the provision of credit to a player; (xii) a licensee should access a player’s account only to debit the account for a wager, remit funds to the credit of the account or as otherwise expressly provided in the Gaming Regulations; and (xiii) in the event no transaction has been recorded on a player’s account for more than 18 months, a licensee is to remit the balance to the player or, if the player cannot be found, to the Directorate.

- Player Confidentiality. Licensees must maintain player identities confidential, as well as matters relating to players, unless either (i) approved in writing by the player; (ii) reasonably necessary in connection with the conduct of games; or (iii) required in connection with an investigation or otherwise by the Directorate.\(^\text{72}\)

56. Among the reporting obligations of licensees are the duties to report dishonest or unlawful acts and to report suspicious activities.\(^\text{73}\) If a licensee suspects that a player has engaged in improper activity in connection with a game the licensee must notify the Directorate in writing promptly after becoming aware of the conduct.\(^\text{74}\) Should a licensee observe conduct or otherwise become suspicious of any activity that may involve money laundering or similar activity, it is required to notify not only the Directorate but the ONDCP as well.\(^\text{75}\) In practice, many operators have filed SARs with the Directorate, most of which pertain to acts by players or others to manipulate software, hack into systems or similar conduct. There have been no SARs relating to suspected money laundering or organized crime.\(^\text{76}\)

57. Licensees are also required to take and investigate customer complaints\(^\text{77}\) and to report back to either the complaining party or the Directorate within 21 days of receiving the complaint.\(^\text{78}\) Complaints can also be made directly to the Directorate, a process that is facilitated by a prominent link on the Directorate’s website that allows complaints to be filed.

\(^\text{72}\) Gaming Regulations, paras. 133 and 134 (Antigua Exhibits, file 1, tab 6).
\(^\text{73}\) Other reporting requirements exist under the Gaming Regulations as well, such as (i) upon Directorate request, provision of gaming records (para. 149), and (ii) provision of annual financial information (paras. 156 - 158).
\(^\text{74}\) Gaming Regulations, paras. 184 and 185.
\(^\text{75}\) Id., para. 186.
\(^\text{76}\) The ONDCP has no cases on record of suspected money laundering related to the gambling and betting services business in Antigua. As noted above, the inability to deposit cash—a regulatory requirement as well as a practical circumstance—makes the business unattractive to money launderers.
\(^\text{77}\) Gaming Regulations, para. 178 (Antigua Exhibits, file 1, tab 6).
\(^\text{78}\) Id., para. 179.
electronically. The Directorate is required to investigate complaints and provide a response to the complaining party. In practice, complaints are made both to the operators directly and to the Directorate.

58. The Directorate has investigatory powers under the Gaming Regulations, and may conduct investigations of licensees whether pursuant to a complaint or otherwise. The Directorate also possesses significant monitoring powers pursuant to which it may oversee, supervise and monitor licensees, key persons or games offered by licensees. Inspectors have the right to enter the premises of a licensee—even without the licensee’s consent—and have broad powers to gather information and data.

59. In practice, the Directorate regularly exercises its investigatory, supervisory and monitoring powers. Directorate investigators make unannounced visits to the premises of each licensee at least once a month and have substantial and continuous interaction with the compliance officers of licensees. Directorate personnel frequently access licensee web sites to observe content and performance and on occasion play on the sites on a “test” basis to observe the conduct of games or contests directly. Several times a day, Directorate personnel access a number of heavily-trafficked internet “bulletin boards” dedicated to the offshore gaming industry to learn about current issues, get information regarding licensees from posting players and learn of possible problem areas. On occasion, the Directorate will post advisories, notices or other information on these bulletin boards. Certain of the internet bulletin boards receive an enormous amount of daily traffic, both in terms of viewings of the site and in postings of messages.

60. The Directorate responds to and investigates each complaint for which it has sufficient information from the complaining party. Complaints received by the Directorate cover a broad expanse of topics, including slow payment of gambling winnings (clearly the largest percentage of complaints), concerns about the fairness of casino-type gaming software, disputes over the time and placement of wagers on sporting contests, inquiries and concerns regarding the legitimacy of particular operators, non-gamblers irritated with unsolicited advertisements from gaming companies, non-payment of winnings or account balances and suspected business failures. The experience of the Directorate is that Antiguan licensees are generally very cooperative in the course of investigations, and most complaints are resolved quickly and accurately.

61. A number of gaming offences and related criminal sanctions are contained in the Gaming Regulations. Offences are equally applicable to players, operators, third parties and government officials and include:

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79 See www.antiguagaming.gov.ag/complaints.asp (a copy is attached as Exhibit 9, found at Antigua Exhibits, file 1, tab 9).
80 Gaming Regulations, paras. 180 – 182.
81 From the inception of the complaint service on its internet web site in June of 2002 to late August of 2003, the Directorate had received 73 complaints through this service.
82 Gaming Regulations, paras. 135 – 137.
83 Id., paras. 138 - 142.
84 Id., para. 203.
85 These internet bulletin boards (see, e.g., www.majorwager.com, www.therx.com) not only perform an important function in the official regulation of internet gaming, but also in the self-regulation arena.
86 Gaming Regulations, paras. 173 – 201 (Antigua Exhibits, file 1, tab 6). The listed offences are cumulative to other offences under Antiguan law, such as theft, money laundering and other financial offences.
• dishonestly obtaining a benefit in connection with any game or service;
• forgery or alteration of a gaming record;
• the knowing use of a forged or altered gaming record;
• impersonating a licence holder, an agent, a key person, an employee of the Directorate or other government official;
• with respect to Directorate employees and other government officials, asking for, receiving or obtaining any money, property or benefit of any kind for such person or any other person for an improper purpose, or agreeing to do so;
• with respect to employees of licensees, taking part in a game of the licensee if directly involved in functions related to the conduct of the game.

62. The Gaming Regulations also address (i) standards in advertising,\textsuperscript{87} requiring, among other things, that advertising not be false, deceptive or misleading and not contain indecent, pornographic or offensive content, providing for the power to order a licensee to stop or change an advertisement and the imposition of a fine for non-compliance; (ii) the payment of prizes and winnings and the settlement of disputes regarding them;\textsuperscript{88}(iii) circumstances under which a system or technical failure disrupts a game or aborts a wager, providing for a dispute resolution procedure and remedial action;\textsuperscript{89} and (iv) ensuring the integrity and independence of the Directorate and other governmental officials engaged in the regulation of the cross-border gaming industry.\textsuperscript{90}

\textbf{(B) The general anti-money laundering scheme}

63. The second component of the regulatory scheme in Antigua is the anti-money laundering efforts of the government, demonstrated principally by the Money Laundering Act, the Money Laundering Guidelines and the actions and authority of the ONDCP and, to a more limited extent, the Money Laundering Regulations.\textsuperscript{91}

64. The Money Laundering Act is a comprehensive, up-to-date statute that criminalizes money laundering, sets up the regulatory authority and powers of the ONDCP, provides for penalties and remedies including the seizure and freezing of assets, conviction-based automatic forfeiture provisions with a reverse onus of proof and civil forfeiture and pecuniary penalty powers. The law also addresses the protection of third parties and provides guidelines for international cooperation. The Money Laundering Act runs to some 67 pages of fine detail in its current form. The fact that the legislation has been amended every year from and including 1999 through 2002 demonstrates the commitment of the government to the efficacy of its anti-money laundering scheme.

Offences under the Gaming Regulations are punishable by fines up to US $5,000 and imprisonment for up to 12 months. Also, winnings taken in violation of the Gaming Regulations are forfeited to the Directorate.\textsuperscript{87}

\textsuperscript{87} Gaming Regulations, paras. 173 – 177 (Antigua Exhibits, file 1, tab 6).
\textsuperscript{88} Id., paras. 159 - 166.
\textsuperscript{89} Id., paras. 167 - 172.
\textsuperscript{90} Id., paras. 187 - 201.
\textsuperscript{91} See Footnote 96 below.
65. Under the Money Laundering Act, money laundering and certain related activities are made criminal offences subject to the imposition of fines and prison sentences. A considerable part of the statute is devoted to collateral offences and powers of the ONDCP, primarily in the area of financial institutions and transactions involving money. These provisions deal with prevention of the use of fictitious identities, record keeping and retention obligations and ONDCP investigative and enforcement powers. There is also a reporting requirement on persons either bringing into or taking out of Antigua currency or negotiable financial instruments (in whatever form and in whatever fashion) in excess of US $10,000, the violation of which may result in the forfeiture of the funds.

66. Extensive, detailed powers providing for the seizure and freezing of property are given in the Money Laundering Act, allowing the assets of persons suspected or convicted of money laundering offences to be frozen and, ultimately, forfeited to the government. The general approach taken by the Money Laundering Act with respect to the seizure of assets allows the court to freeze assets upon an application supported by affidavit of the ONDCP and, thereafter, the burden moves to the owner of the property to convince the court that the seizure is improper, over-broad or unjustified, in whole or in part.

67. Cooperation between the government and the courts and authorities of other countries in cases involving money laundering is mandated by the Money Laundering Act, particularly where the other state is party to a mutual legal assistance treaty with Antigua. Cooperation includes exchanges of information, assistance in identification, tracing, freezing, seizure and forfeiture of property, proceeds or instrumentalities connected to money laundering offences.

68. A schedule to the Money Laundering Act lists commercial activities that result in a person being classified as a "financial institution" for purposes of the Money Laundering Act and applicable regulations. Among the 18 scheduled activities are "internet gambling" and "sports betting." The effect of this is to make all licensed gaming operators in Antigua "financial institutions" for purposes of the Money Laundering Act and all applicable regulations.

69. Although the Money Laundering Regulations contain provisions relating to identification and record keeping procedures and remain in effect, from a practical perspective the Money Laundering Guidelines are the primary money laundering regulations applicable to financial institutions. The Money Laundering Guidelines are a clearly written, well-organized body of instructions and procedures addressing issues such as knowing the customer, record keeping, recognising and reporting suspicious transactions and education and training of personnel. An appendix to the Money Laundering Guidelines provides a number of examples of transactions and conduct that are indicative of money laundering or other financial crimes.

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93 Id., §§ 18 - 18C.
94 Id., §§ 19 - 22. The new office facility of the ONDCP in Antigua was in fact constructed and fully equipped from forfeited funds.
95 Id., § 23.
96 The Money Laundering Guidelines state that the Money Laundering Regulations are “currently the subject of review,” and having been issued in the fall of 2002 the Money Laundering Guidelines are clearly more up-to-date and definitive than the Money Laundering Regulations.
70. The Money Laundering Guidelines have a specific section dedicated to “internet gaming” because:

“[i]nternet gaming businesses, either casinos or sports betting operations, are a relatively new form of financial institution for Antigua and Barbuda. Insofar as they accept funds from customers for the purpose of opening ‘player accounts’ they are similar to the financial institutions for which guidelines are provided in 2.1. However, there are a number of differences which justify the creation of special guidelines for such financial institutions.”

71. A number of the provisions in section 2.2 of the Money Laundering Guidelines are restatements of requirements of the Gaming Regulations dealing with points such as identity requirements, means of taking payments from players and means of making payments to players. Some provisions elaborate on certain of these requirements by:

- providing that satisfactory evidence of age, residence and identity consists of production by the player of a photocopy of a passport, driver’s licence or government identity card containing the requisite information, together with a credit check or banking reference that does not produce information inconsistent with the identification document or other information provided by the player;

- requiring that all payments to players be made to their residential address;

- providing that under no circumstances may payments be made to third parties or to jurisdictions other than the jurisdiction from which the player’s deposit was made;

- requiring the filing of an SAR with the ONDCP in the event a player attempts to “structure” payments in order to avoid the large payment reporting requirements of the Gaming Regulations or the Money Laundering Act;

- providing that payments may be made by licensees to players holding accounts with them; and

- providing that under no circumstances should payments be made to customers of other gaming companies, whether by “set off” or other means.

72. Among the examples of suspicious transactions in Appendix A to the Money Laundering Guidelines are three specifically addressed to “casinos and internet gaming businesses.” These include players who request that payouts be sent to third parties,
particularly in other jurisdictions, and players who engage in “structuring,” or requesting multiple payments. The third example specific to gaming is players who deposit significant sums into their player accounts and then withdraw the money without having undertaken much gaming activity. The ONDCP has also prepared and distributes a summary of relevant money laundering laws, requirements and information directed specifically at the cross-border gambling and betting industry in Antigua.

73. While Antigua has comprehensive and enforced anti-money laundering legislation and machinery in place, the government does not consider the cross-border gambling and betting industry in Antigua particularly susceptible to money laundering or other forms of financial or organized crime for a variety of reasons. Principal among these is that operators in Antigua are prohibited from taking, and in practice do not take, cash from players. With player deposits coming in the form of credit card transactions, electronic transfers, wire transfers or cheque deposits the first and most critical stage of the money laundering process cannot take place through the operators. Further, not only are operators required to establish the identity of players, but they are also strongly motivated to do so by market forces. This is in stark contrast to land-based casinos and gaming outlets, where not only can players wager with complete anonymity but also gamble almost exclusively with cash. The broad electronic and banking record footprint left by non-cash sources of funds combined with the knowledge of the identity of the player result in a transparent and lasting record of the source of funds paid into the cross-border gambling and betting services industry in Antigua. Ironically, the increasing efforts made by the United States to disrupt the transfer of monies to and from players and gaming operators in Antigua have sometimes forced the operators to use less common and transparent money transfer methods. In order to prevent the complete destruction of the industry, the Directorate has reluctantly allowed the operators to use these less transparent means of money transfer.

74. Particularly since the adoption of the Gaming Regulations and the other structural and legislative changes that occurred in Antigua, the ONDCP has not uncovered any material or organized money laundering or other criminal activity associated with the gaming industry on the island. Significantly, since 1999 the ONDCP has handled 34 requests for information from the United States under the Mutual Legal Assistance Treaty between Antigua and the United States, yet not one of those requests have involved criminal conduct related to the cross-border gambling and betting services industry in Antigua.

106 Id., Appendix A.
107 This booklet is entitled Money Laundering Legislation: Antigua and Barbuda, Guidance for Internet Gamers and Sports Book Operators.
108 Money laundering is said to have three stages (i) the placement stage where the proceeds from the illegal activity are initially placed into a financial institution or instrument; (ii) the layering stage of separating the illicit proceeds from their source by creating complex layers of financial transactions designed to disguise the audit trail and provide anonymity; and (iii) the integration stage where illicit proceeds that have been thoroughly layered are brought back into the economy with the appearance of legitimate business funds. See Money Laundering Guidelines, p. 2 (Antigua Exhibits, file 1, tab 5)
109 See the discussion at paragraph 44 above.
110 See the discussion at paragraph 137 below.
111 The Directorate is engaged in dialogue with operators and monitors developments in this area to ensure the integrity of the payment transfer mechanisms in use.
3.3. THE GAMING INDUSTRY IN THE UNITED STATES

3.3.1. Official reports on the United States gambling market

75. Over the past 30 years, the United States government has periodically studied and analysed the gambling and betting market in the United States. In 1976, a federal commission empanelled to study United States national gambling policy opened its final report with the statement that:

“[g]ambling [in the United States] is inevitable. No matter what is said or done by advocates or opponents in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans.”112

76. In 1999, another federal commission, the National Gambling Impact Study Commission (the “NGISC”), completed a lengthy detailed study on gambling in the United States. In its final report to the United States President and Congress,113 the NGISC noted that the 1976 federal gambling commission:

“would be astounded at the exponential growth of gambling, in its availability, forms and dollars wagered in the 23 years since [then].”114

The NGISC Final Report also concluded that:

“Commercial gambling has become an immense industry. Governments are now heavily involved and increasingly active in pursuit of gambling revenues, either directly through state-owned lotteries and Native American tribal gambling or through the regulation and taxation of commercial operators.”115

“There was no single, overarching national decision to turn the United States into a world leader in gambling. Rather, games of chance spread across the map as a result of a series of limited, incremental decisions made by individuals, communities, states and businesses.”116

“In the next 25 years, gambling could, at its present rate of growth, become more and more like other common and legal, but somewhat restricted, business activities, such as the sale of alcohol or cigarettes. Of course, over time, the basic rules of our economic system would be expected to play a greater role in shaping the pattern of gambling, as the quasi-monopolistic circumstances of the present are replaced by more routine competition.”117

77. At the time of the NGISC Final Report, Americans spent approximately US $7 billion on movie tickets, US $26 billion on books and US $450 billion on groceries. In contrast, gamblers in America wagered more than US $630 billion in state-sanctioned gambling activities and lost US $50 billion in the process.118 The NGISC reported in 1999 that state-sanctioned gambling in the United States, “once exotic, (...) has quickly taken its place in

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113 National Gambling Impact Study Commission - Final Report, 18 June 1999 (the “NGISC Final Report”) (extract attached as Exhibit 10, found in Antigua Exhibits, file 1, tab 10).
114 NGISC Final Report, p. 7-1.
115 NGISC Final Report – Executive Summary, p. 1 (attached as Exhibit 11, found in Antigua Exhibits, file 2, tab 11).
116 Id., p. 1.
117 Id., pp.1-2.
mainstream culture”119 and is “common and growing”,120 with 68 percent of Americans having gambled at least once in the year leading up to its report and 86 percent of Americans having gambled at least once in their lifetime.121

78. In the four years since the NGISC Final Report, state-sanctioned gambling in the United States has continued its expansion at an unprecedented rate. As states in the United States face budgetary crises and a relatively weak national economy, they are turning more and more to gambling for tax revenues. In 2003, several states added new commercial casinos, lotteries and horse race betting opportunities. In conjunction with the expansion of gambling opportunities, the acceptance of casino gambling in the United States is at an all-time high, as 85 percent of Americans in 2003 view casino gambling as an acceptable activity for themselves or others.122

79. The US $630 billion in gross wagers reported by the government in 1998 excludes the most widespread and popular form of gambling in the United States non-sanctioned or “illegal” sports betting. The NGISC estimated in 1999 that perhaps as much as US $380 billion in illegal wagers were placed annually by American gamblers on professional and amateur sporting events.123

80. Today, state-sanctioned gambling opportunities are available in 48 states, the District of Columbia, Puerto Rico and United States Virgin Islands.124 Hawaii and Utah are the only two states where state-sanctioned wagering does not presently exist in some form. The state-sanctioned gambling and betting activities within the United States include:

- bingo in 47 states;
- betting on horse racing, dog racing or other sports in at least 41 states;
- state-operated lotteries offering games such as lotto, keno and instant lotteries in 40 states and the District of Columbia;
- casinos in 33 states, which include both commercial and tribal casinos offering a wide variety of gambling games such as card games, betting and random selection games such as roulette and slot machines;
- gambling machines such as slot machines or VLTs at horse racetracks in eight states and in a variety of locations such as bars, truck stops and convenience

119 NGISC Final Report, p. 1-1. (Antigua Exhibits, file 1, tab 10)
120 Id., p. 1-1.
123 NGISC Final Report, p. 2-14 (Antigua Exhibits, file 1, tab 10).
124 See the chart entitled “Overview of Gambling in the United States” attached as Exhibit 14, found at Antigua Exhibits, file 2, tab 14.
stores in five states in a regulated environment and in five states operating in “gray market,” (where legality or illegality is unclear);\textsuperscript{125}

- card rooms in five states.\textsuperscript{126}

81. The omnipresence of fully lawful, state-sanctioned gambling makes the United States the single largest national gambling market in the world.

3.3.2. Global gaming companies of United States origin

82. Many of the largest gaming companies in the world are of United States origin. Within the United States, some of these companies operate their own casinos as well as engage in other gaming-related activities such as developing, manufacturing and distributing gambling machines and providing technical and management support services to other service providers. These companies include Alliance Gaming Corporation, Harrah’s Entertainment Inc, International Game Technology, Park Place Entertainment, Boyd Gaming Corporation, Mandalay Resort Group, MGM Mirage Corporation and Trump Hotels and Casinos.\textsuperscript{127} All of these are publicly owned companies, traded on the New York Stock Exchange.

83. Each of the foregoing companies operates or offers international gaming services of various types. For example, Alliance Gaming utilises a sophisticated remote computer network via the internet to control and monitor progressive video slot machines in Russia from its Las Vegas headquarters.\textsuperscript{128} The network allows for an international connection to an unlimited number of games, operated from any location. Alliance Gaming also distributes gambling machines to Europe and South Africa.

\textsuperscript{125} Jason N. Ader, \textit{Bear Stearns & Co., Inc., North American Gaming Almanac 2002-03} (Huntington Press, 2002) (hereinafter referred to as the “\textit{North American Gaming Almanac}”), p.16. Extracts from this publication are attached as Exhibit 15, found at Antigua Exhibits, file 2, tab 15.

\textsuperscript{126} The primary source for these figures is from the \textit{North American Gaming Almanac}. These figures also rely upon additional sources, including the following: (A) United States Government Accounting Office, \textit{Money Laundering: Rapid Growth of Casinos Makes them Vulnerable} (GAO/GCD-96-28) (4 January 1996), Appendix III, p. 38 (concluding that lawful gambling exists in 47 states, with the following breakdown: (1) charitable bingo in 46 states and the District of Columbia; (2) lotteries in 36 states and the District of Columbia; (3) pari-mutuel wagering in 43 states; (4) casinos (not including Indian gaming) in 14 states; (5) Indian gaming in 29 states; and (6) card room gaming in 13 states.) (Attached as Exhibit 16, found at Antigua Exhibits, file 2, tab 16); (B) United States Government Accounting Office, \textit{Internet Gambling: An Overview of the Issues} (GAO-03-89) (December 2002), p. 42 (stating that 42 states allow wagering on horse racing) (Attached as Exhibit 17, found at Antigua Exhibits, file 2, tab 17); (C) \textit{NGISC Final Report – Executive Summary}, p. 1 (Antigua Exhibits, file 2, tab 11): “America has evolved from a country in which gambling was a relatively rare activity (…) into a nation in which legalized gambling, in one form or another, is permitted in 47 states and the District of Columbia.” (According to the \textit{NGISC Final Report} (at p. 1-1 (Antigua Exhibits, file 1, tab 10)) 37 states and the District of Columbia have lotteries, 28 states authorized casino gambling (including both commercial casinos and Class III Indian casinos) and 43 states have pari-mutuel betting). Included amongst the 37 State lotteries, is Tennessee, which in 2003 approved a state lottery with the actual lottery games to commence in the first quarter of 2004 (Associated Press, 12 June 2003).\textsuperscript{127} Each of these companies maintains a significant internet presence. See \texttt{www.ally.com}; \texttt{www.harrahs.com}; \texttt{www.igt.com}; \texttt{www.boydgaming.com}; \texttt{www.mandalayresortgroup.com}; \texttt{www.mgm mirage.com} and \texttt{www.trump.com}.

84. Others have commercial gambling operations in foreign markets. Park Place owns, operates and manages a number of casinos overseas, with locations including Australia, Uruguay, Canada, South Africa and at sea. MGM Mirage likewise owns and operates casinos in Australia in addition to its extensive United States properties. Harrah’s Entertainment recently began to move into the United Kingdom, forming a joint venture in 2003 with Gala Group, the United Kingdom’s leading mid-market gaming operator with plans to develop eight regional casinos throughout the United Kingdom.

85. The United States federal government also directly offers international betting and gambling services. The four branches of the United States armed forces operate about 8,000 slot machines and video poker electronic gaming devices (“EGDs”) at 94 military bases and installations located outside the United States. In 1999, military personnel, civilian employees of the United States and local nationals gambled US $1.2 billion at these government-owned and operated gambling premises. Approximately 92.5 percent of the money wagered at these government facilities is returned to players as winnings and the remainder—some US $125 million in 2000—was retained by the military as revenue for its “morale, welfare and recreation” activities.

86. In 2001, the United States Department of Defense submitted a written report evaluating the social impact of the readily available gambling machines and concluded that the presence of the military casinos did not have a negative effect on the morale or financial stability of the United States forces, their family members and other persons—including foreign nationals—who gambled at the government owned facilities.

3.3.3. Casino gaming in the United States

(A) Nevada

87. Since it became a state in 1864, Nevada has permitted some form of state-sanctioned gambling. In 1931, during an extremely grim period for the state economy, Nevada legalized virtually all kinds of gambling, and gambling has remained lawful there ever since. It has since become the stated public policy of Nevada that:

“the gaming industry is vitally important to the economy of the state and the general welfare of the inhabitants.”

88. Nevada’s modern casinos, especially those on the main casino area in Las Vegas—the so-called “Las Vegas Strip”—are self-contained mini-cities designed to offer non-stop gambling. For instance, the casino floor in the MGM Grand casino is over 170,000 square

133 Nevada Revised Statutes Annotated, 463.0129.
feet (approximately 16,000 square metres) and holds approximately 3,200 slot machines, 164 table games and a sports betting facility.  

89. In order to attract customers, Nevada casinos widely advertise discount travel fares, inexpensive hotel rooms, bargain meals, low-cost entertainment and other special events. Some casinos even offer free travel to preferred customers. Under United States law, casinos are permitted to advertise gambling in every state of the nation, even within states which do not permit casino gaming. One particularly successful marketing tool of the Las Vegas casinos is to offer entertainment in the form of shows by major stars, Broadway-style musicals, revue spectacles and a variety of lounge acts. All of this entertainment has a single purpose—to bring customers into the casino. Entertainment events that boost a casino’s gambling winnings are frequently held over, whereas those which do not, regardless of how many tickets are sold, are generally discontinued.

90. The Las Vegas-style casinos are made to keep visitors in the resort complex and near the tables and slot machines. Pathways through a casino are built to emphasize the gambling equipment rather than directing visitors to exits. Gaming equipment is carefully arranged in a compact layout to provide secluded, intimate gambling areas, with the gambling equipment the dominant décor on the casino floor.

91. The gambling areas of casinos are also designed to detach visitors from their daily routine and release their inhibitions and conventional responsibilities. The unusual noise and visual effects of the casino floor purposefully create a sensation which heightens the thrill and pleasant tension of gambling. Additionally, most casinos are open 24-hours a day and use a number of techniques to diminish a player’s sense of time and money. There are generally no clocks or views to the outside, making it difficult for gamblers to know the time. The casinos convert cash into readily-expendable chips at gaming tables, which has the effect of detaching gamblers from their customary value of money. To further encourage unchecked gambling, casinos offer free alcoholic beverages to anyone who is

134 North American Gaming Almanac, p. 36. (Antigua Exhibits, file 2, tab 15)
135 John M. Findlay, People of Chance: Gambling in American Society from Jamestown to Las Vegas (Oxford University Press, 1986) (hereinafter “People of Chance”), p. 157. Extracts from this publication are attached as Exhibit 21, found at Antigua Exhibits, file 2, tab 21.
136 See the decision of the United States Supreme Court in Greater New Orleans Broadcasting Assoc., Inc. v. United States, 527 U.S. 173, 190 (1999) (stating that the United States government’s efforts to enforce an antiquated ban on broadcasting advertising of casino gambling was so pierced by governmental exemptions and inconsistencies that the United States government “could not hope to exonerate” the reasons for the ban and further holding that a Louisiana-based casino could lawfully broadcast advertising in neighbouring Texas, where casino gambling was illegal).
137 Suburban Xanadu, p. 95. (Antigua Exhibits, file 2, tab 20)
138 People of Chance, p. 158. (Antigua Exhibits, file 2, tab 21)
139 Bill Friedman, Designing Casinos to Dominate the Competition: The Friedman International Standards of Casino Design (University of Nevada Reno, 2000), pp. 15-18. Extracts from this publication are attached as Exhibit 22, found at Antigua Exhibits, file 2, tab 22.
140 Id.
141 People of Chance, p. 147. (Antigua Exhibits, file 2, tab 21)
142 Id., pp. 133-34, citing Robert D. Herman, Gamblers and Gaming: Motives, Institutions and Controls (Lexington, Massachusetts, 1976), pp. 84 - 88.
143 Id., p. 148.
144 Id., p. 147.
145 Id.
gambling. For ready access to cash, casinos house banks, automated teller machines, credit card cash machines and offer lines of credit on the casino floor. Gambling operators also use a variety of inducements to keep gamblers in the casino. Winning gamblers are commonly awarded free dinners, over-night stays and entertainment. The motive is quite simple—given a long enough stay, winning gamblers will inevitably return to the tables where the law of probability will ultimately catch up with them. Casinos also maintain electronic databases with data on the gambling behaviour of their individual customers. These data are used for direct marketing to the individual gamblers. Casinos also exchange these data between each other.

92. As of 2003, Nevada has over 2,100 licensed casinos that offer virtually every popular form of state-sanctioned gambling. These casinos host an aggregate of 189,193 slot machines and 6,358 tables for blackjack, craps, roulette and other table games and generate state-wide gaming revenues of US $9.5 billion per year.

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148 Suburban Xanadu, p. 7 (Antigua Exhibits, file 2, tab 20). An example is the “customer loyalty schemes” of the major casino companies. For instance, Harrah’s has developed a sophisticated direct marketing system based on a “national patron database.” See www.harrahs.com/e-totalrewards/overview.html (extracts attached as Exhibit 25, found at Antigua Exhibits, file 2, tab 25). Harrah’s customers can earn “reward credits” by gambling in one of Harrah’s casinos. To earn these credits a gambler must use a magnetic card that identifies him and allows Harrah’s to collect data on where, when and how much the specific customers gambles. This information is then used to develop targeted direct marketing initiatives. Customers can earn “reward credits” in all of Harrah’s 24 casinos which are located in several markets in the United States. Rewards include, inter alia, “airfare to other Harrah’s casinos like Las Vegas or New Orleans.” Members of the customer loyalty program can consult their account on Harrah’s website. The latter also contains a “Play for Fun” section where players can “learn to play a new game or check out one of [their] favorites.” Playing these free games is only possible when you log in as a member of the customer loyalty program, thus revealing your identity. In an interview published in Casino Journal of January 2003 Mr. Phil Satre, then Chief Executive Officer of Harrah’s, explained how such customer tracking programs have been a key element of Harrah’s marketing strategy since at least 1978. Even then “reward credits” earned by gambling needed to be exchanged at gambling facilities so that “obviously that makes a visit to the property.” (a copy of this interview is attached as Exhibit 26, found at Antigua Exhibits, file 2, tab 26). See also www.parkplace.com/caesars/lasvegas/Display.aspx?ContentID=5189.

149 Mr Gary Loveman, Harrah’s President and Chief Operating Officer stated that “Our website is just one example of how we’re revolutionizing the way the casino industry utilizes technology”. (…) It enables us to communicate directly with our customers and potential customers outside of the casino environment, expanding our marketing reach through effective, efficient application of information technology.” See “Casino player awards record 251 Honors to Harrah’s” at www.gamblingmagazine.com (a copy is attached as Exhibit 27, found at Antigua Exhibits, file 2, tab 27).

150 For instance the Las Vegas based Mandalay has recently concluded an agreement to share customer data with the Mohegan Sun casino in Connecticut (an “Indian casino” and the second largest casino in the world. See the discussion at paragraph 102 below)). Mandalay will send direct marketing pitches to customers of the Mohegan Sun living within 350 miles from the Mohegan Sun (which includes cities such as New York, Philadelphia and Boston). The Mohegan Sun will do likewise with Mandalay customers. Casinos that enter into such agreements will, for instance, offer high spending gamblers a free weekend trip to the more remote casino. See, “Mandalay Bay, Conn. casino in deal for marketing,” Las Vegas Sun (29 August 2003) (a copy is attached as Exhibit 28, found at Antigua Exhibits, file 2, tab 28).


152 Id. (2001 figures).
93. Las Vegas itself has hosted over 30 million visitors each year since 1997, with more than 35 million visitors in each of the past three years.\footnote{Las Vegas Convention & Visitors Authority, \textit{Historical Las Vegas Visitor Statistics: 1970 to 2002} (www.lvcva.com/pdf/historical_visitor_statistics.pdf).} Approximately 90 percent of visitors come from places other than Nevada, including all other regions of the United States as well as from foreign countries.\footnote{Id., see also Las Vegas Convention & Visitors Authority, \textit{Frequently Asked Research Questions} (www.lvcva.com/press/faq.html).}

\textbf{(B) Atlantic City, New Jersey.}

94. Atlantic City has a history as a seaside resort dating back to the mid-nineteenth century, and for 100 years was a national centre for vacationers and conventioneers. By the 1960s, however, the city had fallen on very hard economic times.\footnote{Suburban Xanadu, p. 177. (Antigua Exhibits, file 2, tab 20)} In the late 1960s and early 1970s, a coalition of business interests and citizens proposed legalized casino gaming as a catalyst to develop Atlantic City’s economy.\footnote{Id.} These efforts led to the passage of a public referendum in 1976 to legalize privately owned, state-regulated casino gambling in Atlantic City.\footnote{People of Chance, p. 206. (Antigua Exhibits, file 2, tab 21)}

95. The legalization of gaming in Atlantic City was extremely successful. By 1982, Atlantic City’s total gaming revenue matched that of Las Vegas and it drew 23 million visitors, more than premier tourist destinations such as New York City and Disneyworld.\footnote{David G. Schwartz, Ph.D., \textit{Statistical Summary of Atlantic City Casino Market: 1978 to 2002} (Las Vegas, Nevada, 2003) (attached as Exhibit 29, found at Antigua Exhibits, file 2, tab 29).} By the early 1990s, Atlantic City was home to 13 casino resorts along its boardwalk and in its marina section, and it was averaging more than 30 million visitors per year.\footnote{Id. and also \textit{North American Gaming Almanac}, p. 106 (Antigua Exhibits, file 2, tab 15), citing, New Jersey Casino Control Commission (reporting Atlantic City gaming revenues of US $4.0 billion in 1998, US $4.1 billion in 1999 and US $4.3 billion in each of 2000 and 2001).} The Atlantic City casinos were built in a similar size and fashion as the grand casinos on the Las Vegas Strip. “Trump Plaza” is representative of the typical Atlantic City casino. It currently has 2,839 slot machines and 96 gaming tables. The Trump Plaza also has a bus center with 14 gates, built to accommodate the heavy flow of bus passengers to the casino from the nearby densely populated metropolitan areas of New York City, Philadelphia, Baltimore and Washington, D.C. Atlantic City draws approximately 35 percent of its casino visitors from bus patrons from New Jersey and the surrounding states. From 1998 to 2002 Atlantic City’s total gaming revenues were over US $4 billion per year.\footnote{William H. Sokolic, “Borgata Averages $1.6 Million Per Day in July,” \textit{Atlantic City Courier-Post} (4 August 2003) (quoting the statement of Ellis Landau, Chief Financial Officer of the Borgata, to financial analysts) (www.courierpostonline.com/news/southjersey/n080403h.htm) (a copy is attached as Exhibit 30, found at Antigua Exhibits, file 2, tab 30).}

96. The expansion of Atlantic City’s gambling market continues today. In July 2003, Boyd Gaming and MGM Mirage opened the US $1 billion Borgata Hotel Casino & Spa—now the largest casino in Atlantic City. The 135,000 square-foot (approximately 12,500 square metres) casino floor contains 145 gaming tables and 3,650 slot machines. The Borgata reports that it won US $1.6 million per day from gamblers during its first month of operation.\footnote{Id. and also \textit{North American Gaming Almanac}, p. 106 (Antigua Exhibits, file 2, tab 15), citing, New Jersey Casino Control Commission (reporting Atlantic City gaming revenues of US $4.0 billion in 1998, US $4.1 billion in 1999 and US $4.3 billion in each of 2000 and 2001).}
(C) Native American gaming

97. Native American or “tribal” or “Indian” gaming began to emerge as a sizeable industry in the 1970s. Initially, Native American tribes limited their activities to charitable gaming, such as bingo, which was permitted by state law. In 1979, Native American bingo operators in Florida decided to build a large bingo hall and cease observing state-mandated wagering limits on bingo gambling. This clearly violated Florida law and led to a legal dispute between the tribe and the state. The Native American tribe ultimately prevailed when a federal court of appeals ruled that if a betting game was otherwise permitted by state law in some other context, the game could be offered without limitation on Native American tribal reservations within the state. This led several Native American tribes in the United States to turn to commercial gaming as an engine of economic development and self-sufficiency.

98. During the 1980s, Native American gaming activities earned formal recognition by the United States government. In 1987, the United States Supreme Court ruled in California v. Cabazon Band of Mission Indians that Native Americans had the right to offer gambling services as part of the federal effort to assist with economic development of Native American lands. In Cabazon, the United States Supreme Court held that state regulation of on-reservation gaming would infringe on tribal government and was, therefore, impermissible unless authorized by the federal government. As a result, tribes in the United States were free to operate gaming activities on their reservations without state regulation or interference.

99. In response to the Cabazon ruling and the corresponding rapid proliferation of tribal gaming, the United States Congress enacted the Indian Gaming Regulatory Act (the “IGRA”) in 1988 to establish a statutory framework for Native American gambling operations. Under the IGRA, Native American tribes are authorized to offer “Class II” gaming such as bingo, lotto, instant bingo and similar games of chance. Native American tribes are also allowed to operate “Class III” gaming—wide-open casino gambling—if they enter into an agreement, or “compact,” with the state in which they are located. In conjunction with the development of tribal lands, during the 1980s the United States government began providing grants to Native American tribes to construct casinos. This helped to fuel a remarkable growth in Native American gaming throughout the United States.

162 The Oneida Tribe in New York opened the first commercial Indian bingo operation in 1975.
167 Id. at § 2703(7).
168 Id. at § 2703(8) and § 2710.
In the decade following the passage of the IGRA, tribal gambling revenues grew more than 30-fold, from US $212 million in 1988 to US $6.7 billion in 1998. The number of tribal gaming facilities also grew at a remarkable pace. In 1988, approximately 70 Native American gambling facilities were operating in 16 states, but by 1997, ten years after the Cabazon ruling, approximately 260 Indian gambling facilities were operating in 31 states.

The expansion of Native American casino gaming has continued to the present. Today, 221 Native American tribes operate 348 gaming facilities. The Native American gaming facilities offer more than 206,000 gambling machines and over 4,500 gambling tables. As of 2002, Native American gaming revenues stood at US $14.1 billion, an increase of 11 percent over the previous year. In 2002, tribal gaming directly and indirectly contributed approximately US $39 billion in gross commercial activity, US $15.5 billion in wages and 450,000 jobs. Tribal gaming also generated US $4.8 billion in state and federal tax revenues during 2002.

In a testimony to its economic development power, the success of tribal gaming has led to the establishment of the world’s largest casinos—the two largest casinos in the world are both Native American casinos. The Foxwoods Casino of the Mashantucket Pequot tribe, which opened in 1992, is located in the State of Connecticut near New York City. It has over 300,000 square feet (approximately 28,000 square metres) of gaming space and 6,400 slot and video poker machines, 354 table games, sports betting, keno and what is billed as the world’s largest bingo hall. The Mohegan Sun Casino was founded by the Mohegan Tribe of Connecticut in 1996 and is similar in size and product offering to Foxwoods. These two enormous casino operations make the full scope of gambling and betting services readily available to Americans in the heavily populated Eastern portion of the United States.

Native American casinos continue to proliferate throughout the United States, especially in the far West. In March 2000 for instance, California law was amended to permit tribes to run Las Vegas-style casino gaming on reservation land. Tribes rushed to build casinos following the change, and three years later more than 40,000 slot machines are operating in Californian tribal gaming facilities.

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170 NGISC Final Report, pp. 6-1 to 6-2 (citing several sources) (Antigua Exhibits, file 1, tab 10).
171 Id., p. 6-2.
173 Id.
174 Id., p. 13.
175 Id.
176 Suburban Xanadu, p. 183 (Antigua Exhibits, file 2, tab 20); see also Foxwood’s web site, www.foxwoods.com (extracts attached as Exhibit 32, found at Antigua Exhibits, file 2, tab 32).
177 In its analysis of Connecticut gaming industry, the investment bank Bear Stearns calls the potential market “very deep” because it draws from both the New York and Boston urban centres (North American Gaming Almanac, p. 118) (Antigua Exhibits, file 2, tab 15). In 2001, there were 28.7 million adults living within 200 miles of the two Connecticut tribal mega-casinos and, by 2006, there will be 29.5 million adults living within 200 miles of these casinos. This high population concentration has enabled Connecticut’s two tribal casinos to generate more than US $1 billion per year in gaming revenues from 1998 through 2001. The investment bank’s analysts expect more than 25 million visitors per year to these two casinos by 2006.
178 Kurt van Kuller, Indian Casino boom enters the Bond Market, (Merrill Lynch, 12 May 2003), p. 5 (a copy is attached as Exhibit 33, found at Antigua Exhibits, file 2, tab 33).
104. Large American gaming companies, including Harrah’s Entertainment, Park Place and Trump, have entered into contracts with many of the tribes to provide management services to the gaming operations.\textsuperscript{179} Providing management services to tribal casinos has permitted the large United States gaming companies to successfully expand their lucrative operations into numerous markets with tribal casinos, often leaving only a small portion of the profits to tribal members.\textsuperscript{180}

(D) Non-tribal riverboat and other casinos outside Nevada and Atlantic City

105. As Native American tribes began expanding casino operations, states also began to explore casino gambling as a way to restore economic vibrancy.\textsuperscript{181} One of the forms of gambling seized upon by several states was a return to the fabled riverboat gambling of the Mississippi River frontier era.\textsuperscript{182} While suffering from a bad economy in the 1980s, Iowa became the first state to legalize riverboat gambling. Other states quickly followed and by the late 1990s Illinois, Indiana, Louisiana, Missouri, and Mississippi also had variants of riverboat gambling.\textsuperscript{183} Initially, most of the riverboat casinos were required to leave their docks while in operation. These rules have loosened considerably over time, to the point where most riverboat casinos remain docked and open at all times, in the manner of any Las Vegas or Atlantic City casino. The United States riverboat casino industry generated approximately US $9.3 billion in total revenue in 2001.\textsuperscript{184}

106. Soon thereafter several states introduced land-based casino gaming:

- In 1989, South Dakota legalized a limited casino development in the town of Deadwood to promote tourism in that city. As of 2002, South Dakota had 38 land-based casinos which generated US $66.3 million in gaming revenues.\textsuperscript{185}

- In 1993, Louisiana permitted Harrah’s Entertainment to open a land-based casino in a New Orleans tourist area. As of 2002, Louisiana had a total of 16 casinos generating US $2 billion in gambling revenues.\textsuperscript{186}


\textsuperscript{181} Suburban Xanadu., p. 187 (Antigua Exhibits, file 2, tab 20).

\textsuperscript{182} The description of riverboat gambling in this Submission does not include the longer-standing forms of gambling on water on cruise ships and the so-called “cruises to nowhere”—boat trips that head out into international waters for the sole purpose of casino gambling.


\textsuperscript{184} Michael Kaplan, “Gambling in America: A Special Report,” \textit{Cigar Afficionado} (September/October 2002), p. 66 (copy attached as Exhibit 34, found at Antigua Exhibits, file 2, tab 34), quoting Steve Rittvo, President of the Innovation Group, a New Orleans based company that does feasibility studies for the casino industry.

\textsuperscript{185} AGA 2003 Survey, p. 12. (Antigua Exhibits, file 2, tab 23)

\textsuperscript{186} Id., p. 9.
• In 1990, Colorado legalized limited stakes gambling in three tourist cities. As of 2002, Colorado had 42 land-based casinos which generated US $719.7 million in gaming revenues.\footnote{Id., p. 7.}

• In 1999, legal commercial casinos began to open in Michigan. As of 2002, Michigan had three land-based casinos which generated US $1.1 billion in gaming revenues.\footnote{Id., p. 10.}

107. With the proliferation of Native American, riverboat and land-based casinos throughout the United States, Americans in all regions of the country are now within a short trip of state-sanctioned casino gambling.

(E) The size of the United States casino market

108. The American Gaming Association (the “AGA”), a casino trade association, reports that total gambling revenue of the non-Native American casinos in 2002 was US $26.7 billion.\footnote{Id., p. 2.} This is comparable to spending on other leisure pursuits such as basic cable television (US $41 billion), lawn care and gardening (US $37.7 billion), golf (US $24.7 billion), sound recordings (US $14.3 billion) and movie box-office sales (US $8.4 billion).

109. The AGA further reports that non-Native American casinos in the United States have attracted over 50 million visitors in each of the past three years.\footnote{Id., p. 16 (calculation based on a total United States population over age 21 of 197.1 million as projected by the United States Census Bureau).} These 50-million plus casino visitors have made approximately 300 million individual visits per year to casinos, making United States casinos as popular a destination as amusement and theme parks, and more popular than visits to zoos or professional baseball parks.\footnote{Id., p. 2.} The 50-million plus casino visitors make up about 26 percent of the United States population over the age of 21.\footnote{Id., p. 16 The 2000 and 2001 figures are from the American Gaming Association, State of the States: The AGA Survey of Casino Entertainment (2002) (hereinafter referred to as the “AGA 2002 Survey”), p. 2 (http://www.americangaming.org/survey2002/survey2002.pdf) (a copy is attached as Exhibit 35, found at Antigua Exhibits, file 2, tab 35). The slight decrease in visitors between 2000 and 2002 is due primarily to the effect of the 11 September 2001 events and the slowdown of the world economy.}

3.3.4. Lotteries in the United States

110. All lotteries currently operating in the United States are government-operated monopolies. The first modern state lottery in the United States was set up in New Hampshire in 1964, and others soon followed. In 1973, seven states had lotteries with total sales of US $2 billion.\footnote{AGA 2003 Survey, p. 2.} During the 1980s, 18 more states added lotteries and by 1997, state lotteries operated in 37 states and generated US $34 billion in sales. Three years later, the numbers had grown to 39 states and total ticket sales of over US $40 billion.\footnote{AGA 2003 Survey, p. 16 (reporting United States lottery sales at US $40.9 billion) (extracts attached as Exhibit 36, found at Antigua Exhibits, file 2, tab 36); see also Michael Kaplan, op. cit. footnote 184, p. 81 (Antigua 03-26958_1 34}
Submission, state lotteries operate in 40 states and the District of Columbia, with Tennessee set to commence its state lottery in the first quarter of 2004.\textsuperscript{195}

(A) Types of state lottery games

111. The lotteries offer a wide range of games including:

\textit{Instant Games.} Instant or scratch-card games are offered in all states with lotteries in a huge variety.\textsuperscript{196} For example, the California Lottery currently has 39 separate scratch-card lottery games\textsuperscript{197} while the Georgia Lottery offers 80 such games.\textsuperscript{198}

\textit{Lotto.} Lotto is also offered in almost every state with a lottery and typically involves a very high money prize or “jackpot”. The current record prize in the United States for one winning lottery entry is US $296 million.\textsuperscript{199}

\textit{Keno.} Two different types of keno are offered by lottery operators.\textsuperscript{200} The first type is a regular periodic drawing one or two times per week. The other type of keno lottery is known as “fast draw” keno, where drawings occur on an electronic monitor every five minutes. As of 2002, keno games were operated by lottery operators in 11 states.\textsuperscript{201}

\textit{Daily Numbers Games.} Like lotto and keno, daily numbers games are a variety of random selection number games. The daily numbers games require players to make a three- or four-digit selection on a daily basis to win a fixed prize in the range of US $500 to US $2,500.\textsuperscript{202} Some states hold numbers drawings as often as four times per day. Daily numbers games are offered in almost every state with a lottery.\textsuperscript{203}

\textit{Video Lottery Terminals.} Video lotteries are the newest and fastest growing type of gambling offered by lottery operators in the United States.\textsuperscript{204} South Dakota introduced the first VLT network in the United States in 1989. Prior to the introduction of VLTs, the South Dakota lottery was struggling with total sales of US $21 million per year. A decade after introducing VLTs, the South Dakota lottery had grown to over US $500 million in annual total sales.\textsuperscript{205} Currently VLTs are operated in the States of Delaware, Oregon, New York, South Dakota, Rhode Island, West

Exhibits, file 2, tab 34) (reporting total United States lottery sales in 2000 of US $37.2 billion and in 2001 of US $38.4 billion). See also the chart attached as Exhibit 71, found at Antigua Exhibits, file 3, tab 71.

See the chart attached as Exhibit 72, found at Antigua Exhibits, file 3, tab 72.

\textit{La Fleur’s 2001 World Lottery Almanac}, p. 21 (Extracts attached as Exhibit 37, found at Antigua Exhibits, file 3, tab 37).


\textit{La Fleur’s 2001 World Lottery Almanac}, p. 6.

\textit{Id.}, p. 13.

\textit{Id.}, p. 21. Examples of online promotions and instructions on how to play electronic keno can be viewed at: www.oregonlottery.org/keno/otherplay.shtml.

\textit{La Fleur’s 2001 World Lottery Almanac}, p. 12. Examples on online promotions and instructions on how to play daily number games, as well as to receive updates on winning numbers, can be viewed at www.oregonlottery.org/pick4/index_beer.shtml.

\textit{La Fleur’s 2001 World Lottery Almanac}, p. 21.

\textit{Id.}, p. 14.

\textit{Id.}, p. 14.
Virginia, Louisiana and Montana. As of 2000, there were over 60,000 VLTs in the United States with net sales of US $2.3 billion and profits of US $685 million.

In the United States, VLTs are viewed as a complementary product to traditional lottery games because they are often located in bars and taverns, establishments which have not been successful as retailers for lottery tickets in the past. Historically, the primary opposition to the expansion of VLTs came from the horse race betting industry, which feared VLTs would reduce their turnover. However, with the successful installation of VLTs at racetracks in Delaware, Louisiana, New York, Rhode Island and West Virginia, the horse race betting industry has become an active proponent of video gambling and actively lobbies for the legalization of VLTs at racetracks.

**Sports betting.** The Oregon lottery offers a sports betting game called “Sports Action”.

**(B) Nationwide lottery retailers**

Lottery tickets are primarily sold in the United States through private retailers who are paid a commission of from five to seven percent of sales. In 2000, there were 177,461 lottery retailers in the United States. With this vast network of lottery retailers, by 2000 Americans could purchase lottery tickets at (i) 29,981 grocery stores; (ii) 29,314 convenience stores; (iii) 53,781 petrol stations; (iv) 16,750 liquor stores; (v) 5,093 merchandising locations; (vi) 4,266 pharmacies and drug stores; (vii) 3,347 news or smoke stands; and (viii) 2,776 bars and restaurants. These figures do not include other forms of delivery such as self-service lottery ticket vending machines.

**(C) Lottery marketing**

Lottery operators spend in the total range of US $400 million per year to market their games through mass advertising on television, radio and the print media. The Oregon legislature began offering video lottery gaming in 1991 in order to replace the 10,000 gaming machines operating in the grey market. The Oregon legislature contends that the benefits of state-run VLTs include the generation of revenue for state programs, ensuring VLTs were run honestly and fairly and ensuring that taxes were paid on VLT winnings (www.oregonlottery.org/video/aboutvideo.shtml).
NGISC has described lottery advertising as “deceptive,”216 “misleading”217 and “manipulative.”218 It also expressed the following concerns with regard to lottery advertising:

“One particularly troublesome component of lottery advertising is that much of it is misleading, even deceptive. State lotteries are exempt from the Federal Trade Commission’s truth-in-advertising standards because they are state entities and, in terms of their advertising, can in fact operate in a manner that true commercial businesses cannot. (...) Lottery advertising rarely explains the poor odds of winning. Many advertisements imply that the odds of winning are ‘even better than you might think.’ For example, one video presented to the Commission stated that ‘chances are good you can be $10,000 richer.’ An ad aired in Texas compared the odds of winning the lottery to the odds of some everyday events, implying that winning the lottery is possible, perhaps even probable.”219

3.3.5. Sports betting

(A) Horse race betting

114. The horse race betting industry uses the so-called “pari-mutuel” system. This refers to the combining of wagers into a common pool in which players bet against one another instead of against the “house.”220 In a typical United States pari-mutuel wagering system, the money bet on a race is pooled, and approximately 80 percent is returned to the bettors who placed winning bets. The remaining 20 percent, also referred to as the “takeout,” is distributed among the horsemen, the track owners and state and local governments.221

115. There are more than 100 racetracks that offer state-sanctioned sports betting opportunities operating in over 40 states throughout the country,222 and these racetracks are home to over 50,000 horse races per year. Each year approximately US $15 billion is wagered on horse racing in the United States.223

116. The legal framework for wagering on horse racing is governed at the federal level by the Interstate Horseracing Act (“IHA”), a 1978 law enacted by United States Congress to regulate interstate pari-mutuel wagering on horse races.224 The goal of the IHA was to “further the horseracing and legal off-track betting industries in the United States.”225 At the time it enacted the IHA, Congress recognised that pari-mutuel wagering on horseracing is a:

216 NGISC Final Report, p. 3-15.
217 Id., p. 3-16.
218 Id., p. 3-16.
219 Id., p. 3-16.
222 NGISC Final Report, p. 2-11 (Antigua Exhibits, file 1, tab 10). See the chart attached as Exhibit 40, found at Antigua Exhibits, file 3, tab 40.
223 NGISC Final Report, p. 2-13 (Antigua Exhibits, file 1, tab 10).
In addition to the IHA, each state which permits gambling on horse races has its own statutes and regulations governing horse racing activities within the state.

117. The horse race betting industry has successfully used advances in communications technology to expand gambling opportunities. Today, as a result of these technological innovations, 85 percent of bets on horse races are generated away from the track where the race is actually being run by means of “simulcasting,” or the live broadcasting of horse races via satellite communication or other remote means. This remote wagering takes place in various forms:

- broadcasting via “simulcast” to other race tracks so that customers who are present at one racetrack may place a bet on a televised race taking place at another track;
- broadcasting to betting shops located away from the horse racing track, so-called “off-track betting parlors” (“OTBs”). At these OTBs customers can bet on televised races;
- broadcasting to television in the home (or via the internet) in combination with “account betting” by telephone or internet from the home.

118. With account betting, bettors can establish accounts with licensed operators. To establish accounts, individuals must appear in person or provide documentation by mail and then deposit money in an account, which may be increased or reduced according to their gambling wins and losses. In the late 1990s, racetracks began to offer account wagering over the internet. In order to accommodate this new form of account wagering, in 2000, the United States expanded the IHA to permit betting on horse races over the internet. Today, United States residents can lawfully gamble on horse races by telephone or online with several United States-based companies. As of 2003, eight states permit account wagering within their borders, but the companies operating in these eight states accept bets from residents of most other states. The most prominent accounting wagering companies in the United States include:

Youbet.com (www.youbet.com) provides United States residents who are 21 years or older the ability to watch and, in 37 states, the ability to wager on horse races. Customers have 24-hour access to live racing from a choice of over 80 racetracks representing all major racetracks, in the United States, Canada and Australia. Customers are charged a transaction cost but this is waived for high volume bettors. Youbet.com is licensed by the State of Oregon to operate simulcasts and interactive

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227 See the chart “US Horseracing Statistics” attached as Exhibit 41, found at Antigua Exhibits, file 3, tab 41.
228 NGISC Final Report, p. 2-31 (Antigua Exhibits, file 1, tab 10).
229 In December 2000, the definition of off-track wager was expanded to include “pari-mutuel wagers, where lawful in each state involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools.” See, United States Government Accounting Office, Internet Gambling, op. cit, footnote 126, p. 43 (Antigua Exhibits, file 2, tab 17).
wagering and represents that it “is in full compliance with all applicable state and federal laws.”

TVG (www.tvgnetwork.com) states that it:

“combines live, televised coverage from over 50 of America’s premier tracks with the convenience of wagering from home via telephone, online and where available, set-top remote control.”

TVG is owned by Gemstar-TV Guide International Inc. and is based in Los Angeles, California with branches in three other states. To open a TVG wagering account, players must be over 21 and live in one of the 12 states where wagering services are available. Accounts can be opened in under 4 minutes over the telephone or via the internet. TVG’s interactive television network is available in approximately 8.5 million households nationwide via direct-to home satellite systems and cable television services. Up to eight live races an hour are shown, in addition to highlighted coverage of a further four to six races per hour between 12 pm and 12 am, seven days a week. There is a charge of US $0.25 per wagering transaction; however, this is refunded if the user wagers more than US $2,500 in a month. A customer can bet up to US $9,999.00 per wager.

Capital OTB (www.capitalotb.com) offers account wagering on horse races via telephone and the internet. According to its website:

“It is the most efficient & convenient wagering system anywhere enabling customers to wager from almost anywhere in the world.”

Xpressbet.com (www.xpressbet.com) is another online horse racing betting service with offices located in eight states in the United States. XpressBet.com is a subsidiary of a publicly held corporation and accepts bets from 39 states.

(B) Greyhound race betting

As of 2003, there are 47 greyhound dog racing tracks in the United States operating in 15 states. These tracks attract about 15 million visitors per year and the aggregate amount wagered in the greyhound racing industry is approximately US $2.0 billion per year.

230 www.youbet.com/faq/ (a copy is attached as Exhibit 42, found at Antigua Exhibits, file 3, tab 42).
231 www.tvgnetwork.com/about/faq.asp (a copy is attached as Exhibit 43, found at Antigua Exhibits, file 3, tab 43).
232 California, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, New Mexico, North Dakota, Ohio, Oregon and Wyoming.
233 www.capitalotb.com/NewWeb/about.otb.content.htm (a copy is attached as Exhibit 44, found at Antigua Exhibits, file 3, tab 44).
234 Greyhound Racing Association of America (www.gra-america.org); see also NGISC Final Report, p. 2-11 (Antigua Exhibits), file 2, tab 11 (reporting that, as of 1999, there were 49 greyhound racing tracks operating in 15 states). The 15 states with greyhound racing are spread throughout the United States: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Iowa, Kansas, Massachusetts, New Hampshire, Oregon, Rhode Island, Texas, West Virginia and Wisconsin. Greyhound Racing Association of America.
236 Id.
(C) Jai alai betting

120. Jai alai is a ball sport for two players which is primarily played in Florida, Connecticut and Rhode Island. Bets can be placed live at the arena or on matches viewed via simulcast.\(^{237}\)

(D) Nevada bookmakers

121. As of 2002, Nevada had 160 licensed and regulated “bookmakers” which hosted wagering on all professional and amateur sports. When betting with a bookmaker a gambler bets against the bookmaker as opposed to betting against the other gamblers, as is the case with pari-mutuel betting.

122. The most popular sports on which bets are made with Nevada bookmakers are American football, basketball and baseball.\(^{238}\) Wagers are also accepted on hockey, golf, auto racing, soccer and other sports and athletic events.\(^{239}\) In fiscal year 1998, sports betting in Nevada reached a high of US $2.3 billion (total amount wagered), generating US $77.4 million in revenues (profits).\(^{240}\) Primarily due to competition from foreign sports gambling operators, the total amount wagered with Las Vegas bookmakers has slightly decreased since 1998.\(^{241}\) In 2002, the total amount wagered was US $1.9 billion and industry profits were US $110 million.\(^{242}\) Nevada bookmakers offer their services to home users via the internet and the telephone.\(^{243}\)

(E) Plans for sports gambling in Delaware

123. In May 2003, a committee empanelled by the Delaware legislature\(^{244}\) recommended the introduction of sports betting at existing Delaware casinos.\(^{245}\) The primary purpose of adding sports gambling is to improve the competitive position of Delaware’s existing (primarily horse racing) gambling facilities vis-à-vis those of neighbouring states. In 1994 Delaware allowed the installation of video lottery terminals (“VLTs”) on these premises to “revitalize Delaware’s ailing horse racing industry.”\(^{246}\) This was very successful but the continuation of this success was, according to this committee, threatened by the introduction

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\(^{237}\) See, e.g., the Florida Gaming Corporation, at [www fla-gaming.com/bet.htm](http://www.flagaming.com/bet.htm); see also Newport Grand Jai Alai, [Simulcasts](http://www.newportgrand.com/simulcasts.htm).


\(^{239}\) Id.

\(^{240}\) NGISC Final Report, p. 2-14 (Antigua Exhibits, file 1, tab 10), citing Robert Macy, “Ban on college Sports Betting Could Cost State Books Millions”, Las Vegas Review – Journal (18 May 1999), 4A. The state-sanctioned sports betting market in Nevada makes up only a small fraction, about two percent, of the total gaming revenues generated in Nevada.

\(^{241}\) See the statements of Mr Joe Lupo, manager of a bookmaker in Las Vegas, reported in Michael Kaplan, op. cit. footnote 184, pp. 72-73 (Antigua Exhibits, file 2, tab 34).

\(^{242}\) Nevada State Gaming Control Board, Gaming Revenue Report for the year ending 31 December 2002 (a copy is attached as Exhibit 46, found at Antigua Exhibits, file 3, tab 46).

\(^{243}\) See the advertisements attached as Exhibit 47, found at Antigua Exhibits, file 3, tab 47.

\(^{244}\) The committee was created pursuant to Delaware House Resolution No. 63 of the 141st General Assembly of Delaware.

\(^{245}\) Report of the Committee to Study the Feasibility of Instituting Sports Gaming Activities at Existing Gaming Venues in Delaware: To the House of Representatives of the 142nd General Assembly of Delaware (30 May 2003) (a copy is attached as Exhibit 48, found at Antigua Exhibits, file 3, tab 48).

\(^{246}\) Id., p. 3.
of VLTs in neighbouring states. This background is described as follows in the committee’s report:

“With General Fund Revenues of $181 Million per year, or nearly 10% of Delaware’s annual budget, the Video Lottery is Delaware’s third largest source of revenue, trailing only the personal income and corporate franchise taxes. Importantly, over 70% of those State revenues are generated from residents of other States, principally Maryland and Pennsylvania. Thus, the Video Lottery has the beneficial feature of bringing economic activity in from out of State and generating approximately $127 Million in General Fund revenues from non-residents.

(…)

In sum, the Horse Racing Redevelopment Act has worked well for Delaware. However, the investment, jobs and revenues generated by it are at risk. Delaware has three neighboring states, Pennsylvania, Maryland, and New Jersey – the latter already has a major gaming center in Atlantic City. Impressed with the orderliness, efficiency and fiscal impact of the Video Lottery, both Pennsylvania and Maryland are currently considering replicating it, thus threatening to reduce dramatically the out of state patronage currently enjoyed by the Video Lottery.

These factors raise the question: how can this investment, jobs and revenue be protected by making Delaware’s Video Lottery more attractive to those out-of-state patrons? HR 63 was enacted to study one such proposal: *the renewal of sports betting*."

(F) United States restrictions on further expansion of sports betting

124. In 1992, the United States enacted federal legislation to prevent the expansion of state-sanctioned sports betting (other than betting on horse races, greyhound races or jai alai) beyond the states where such gambling was already lawful. 248

(G) The non-sanctioned sports betting market

125. The NGISC estimated that up to US $380 billion in “illegal” or non-state-sanctioned wagers are placed annually by American gamblers on professional and amateur sporting events. 249 New York law enforcement officials estimated, for instance, that amounts wagered on illegal gambling in New York City alone totaled up to US $15 billion in 1995, and the majority of this was from sports betting. 250 In order to facilitate gambling on sports events, newspapers and web sites throughout the United States publish daily “Las Vegas lines” and point spreads on amateur and professional sporting events. 251 *There is no prohibition against the publication of this wagering information.*

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247 *Id.*, p. 3-4.
249 NGISC Final Report, p. 2-14 (Antigua Exhibits, file 1, tab 10).
250 Koleman S. Strumpf, *Illegal Sports Bookmakers*, (Department of Economics, University of North Carolina at Chapel Hill, February 2003), p. 6 (a copy is attached as Exhibit 49, found at Antigua Exhibits, file 3, tab 49).
251 NGISC Final Report, p. 2-14. (Antigua Exhibits, file 1, tab 10)
126. The non-sanctioned sports-betting market dwarfs the state-sanctioned one. The vast majority of sports gambling in the United States is done with unregulated bookmaking operations which, like state-sanctioned bookmakers, pool large volumes of individual bets. While much attention has been focused on the subject of internet sports betting, wagers placed over the internet constitute no more than ten percent of the non-sanctioned United States sports betting market.

127. Studies of the “underground” bookmakers in the United States show that they are sophisticated businesses offering precisely the same services as the state-sanctioned bookmakers, and are able to do so by subscribing to publicly available services which provide real-time “Las Vegas” odds. The “net win” or “hold” of these operators is equivalent to that of state-sanctioned bookmakers. A study of the seized records from a large underground bookmaker in the New York City area, with annual betting volume of US $200 million, established that the average better wagered US $3,400 per week with the bookmaker. This family-run business handled the same volume as the largest Las Vegas bookmakers and would have – if it were located in Nevada – constituted ten percent of the entire Nevada state-sanctioned sports gambling market.

128. United States law enforcement efforts to crack down on non-sanctioned bookmakers have dwindled over the last 40 years. In 1960, approximately 123,000 arrests were made for illegal gambling. By 1995, although the underground sports betting market had grown, like other forms of gambling, at an astonishing rate, the number of gambling-related arrests dramatically decreased to 15,000 per year. A study of New York area bookmakers showed that in the mid 1990s periodic arrests were common, yet bookmaking-related prison sentences were very rare. As the need for enforcement of United States sports betting laws increased, the actual enforcement of the sports betting laws decreased. In the NGISC Final Report, the NGISC concluded that illegal sports betting in the United States is (emphasis added):

“easy to participate in, widely accepted, very popular, and, at present, not likely to be prosecuted.”

3.3.6. Other types of gambling and betting in the United States

129. Bingo is one of America’s oldest forms of gambling and originated as a way to raise money for charitable groups. Approximately 50 million Americans wager at least US $10 billion on bingo each year.

130. Several states permit non-casino “card rooms,” which are generally facilities where players can meet to play card games such as poker against each other and the “house” only

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253 Id., p.1.
254 Id., p. 17.
255 Id., p. 11, fn. 22.
256 Id., pp. 9-10.
257 Anthony N. Cabot and Robert D. Faiss, op. cit. at footnote 238, p. 8.
259 Koleman S. Strumpf, op. cit. at footnote 250, p. 8.
260 NGISC Final Report, p. 2-14. (Antigua Exhibits, file 1, tab 10)
makes a per-hand or similar fee. California currently has 99 card rooms; Florida ten; Montana has approximately 200 card rooms; the small state of North Dakota has several hundred card rooms; and Washington has 74 card rooms. The gross revenues for United States card rooms in 2001 were US $886.4 million.

131. The United States gaming market also includes cruise ship casinos and the so-called “cruises to nowhere”—boat trips that head out into international waters for the sole purpose of gambling. Currently, there are over 30 companies in the United States which offer gambling on the high seas. These companies primarily operate from California, Florida, Louisiana, New York, South Carolina, Texas and Washington. Although these floating casinos generally offer table games and slot machines, some offer sports betting as well.

4. THE UNITED STATES’ MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES FROM ANTIGUA

4.1. DESCRIPTION OF THE MEASURES

4.1.1. Introduction

132. In the request for the establishment of a panel submitted to the WTO on 13 June 2003, the government of Antigua attached an Annex in which it listed a large number of United States federal and state statutes that adversely affect the ability of Antiguan service suppliers to provide cross-border gambling and betting services to consumers in the United States. The Annex also included references to a number of illustrative actions by United States federal and state authorities that also constitute measures that inhibit the provision of cross-border gambling and betting services into the United States. During the consultations as well as in meetings of the DSB the United States expressed itself confused by the nature, extent and impact of the measures cited in the Annex.

133. Antigua believes these expressions of confusion to be merely a “red herring”—not only is the United States better positioned than Antigua to coherently construe its own laws, but crucially the United States has unambiguously stated in the context of this dispute that the provision by Antiguan service suppliers of cross-border gambling and betting services into the United States is illegal under United States law. Under such circumstances, the United States should not be allowed to in essence “hide behind” the complexity and opacity of its own legal structure to deflect attention from the fundamental simplicity of this complaint.

262 North American Gaming Almanac, pp. 539-44 (Antigua Exhibits, file 2, tab 15) (for figures on Montana, North Dakota and Washington); California Gaming Control Commission, List of Licensed Cardroom (http://www.cgcc.ca.gov/cardrooms.shtml) (a copy is attached as Exhibit 51, found at Antigua Exhibits, file 3, tab 51); Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 71st Annual Report: July 1, 2001 to June 30, 2002, p. 23 (http://www.state.fl.us/dbpr/pmw/annual_reports/ar0102.pdf) (a copy is attached as Exhibit 52, found at Antigua Exhibits, file 3, tab 52).

263 American Gaming Association, AGA Fact Sheet: Gaming Revenue: Current Year Data, (http://www.americangaming.org/casino_entertainment/aga_facts/facts.cfm/id/7) citing Christiansen Capital Advisors LLC (a copy is attached as Exhibit 53, found at Antigua Exhibits, file 3, tab 53).


265 Id.
4.1.2. Complex United States legislation

134. The rules applying to the cross-border supply of gambling and betting services in the United States are complex and comprise a mixture of state and federal law the precise meaning of which is often unclear. The debate on the interpretation of these rules has often been conducted in terms of the legality of “internet gambling” (because the internet has become one of the main tools to supply gambling and betting services on a cross-border basis). A recent report by the United States General Accounting Office (an agency of the federal government) describes the legal framework for internet gambling in the United States as “complex”. The General Accounting Office further summarises the legal framework in the United States as follows:

“Both federal and state laws apply to Internet gambling in the United States. In general, gambling is a matter of state law, with each state determining whether individuals can gamble within its borders and whether gaming businesses can legally operate there. Since Internet gambling typically occurs through interstate or international means, with a Web site located in one state or country and the gambler in another, federal law is used to protect the states from having their laws circumvented. To date, the Wire Act is the federal statute that has been used to prosecute federal Internet gambling cases, although courts sometimes disagree on the applicability of certain provisions of the statute. In addition, the Travel Act and the Illegal Gambling Business Act have been used to prosecute gambling entities that take interstate or international bets over the telephone and would likely be applicable to Internet gambling activity. Some states have taken specific legislative actions to address Internet gambling, in some cases criminalizing it and in others relying on existing gambling laws to bring actions against entities engaging in or facilitating Internet gambling.”

135. The General Accounting Office report directly addressed some of the ambiguities in United States law on this issue. Some of these ambiguities are discussed more extensively in a report prepared by Mr Jeffrey R. Rodefer from the Department of Justice of the State of Nevada. This complexity and ambiguity as well as the overlap between federal law and the laws of the more than 50 states and territories makes it very difficult to identify with complete precision all laws and regulations of the United States that could be applied in the prohibition of the cross-border supply of gambling and betting services.

4.1.3. The existence of a complete prohibition is not in dispute

136. In the context of this dispute the United States government has stated that the provision of cross-border gambling and betting services (into the United States from abroad)

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266 United States General Accounting Office, Internet Gambling, op. cit. footnote 126, p. 3 (Antigua Exhibits, file 2, tab 17).
267 The footnotes in the quoted paragraph are not in the original text.
269 18 U.S.C. § 1952, listed in Section I of the Annex to Antigua’s panel request.
271 United States General Accounting Office, Internet Gambling, op. cit. footnote 126, p. 11. (Antigua Exhibits, file 2, tab 17)
272 Id., p. 12-17.
273 Jeffrey R. Rodefer, “Internet Gambling in Nevada. Overview of Federal Law Affecting Assembly Bill 466” published on 18 March 2003 on the website of the Department of Justice of Nevada (www.ag.state.nv.us) (a copy is attached as Exhibit 54, found at Antigua Exhibits, file 3, tab 54).
is always unlawful in the entire territory of the United States and under whatever form. Antigua accepts this premise for the purpose of this dispute settlement procedure. Consequently there is no need to conduct a debate on the precise scope of specific United States laws and regulations. The subject of this dispute is the total prohibition on the cross-border supply of gambling and betting services—and the parties are in agreement as to the existence of that total prohibition. The precise way in which this import ban is constructed under United States law should not affect the outcome of this proceeding.

4.1.4. Prohibition measures and related restrictions on money transfers

To facilitate the legal discussion in this Submission, Antigua has made a distinction between two broad types of measures: (i) those which act to prohibit the offering of gambling and betting services per se and (ii) those restricting international money transfers and payments relating to gambling and betting services. While the former include statutes criminalising the provision of the services (such as those used by the United States in 2000 to prosecute and imprison a licensed Antiguan operator), the latter category comprises enforcement measures, such as the actions by the Attorney General of New York against Paypal, Inc., a company that provides internet payment services.

The two categories of measures identified by Antigua are not two rigidly distinct categories. In fact the measures in the second category of payment-related measures are actions by law enforcement authorities based on the legislative measures in the first category (and are therefore a practical manifestation of the measures in that first category). The only reason why the distinction is made is to facilitate the discussion on the application of specific provisions of the GATS to the facts of this dispute.

4.2. Compliance with Article 6.2 of the DSU

Article 6.2 of the DSU provides that a request for the establishment of a panel shall “identify the specific measures at issue.” The Appellate Body has repeatedly stated that there are two reasons why a panel request must be precise. First, it forms the basis for the terms of reference which define the scope of the dispute. Second, it serves the due process objective of notifying the defendant and the third parties of the complainant’s case.

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274 See, e.g., the statement of the United States’ representative at the DSB meeting of 24 June 2003: “(...) the United States had made it clear that cross-border gambling and betting services were prohibited under US law.” (WT/DSB/M/151, p.11).

275 See Press Release by the New York Attorney General dated 21 August 2002 (a copy is attached as Exhibit 55, found at Antigua Exhibits, file 3, tab 55) and the “Assurance of Discontinuance” signed between the New York Attorney General and Paypal, Inc. dated 16 August 2002 (a copy is attached as Exhibit 56, found at Antigua Exhibits, file 3, tab 56). The New York Attorney General started an inquiry against Paypal because it provided payment services to companies that supply gambling and betting services to persons resident in New York without being expressly authorized to do so under New York law. Because, in the opinion of the Attorney General, this supply of gaming services is illegal under New York and United States federal law it would therefore also be illegal for Paypal to provide internet payment services to businesses offering these unauthorised gaming services. The matter was settled when Paypal agreed to cease processing payments for such gaming companies and pay the sum of US $200,000. Other examples of such measures are provided by the New York Attorney General’s press releases of 14 June 2002 and 11 February 2003 announcing similar settlements with 11 banks that provide credit card services (attached as Exhibits 57 and 58, found at Antigua Exhibits, file 3 tabs 57 and 58).

276 See, e.g., the Appellate Body Reports in EC – Bananas III, para. 142 and US – Carbon Steel, para. 126.
140. The complexity of the United States’ legislation has made it relatively difficult for Antigua to “identify the specific measures” (despite the obvious simplicity of the effect of the United States total prohibition). To avoid misunderstanding and procedural difficulties Antigua adopted the following approach in its panel request:

- Section I and Section II of the Annex attached to the panel request list specific references to United States laws (at both the federal and the state level) that it believed could reasonably be construed as adversely impacting the cross-border supply of gambling and betting services; and
- Section III of the Annex to the panel request provides examples of non-legislative measures, such as court decisions, criminal prosecutions or statements and actions by state Attorneys General, that apply some of these laws to the cross-border supply of gambling and betting services.

141. This approach was clearly explained in the panel request and, for the avoidance of doubt, it was added that:

“The measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States’ obligations.”

142. Further Antigua explicitly stated in the panel request that:

“[a]lthough this is not always clear on the face of the text of these laws, relevant United States authorities take the view that these laws (separately or in combination) have the effect of prohibiting all supply of gambling and betting services from outside the United States to consumers in the United States.”

143. In the circumstances Antigua has used its best endeavours to “identify the specific measures at issue” and submits that it has done more than could reasonably be required from a complainant by conducting a detailed investigation of an arcane area of law of the United States (and by attempting to provide examples of legislation and other measures that adversely impact on Antiguan service suppliers). Clearly, given that United States itself has stated that the offering of gambling and betting services into the United States from Antigua is unlawful in every instance, the United States has been given fair notice of Antigua’s claim.

4.3. PROCEDURAL ISSUES REGARDING THE MEASURES

144. At the DSB meeting of 24 June 2003 the United States representative mentioned three procedural concerns with the panel request of Antigua:

- the Annex to Antigua’s panel request contained items that “did not constitute ‘measures’ that could properly be included within the scope of a panel request”;
- the Annex to the panel request “included several measures which appeared not to have been included in the 1 April 2003 consultation request”; and

277 Last sentence of the second paragraph of Antigua’s panel request.
• “not all of the measures cited in the Annex were related to cross-border gambling and betting.”

These procedural issues are easily dealt with.

145. The United States’ first apparent concern that some of the United States measures listed in the Annex to the panel request are not “measures” presumably relates to the matters listed in Section III of the Annex (which lists court decisions and statements of law enforcement and administrative agencies either taking or explaining actions against cross-border gaming services). However, the measures listed in Section III of the Annex to the panel request clearly are “measures” within the meaning of the GATS. The United States entities that have taken these measures include the United States Second Circuit Court of Appeals, the Supreme Court of the State of New York, the Gaming Control Board of Michigan and the Attorneys General of the States of Florida, Minnesota and New York.

146. Article XXVIII(a) of the GATS defines “measure” as:

“any measure by a Member, whether in the form of a law, regulation, rules, procedure, decision, administrative action, or any other form.”

147. Article I:3(a) of the GATS defines “measures by Members” as:

“measures taken by:
(i) central, regional or local governments and authorities; and
(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.”

148. The measures listed in Section III of the Annex to the panel request come within the meaning of “measure” specified in Article XXVIII(a) of the GATS as either “procedure, decision, administrative action or any other form” taken by “central, regional or local governments and authorities.” Further, the measures described in Section III of the Annex are based upon or arise out of a number of the statutory provisions listed in Sections I and II of the Annex and are therefore in any event caught by the GATS in that capacity.

149. The United States’ second stated concern relates to measures that “appeared not to have been included” in the consultation request of Antigua. There are a number of differences between the list of measures annexed to the consultation request and the list of measures annexed to the panel request. The main difference between the two is that the Annex to the panel request contains considerably fewer measures than the Annex to the consultation request. The United States suggests, however, that certain measures were added in the Annex to the panel request that do not appear in the consultation request. Presumably the United States’ concern is related to three references that contained typographical errors in the Annex to the consultation request, which were corrected in the Annex to the panel request. These are the following (with the differences underlined):

278 See also the Reports of the Appellate Body in US – Gasoline (at p. 28) and US – Shrimp (at para. 173) where it is stated that a Member bears responsibility for acts of all its departments of government, including legislative, executive and judiciary. This concept is also clear in Article I:3(a) of the GATS which provides that “each Member shall take such reasonable measures as may be available to it to ensure [observance of the Member’s obligations and commitments] by regional and local governments and authorities and non-governmental bodies within its territory.”
150. The request for consultations (and the addendum thereto) submitted by Antigua made it clear that the subject matter of this dispute is the United States’ prohibition on the cross-border supply of gambling and betting services as it results from the application of a great number of separate laws. In this respect it should have been clear to the United States that these typographical errors are indeed nothing but typographical errors. The reference to the Colorado statutes contained in the consultation request simply makes no sense and it is clear on the face of this reference that it contains an error. Article II, § 9 of the New York Constitution concerns suffrage and Article I, § 22 of the Rhode Island Constitution concerns the right to bear arms. Each of the constitutional articles as corrected in the Annex to the panel request concern gambling. Here too, it should have been clear to the United States that these were mere typographical errors. In each case, it is difficult to believe that the United States could have been prejudiced by the corrections.

151. Furthermore, in Brazil – Aircraft the Appellate Body stated that Articles 4 and 6 of the DSU do not require

“(…) a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel.”

If “precise and exact identity” were to be a requirement it would never be possible for a complainant to obtain a more precise understanding of the other WTO Member’s measures during consultations—and that would undermine the effectiveness of the dispute settlement process.

152. Finally, the objectives underlying Article 6.2 of the DSU as well as Article 4.4 of the DSU are the need to define the scope of the dispute and the due process objective of notifying the defendant and the third parties of the complainant’s case. Correcting three rather obvious typing errors has certainly not harmed these objectives.

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279 Appellate Body Report on Brazil – Aircraft, para. 132.
280 According the Appellate Body “the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings.” (India – Patents (US), para. 94). See also the Panel Report on Brazil – Aircraft, para. 7.9.
281 In the Preliminary Panel Ruling in Canada – Measures relating to exports of wheat and treatment of imported grain, WT/DS276/12 the Panel stated that: “(…) Article 4.4 omits the term ‘specific’ in referring to the ‘measures at issue’. We believe this difference in language is not inadvertent and must be given meaning. Indeed, in our view, this difference in language supports the view that requests for consultations need not be as specific and as detailed as requests for establishment of a panel under Article 6.2 of the DSU.” (para. 15).
282 See the discussion at paragraph 139 above.
153. The United States’ third procedural concern that not all the measures cited in the Annex are related to cross-border gambling and betting, is answered in the panel request itself which explicitly states that the listed measures only come within the scope of this dispute to the extent that they do relate to cross-border gambling and betting. If there are measures in the Annex that do not relate to cross-border gambling and betting in the way described in the panel request, they are not within the scope of this dispute.

154. Further, Antigua believes that the key issue regarding the measures in this proceeding is whether or not there are measures that impede the ability of Antigua to offer cross-border gambling and betting services into the United States. Logically then, if simply one of the measures listed in the Annex to the panel request has this effect then this matter has been established, even if (quod non) the remaining scores of listed measures are irrelevant.283

5. VIOLATION OF THE GATS

5.1. APPLICABILITY OF GATS: MEASURES AFFECTING TRADE IN SERVICES

155. In Canada – Autos the Appellate Body found that a threshold question for the application of the GATS is whether the measure at issue is a measure “affecting trade in services.”284 In this dispute it is clear that this is the case. First, there can be no real dispute that the offerings of the gaming industry of Antigua to consumers in the United States and elsewhere constitute “services”. Second, it has been firmly established in WTO law that what constitutes “measures (…) affecting trade in services” is to be very broadly construed. As stated by the Appellate Body in EC – Bananas III:

“In our view, the use of the term ‘affecting’ reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on’, which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term ‘affecting’ in the context of Article III of the GATT is wider in scope than such terms as ‘regulating’ or ‘governing’. (…) We also note that Article I:3(b) of the GATS provides that ‘services’ includes any service in any sector except services supplied in the exercise of governmental authority’ (emphasis added), and that Article XXVIII(b) of the GATS provides that the ‘supply of a service’ includes the production, distribution, marketing, sale and delivery of a service’. There is nothing at all in these provisions to suggest a limited scope of application for the GATS.”285

5.2. MODE 1—CROSS-BORDER SUPPLY

156. The services at issue are supplied from Antigua by means of distant communication (in particular through internet connection, telecommunications or postal or delivery services) into the territory of the United States. Antigua submits that this constitutes “mode 1” or “cross-border” supply of services, which is defined in Article I:2(a) of the GATS as:

“supply of a service (…) from the territory of one Member into the territory of any other Member”

283 This point is particularly salient given the agreement of the parties on the legal position of the United States government regarding the legality of these services. See the discussion at paragraph 136 above.

284 Para. 152, see also Article I:1 of the GATS.

157. This view is supported by the so-called “scheduling guidelines” circulated by the GATT Secretariat during the Uruguay Round negotiations. The objective of this 1993 document was “to explain how commitments should be set out in [GATS] schedules in order to achieve precision and clarity.” Paragraph 19 of the 1993 scheduling guidelines provides as follows (emphasis added):

“It is important to have a common understanding of what each mode covers. To this end, further examples and explanations are given below.

(a) Cross-border supply

International transport, the supply of a service through telecommunications or mail, and services embodied in exported goods (e.g. a computer diskette, or drawings) are all examples of cross-border supply, since the service supplier is not present within the territory of the Member where the service is delivered.”

This definition is confirmed in the revised scheduling guidelines which were adopted by consensus by the Council for Trade in Services on 23 March 2001 for use during the ongoing services negotiations that started in 2000 (the “2001 scheduling guidelines”).

158. Antigua notes that a “Progress Report” adopted by the Council for Trade in Services on 19 July 1999 concerning the “Work Programme on Electronic Commerce” mentions that “there was particular difficulty” in making a distinction between supply under modes 1 and 2 (“cross-border supply” and “consumption abroad,” respectively). While that may be the case in certain circumstances Antigua believes that this is not the case here. In any event whether the gambling and betting services at issue in this proceeding are supplied in mode 1 or mode 2 does not have a material impact on this dispute because the United States has made the same commitments for both modes of supply.

5.3 THE UNITED STATES SCHEDULE OF SPECIFIC COMMITMENTS UNDER THE GATS

5.3.1. Schedules of commitments under the GATS

159. The GATS itself is a relatively brief document. The full nature and extent of each Member’s obligations under the GATS can only be determined by reference to their respective “schedules of specific commitments” that are mandated by Article XX:1 of the GATS. Once developed, the schedules of specific commitments of the Members “shall be annexed to [the GATS] and shall form an integral part thereof.”

286 “Scheduling of initial commitments in trade in services: explanatory note” (MTN.GNS/W/164) (3 September 1993) (a copy is attached as Exhibit 59, found at Antigua Exhibits, file 3, tab 59).

287 1993 scheduling guidelines, para. 1.

288 “Guidelines for the scheduling of specific commitments under the General Agreement on Trade in Services (GATS)” (S/L/92) (28 March 2001), para. 28 (a copy is attached as Exhibit 60, found at Antigua Exhibits, file 3, tab 60).

289 S/L/74, para. 5.

290 The 1993 scheduling guidelines (Antigua Exhibits, file 3, tab 59) provide the following explanation about “consumption abroad”: “This mode of supply is often referred to as ‘movement of the consumer’. The essential feature of this mode is that the service is delivered outside the territory of the Member making the commitment. Often the actual movement of the consumer is necessary as in tourism services. However, activities such as ship repair abroad, where only the property of the consumer ‘moves,’ or is situated abroad, are also covered.” (para. 19) This definition is taken over without change in paragraph 29 of the 2001 scheduling guidelines.

291 See the discussion at paragraphs 160 and 166 and footnotes 294 and 298 below.

292 GATS, Article XX:3.
5.3.2. The United States schedule

160. In its schedule of commitments under the GATS the United States has made a full commitment for the cross-border supply of services classified under Subsector 10.D “Other recreational services (except sporting).” In drafting its Schedule, the United States made use of the “Services Sectoral Classification List” prepared by the GATT Secretariat during the multilateral negotiations that led to the establishment of the WTO and the GATS (this classification list is generally referred to as “W/120” after its document number).

161. Subsector 10.D of W/120 is headed “Sporting and other recreational services” and lists “964” as the “corresponding CPC.” This “CPC” is the 1991 “Provisional Central Product Classification” of the United Nations. Its heading 964 “Sporting and other recreational services” is broken down as follows (emphasis added):

964 Sporting and other recreational services

9641 Sporting services
96411 Sports event promotion services
96412 Sports event organization services
96413 Sports facility operation services
96419 Other sporting services

9649 Other recreational services
96491 Recreation park and beach services
96492 Gambling and betting services
96499 Other recreational services n.e.c.

162. Subsector 10.D of the United States Schedule is headed “Other recreational services (except sporting)”. Thus the United States has clearly excluded CPC category “9641 Sporting services” from the commitments it has made in Subsector 10.D of its Schedule. By the same token Subsector 10.D of the United States Schedule clearly includes CPC category “9649 Other recreational services” which encompasses CPC category “96492 Gambling and betting services”.

163. During consultations with the United States, Antigua fully disclosed its interpretation of the United States Schedule and the legal basis for that interpretation to the United States, both orally and in writing. In reply the United States simply denied that it has made commitments for gambling and betting services. Despite being asked to do so by Antigua the United States has not explained:

- why Antigua’s interpretation of the Schedule is legally incorrect;

293 GATS/SC/90 (extracts are attached as Exhibit 61, found at Antigua Exhibits, file 3, tab 61).
294 With regard to that sector the United States has also made a full commitment for “consumption abroad.” See the discussion at paragraphs 156 - 158 below.
295 MTN.GNS/W/120 (dated 10 July 1991) (a copy is attached as Exhibit 62, found at Antigua Exhibits, file 3, tab 62).
296 See Panel Report on EC – Bananas III, para. 7.289; see also the 1993 scheduling guidelines para. 16 (Antigua Exhibits, file 3, tab 59). The provisional CPC is published as Statistical Papers Series M No. 77, Provisional Central Product Classification, Department of International Economic and Social Affairs, Statistical Office of the United Nations, New York, 1991 (extracts are attached as Exhibit 63, found at Antigua Exhibits, file 3, tab 63).
• what alternative approaches should be followed to interpret the United States Schedule; or

• what type of activities are, in the view of the United States, covered by Subsector 10.D “Other recreational services (except sporting)” in its Schedule.

5.3.3. Interpretation in accordance with the Vienna Convention on the Law of Treaties

164. Because the United States Schedule is made an integral part of the GATS by Article XX:3 of the GATS, it must be interpreted on the basis of the general rules of interpretation provided for in Article 31 of the *Vienna Convention on the Law of Treaties*, which provides as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

   (b) any instrument which 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.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

165. Antigua’s interpretation of the United States Schedule follows from:

• the ordinary meaning of the words “other recreational services” (Article 31(1) of the Vienna Convention);

• agreements and instruments connected to the conclusion of the GATS that are part of its context (Article 31(2) of the Vienna Convention); and

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297 See, by analogy, the Appellate Body Report in *EC – Computer equipment*, at para. 84 (concerning the interpretation of a GATT 1994 Schedule).
• practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31(3) of the Vienna convention).

None of the interpretation methods permitted by the Vienna Convention contradicts Antigua’s interpretation of the United States Schedule.

(A) The ordinary meaning of the words “other recreational services”

166. Even an interpretation exclusively based on the ordinary meaning of the words “other recreational services” in the United States Schedule leads to the plausible conclusion that gambling and betting services fall within this broadly worded category. It could perhaps be argued that, if only taking into account the “ordinary meaning” of the words, gambling and betting services might be classified under “Entertainment services” (Subsector 10.A of the United States Schedule). However, that would not change the conclusion because the United States also made a full commitment for cross-border supply of services under that category.298

(B) Instruments connected to the GATS that are part of its context

167. The two most important such documents for the interpretation of any GATS schedule are the W/120 list and the 1993 scheduling guidelines.

168. Paragraph 16 of the 1993 scheduling guidelines provides as follows

“The legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector or sub-sector scheduled. In general the classification of sectors and sub-sectors should be based on [W/120]. Each sector contained in [W/120] is identified by the corresponding Central Product Classification (CPC) number. Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognised classification (e.g. Financial Services Annex).”

This paragraph was carried over in the 2001 scheduling guidelines without change (where it is now paragraph 23).

169. The United States Schedule clearly follows the structure of W/120, with the exception of insurance services (Subsector 7.A) in relation to which the Schedule explicitly states (no doubt pursuant to the scheduling guidelines) that:

“Commitments in this subsector are undertaken pursuant to the alternative approach to scheduling commitments set forth in the Understanding on Commitments in Financial Services.”

170. During consultations the United States submitted that W/120 is not a legally binding document. It also stated that the 1993 scheduling guidelines provide only general guidance and that the document itself provides in paragraph 1 that it “should not be considered as an authoritative legal interpretation of the GATS.” The latter phrase, however, only confirms what is obvious in the light of Article IX:2 of the WTO Agreement which reserves the right to make such interpretations to the Ministerial Conference and the General Council.

298 The United States also has a full commitment for “consumption abroad” for Subsector 10.A “Entertainment services.”
Furthermore this phrase in any event does not relate to a provision such as paragraph 16 of the 1993 scheduling guidelines which provides no interpretation at all (unlike, for instance, paragraph 7 of the 1993 scheduling guidelines which interprets the national treatment principle). Paragraph 16 (and various others) of the 1993 scheduling guidelines merely explain how WTO Members should schedule items and how, in the interest of clarity, they should provide concordance with the CPC (or additional definitions) should they wish to use their own classifications or definitions. In doing so these paragraphs simply set a standard for clear and unambiguous communication in a legal context requiring “the greatest possible degree of clarity.”

In the absence of such standards for communication, GATS schedules could well have varied wildly in the drafting and WTO Members might not have been able to understand each other’s schedules. In that light, documents such as the scheduling guidelines and W/120 obviously form a very important part of the context of the United States Schedule.

171. W/120’s status as an “agreement” or “instrument” that is part of the context of the GATS (and the WTO Agreement in general) is further confirmed by Article 22 of the DSU concerning the suspension of concessions in relation to non-compliance with rulings and recommendations of the DSB. Paragraph (3)(f)(ii) of Article 22 provides that (original footnote included):

“for purposes of this paragraph, “sector” means:

(…)  
(ii) with respect to services, a principal sector as identified in the current “Services Sectoral Classification List” which identifies such sectors;  

14 The list in document MTN.GNS/W/120 identifies eleven sectors.”

172. Antigua believes that given the clear importance and acceptance of W/120 in construing Member’s commitments under the GATS, the United States had the ability unambiguously to exclude gambling and betting services from its commitments under its Schedule. Indeed, numerous WTO Members that made commitments for Subsector 10.D have totally or partially excluded gambling and betting services from the scope of their commitment in that sector. The United States has not done so.

(C) Practice in the application of the Treaty

173. Since the entry into force of the GATS, WTO Members have consistently referred to W/120 (and its cross-references to the CPC) as the classification used for GATS purposes and as the main point of reference for any discussion on the classification of services.

174. The Appellate Body has used the CPC as an interpretative tool even when the issue at stake was the scope of the GATS in general rather than the interpretation of a Member’s schedule. In EC – Bananas III, for instance, the Appellate Body refers to the CPC when it draws the conclusion that banana traders of United States origin are service suppliers and that

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299 1993 scheduling guidelines, para. 16 (Antigua Exhibits, file 3, tab 59).
300 For instance, Austria, Bulgaria, the European Communities, Finland, Slovenia and Sweden excluded gambling from the scope of their respective commitments under Subsector 10.D by specifically using the words “other than gambling” or similar words.
301 See, e.g., paras. 23-24 of the 2001 scheduling guidelines (Antigua Exhibits, file 3, tab 60); see also the United States’ own communication to the WTO on “Classification of Energy Services”, dated 18 May 2000 (S/CSC/W/27) (attached as Exhibit 64, found at Antigua Exhibits, file 3, tab 64).
their activities come within the scope of the GATS. This qualification allowed the application of Article II of the GATS (application of which is not linked to Member’s schedules) to the situation at issue in EC – Bananas III.

175. In Canada – Autos several WTO Members and the Panel itself referred to the 1993 scheduling guidelines and an addendum thereto when discussing the interpretation of GATS schedules and the GATS itself. None of the parties in that dispute (nor the Panel) submitted that it would be inappropriate to make use of the 1993 scheduling guidelines for the interpretation of GATS schedules.

176. Finally, even the United States International Trade Commission (the “USITC”) uses W/120 and its cross-references to CPC as a tool to interpret the United States Schedule. In 1997 the USITC published a document explaining the United States Schedule. On page viii of that document it is stated that:

“The U.S. Schedule makes no explicit references to CPC numbers, but it corresponds closely with the GATT Secretariat’s list.”

177. The USITC document also contains a “Concordance of Industry Classifications” which is described as follows:

“The concordance developed by the USITC clarifies how the services sectors reference in the GATT Secretariat’s list, the CPC System, and the U.S. Schedule correspond. The first column of the concordance identifies the service sectors listed by the GATT Secretariat. The second column identifies the CPC classifications that correspond to the GATT Secretariat’s list. The third column identifies the sectors addressed in the U.S. Schedule, and the fourth column provides more detailed information regarding the structure and coverage of the U.S. Schedule.”

178. According to the actual concordance table included in the USITC document (the relevant part of which is reproduced below), Subsector 10.D of the United States Schedule corresponds to Subsector 10.D of W/120 and CPC code 964. The fourth column (in which more information is provided on the structure and coverage of the United States Schedule) provides that Subsector 10.D of the United States Schedule excludes “sporting.” It does not, however, state that gambling and betting services, which are covered by CPC code 964, are excluded from the Schedule.

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302 Appellate Body Report in EC – Bananas III, paras. 225-227. See also the Appellate Body Report in Canada – Autos, para. 157, where the Appellate Body draws the conclusion that there is “trade in services” in that case, inter alia on the basis of a reference to the CPC.


304 Panel Report in Canada – Autos: for Canada see para. 10.241; for Japan, see para. 6.1002; for both complaining parties (i.e. Japan and the EU), see para. 10.295; for the Panel itself, see para. 10.243.

305 United States International Trade Commission, U.S. Schedule of Commitments under the General Agreement on Trade in Services – With explanatory materials prepared by the U.S. International Trade Commission, dated May 1997 (extracts are attached as Exhibit 65, found at Antigua Exhibits, file 3, tab 65). As is stated on page vii of the USITC document, the USITC has “assumed responsibility for maintaining and updating, as necessary, the United States’ Schedule of Commitments (…)”. Page viii.
<table>
<thead>
<tr>
<th>Sectors and Subsectors</th>
<th>Sections, Divisions, Groups, Classes</th>
<th>U.S. Schedule of Services Commitments</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>10. RECREATIONAL, CULTURAL AND SPORTING SERVICES</td>
<td>Class 9619: Other entertainment services</td>
<td>10. RECREATIONAL, CULTURAL AND SPORTING SERVICES</td>
<td>GATT and U.S. section 10 excludes audiovisual services</td>
</tr>
<tr>
<td>A. Entertainment services</td>
<td>Class 9619: Other entertainment services</td>
<td>A. Entertainment services</td>
<td>GATT and U.S. sector “10A: Entertainment services” includes theatre, live bands and circus services.</td>
</tr>
<tr>
<td>B. News agency services</td>
<td>Group 962: News agency services</td>
<td>B. News agency services</td>
<td></td>
</tr>
<tr>
<td>C. Libraries, archives, museums and other cultural services</td>
<td>Group 963: Library, archive, museum and other cultural services</td>
<td>C. Libraries, archives, museums and other cultural services</td>
<td></td>
</tr>
<tr>
<td>D. Sporting and other recreational services</td>
<td>Group 964: Sporting and other recreational services</td>
<td>D. Other recreational services</td>
<td>U.S. sector “10D: Other recreational services” excludes sporting</td>
</tr>
<tr>
<td>E. Other (No corresponding CPC)</td>
<td></td>
<td>E. No U.S. commitment</td>
<td></td>
</tr>
</tbody>
</table>

### 5.4. VIOLATION OF SPECIFIC GATS PROVISIONS

179. Some of the GATS provisions at issue in this case have not been interpreted by panels or the Appellate Body. However, the Appellate Body has indicated that past interpretation of GATT provisions can provide useful guidance for the interpretation of similar GATS provisions.\(^\text{307}\)

#### 5.4.1. Violation of specific GATS provisions by the prohibition measures

**A) Article XVI of the GATS: market access**

180. Article XVI:1 of the GATS provides as follows

> “With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less

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\(^{307}\) Appellate Body Report on *EC – Bananas III*, para. 231.
favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.”

181. In its Schedule the United States has made a full commitment to the cross-border supply of gambling and betting services. Simultaneously, the United States totally impedes cross-border market access by prohibiting all cross-border supply of gambling and betting services. This constitutes a manifest violation of Article XVI:1 of the GATS.

182. Article XVI:2 of the GATS provides as follows

“In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
(b) (…)
(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
(…)”

183. The United States maintains an array of measures that constitute a total prohibition of the supply of gambling and betting services unless this has been authorised (generically or individually) by authorities of the United States (via legislation, regulation or individual licences). Thousands of service suppliers of United States origin have been given an authorisation to supply gambling and betting services (often creating monopolies or exclusive service suppliers). It is impossible, however, for service suppliers from Antigua to obtain an authorisation to supply services on a cross-border basis.

184. This complete ban on cross-border supply maintained by the United States qualifies as a “limitation on the number of service suppliers” prohibited by Article XVI:2(a) of the GATS. The United States measures violate Article XVI:2(a) not only as establishing a numerical quota (of zero)\footnote{Compare, with regard to Article XI:1 of GATT 1994, the Panel Report on Canada – Periodicals, para. 5.5.} but also as measures creating monopolies or exclusive service suppliers.

185. The complete ban on cross-border supply also qualifies as a “limitation on the total number of service operations” prohibited by Article XVI:2(c) of the GATS.

(B) Article XVII of the GATS: national treatment

186. Article XVII of the GATS provides as follows:

“1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like service or services suppliers of any other Member.”

187. The United States Schedule provides no limitations on national treatment for the cross-border supply of gambling and betting services.

188. The fact that the United States’ measures at issue in this case disfavour services and service suppliers of other WTO Members compared to services and service suppliers of United States origin needs no further explanation. The only question that merits consideration is whether the services and service suppliers of Antigua are “like” those of the United States. As explained in more detail below, Antigua submits that it is clear that this is indeed the case. The types of games offered from Antigua are the same as those offered in the United States and all involve the winning or losing of money. The only differences are the origin of the services and the suppliers and the mode of supply (cross-border as opposed to commercial presence). These differences, however, are not relevant in the context of a commitment to national treatment of cross-border supply under the GATS.

(1) Likeness in Article XVII of the GATS—General considerations

189. To date, panels and the Appellate Body have addressed the issue of “likeness” in the GATS in only two disputes: EC – Bananas III and Canada – Autos. In both disputes the panels accepted that the services and the service suppliers were “like” without the extensive discussion that has taken place in the “likeness” debate in the context of the GATT. In the view of Antigua, this is not a coincidence because the concept of likeness will often be less important in disputes concerning trade in services than in disputes on trade in goods. In the case of trade in goods the characteristics of a specific product are often inherently “locked in” to the good (for instance in a specific type of cement as in EC – Asbestos). In the case of trade in services, however, the characteristics of the “product”—the service—are intangible and often easily adaptable.

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309 See the discussion at paragraphs 192-195 below.


311 The view that the likeness debate may be of lesser importance in services contexts than in goods contexts is also supported by the Appellate Body’s statement in Japan – Alcoholic Beverages, according to which the “likeness” concept is a flexible one that may have different meanings in different WTO Agreements and in different circumstances: “the concept of ‘likeness’ is a relative one that evokes the image of an accordion. The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.” (Appellate Body Report on Japan – Alcoholic Beverages, p. 21).

312 See also William J. Davey and Joost Pauwelyn, “MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of ‘Like Product’” in Thomas Cottier and Petros C. Mavroidis (eds.), Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law (The University of Michigan Press, 2000), p. 13-50, at footnote 14: “It would seem to be difficult to transpose this approach to the GATS. Since most, if not all, features of services and service suppliers are intangible, none of them can really be said to be objectively linked to the service or service supplier itself.”
190. Thus, even if services and service suppliers are “unlike” it will often be relatively simple to adapt the foreign service and service supplier in order to make these “like” their domestic counterparts. Of course, the regulatory system of the importing WTO Member must offer the foreign services and suppliers an opportunity to be or become “like.” For example, a WTO Member can not set up a regulatory system that is only open to domestic services and suppliers and then argue that all foreign services and suppliers are “unlike” because they are unregulated. Such an approach would sanctify a regulatory regime that is inherently discriminatory and cannot therefore be compliant with Article XVII of the GATS.

191. In this respect, Antigua invites the Panel to exercise judicial economy in deciding whether an investigation of specific characteristics of various gaming services is necessary to dispose of this dispute. Antigua strongly believes this not to be the case because access to the United States market for gambling and betting services is not determined by the application of objective criteria to the services and the service suppliers. Even an Antiguan service that is identical to a service of United States origin (which many—perhaps all—are) would have no access to the United States market simply because it is provided from a foreign location. This factor, however, can play no role in the determination of “likeness” in Article XVII of the GATS because it is the specific purpose of Article XVII to remove different treatment solely on the basis of origin.  

(2) Like services and service suppliers: specific characteristics

Different mode of supply

192. The fact that services of Antiguan gaming operators are supplied via a different “mode of supply” than services of suppliers of United States origin (cross-border as opposed to commercial presence) does not make these “unlike.” If the use of a different “mode of supply” were sufficient for a WTO Member to escape the obligations of national treatment on the basis of “unlikeness,” this would seriously undermine the effectiveness of the GATS. In particular, a commitment to national treatment for cross-border supply would be meaningless because the simple fact that a service is supplied cross-border would make that service and its supplier “unlike” their domestic counterparts and remove the national treatment obligation. Such an interpretation is contrary to the principle of effective treaty interpretation because it

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313 See, by analogy on Article III:4 of the GATT 1994 the Panel Report on US – FSCs (21.5) “We view the principal purpose of the ‘like product’ inquiry under Article III:4 of the GATT 1994 as ascertaining whether any formal differentiation in treatment between an imported and a domestic product could be based upon the fact that the products are different – i.e. not like – rather than on the origin of the products involved” (para. 8.132) and “We do not believe that the mere fact that a good has US origin renders it ‘unlike’ an imported good” (para. 8.133). See also (again with regard to Article III:4 of the GATT 1994), the Panel Report in India – Autos, para. 7.173–7.176. With regard to Article III:2 of the GATT 1994, see the Panel Report on Indonesia – Autos, para. 14.113: “an origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually trade like products” and, also with regard to Article III:2 of the GATT 1994, the Panel Report on Argentina – Hides and Leather, para. 11.168-11.169. With regard to the possibility to make use of hypothetical examples in the “likeness” analysis (in the context of Article III:2 of the GATT 1994), see Appellate Body Report on Canada – Periodicals, p. 20-21.

314 See also the note by the WTO Secretariat entitled “The work programme on electronic commerce” (S/C/W/68) which, in para. 33 (concerning Article XVII of the GATS) states that: “As discussed in the context of Article II on MFN, likeness in the national treatment context also depends in principle on attributes of the product or supplier per se rather than on the means by which the product is delivered.”
renders redundant an important part of the GATS, i.e. all schedules with national treatment commitments for cross-border supply.315

Specific characteristics

193. In the context of trade in goods the Appellate Body (in EC – Asbestos) referred to four categories of characteristics that have been used to assess “likeness” in the context of the GATT: (i) physical properties; (ii) capability of serving the same or similar end-uses; (iii) consumer perception; and (iv) international tariff classification.316

194. To the extent that a comparable analysis of characteristics would need to be made in the GATS context, Antigua submits that the gambling and betting services offered from Antigua and those offered in the United States are virtually the same. The types of games are the same and all involve the placing of wagers and the winning or losing sums of money. Consumers perceive Antiguan and United States gambling services as interchangeable.317 Both Antiguan and United States origin gambling and betting services are offered to the public via communication technology including telephone and electronic communication. Finally, the international classification of services used in the WTO context, the provisional CPC classification, provides only one category for gambling and betting services. The more recent versions of the CPC classification, CPC Version 1 and CPC Version 1.1 also provide for just one category for gambling and betting services.318

195. To the extent that suppliers from Antigua and suppliers from the United States provide like services, they are also like service suppliers.319

(C) Article VI of the GATS

196. Article VI:1 of the GATS provides that:

“In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”

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315 See also (with regard to the principle of effective treaty interpretation) the Appellate Body Report on US – Gasoline, p. 23 and Appellate Body Report on Korea – Dairy, para. 81.


317 Various gambling operators of United States origin state that the cross-border supply of gambling and betting services is hurting their sales. See the statement by Mr Steve Woodall, Fiscal Officer in Idaho (reported in *The Spokesman Review* (2 February 2001), article attached as Exhibit 66 (found at Antigua Exhibits, file 3, tab 66)); the statement by Mr Dennis Kennedy, Executive Director of the Ohio Lottery, reported in David Bennett, “Lottery’s pot for schools ends up short”, *Crain’s Cleveland Business* (23 July 2001), attached as Exhibit 67 (found at Antigua Exhibits, file 3, tab 67)). See also the arguments put forward by the horse race betting industry in Florida (reported in Jim Saunders, “Video-gambling debate spins in soft economy”, *The Florida Times-Union* (28 December 2002) attached as Exhibit 68 (found at Antigua Exhibits, file 3, tab 68)); and the statement of Mr Joe Lupo, manager of a bookmaker in Las Vegas, reported in Michael Kaplan, op. cit. at footnote 184 above, pp. 72-73 (Antigua Exhibits, file 2, tab 34)).

318 Version 1 is the 1997 version and Version 1.1 the 2002 version of the CPC. Both classify “gambling and betting services” as a class (9692) and subclass (96920) under “Section 9 – Community, social and personal services”; “Division 96 – Recreational, cultural and sporting services”; and “Group 969 – Other amusement and recreational services”. The different versions of the CPC can be consulted electronically on http://unstats.un.org/unsd/cr/registry/regct.asp?Lg=1. Copies are attached as Exhibit 69 (found at Antigua Exhibits, file 3, tab 69).

As explained above the United States maintains numerous laws and regulations prohibiting the supply of gambling and betting services unless a specific authorisation has been granted. These are “measures of general application affecting trade in services” caught by Article VI:1 of the GATS. Many service suppliers of United States origin have been given an authorisation to supply gambling and betting services. It is impossible, however, for foreign service suppliers to obtain an authorisation to supply services on a cross-border basis or to even apply for such an authorisation. Antigua submits that this constitutes a violation of Article VI:1 of the GATS.

Article VI:3 of the GATS provides that:

“Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.”

Article VI:3 of the GATS implies that a WTO Member is obliged to make authorisation procedures that are open to domestic service suppliers available to suppliers from other WTO Members that want to supply services on which a commitment has been made. By prohibiting all cross-border supply of gambling and betting services, the United States obviously does not fulfil that obligation with respect to those services.

5.4.2. Violation of specific GATS provisions by the measures restricting international money transfers

As explained above the United States also maintains measures that restrict international money transfers and payments relating to the cross-border supply of gambling and betting services. United States authorities particularly seek to restrict payments and transfers relating to “unauthorised” gambling and betting services with businesses that “usually operate offshore in foreign locations”. “Legally authorized gaming transactions” are exempt from these measures. The purpose of these measures is to prevent foreign suppliers of gambling and betting services from offering their services on a cross-border basis.

To the extent that these measures reinforce the prohibition measures discussed in paragraphs 137 and 138 above they violate Articles XVI:1, XVII and VI:1 of the GATS. These measures also violate Article XI:1 of the GATS which provides as follows:

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321 “Agreement reached with Paypal to bar New Yorkers from online gambling,” Press Release from the Office of the New York State Attorney General (21 August 2002) (Antigua Exhibits, file 3, tab 55). On 10 June 2003, the United States House of Representatives adopted legislation known as H.R.2143, the “Unlawful Internet Gambling Funding Prohibition Act” (a copy is attached as Exhibit 70, found at Antigua Exhibits, file 3, tab 70). This is designed to unambiguously prohibit banks and other financial service providers from engaging in financial transactions involving gambling and betting services from non-United States based gambling operators (Section 4(2)(E)(ix) excludes “any lawful transaction with a business licensed or authorized by a State” thus exempting United States gambling operators from the prohibition to facilitate payment of internet gambling services). The second component of the United States Congress, the Senate, has yet to adopt this legislation.
“Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.”

6. **ARTICLE XIV OF THE GATS**

6.1. **ARTICLE XIV OF THE GATS IS AN AFFIRMATIVE DEFENCE**

202. It is possible that the United States may try during the course of this proceeding to invoke one or more of the general exceptions of Article XIV of the GATS. It would of course be inconsistent for the United States to seek to do so given its principal position during consultations that it has made no commitment in relation to gambling and betting services. At the DSB meeting of 24 June 2003 the United States nevertheless stated that cross-border gambling and betting services are prohibited because of “the social, psychological dangers and law enforcement problems that they created, particularly with respect to internet gambling and betting.”\(^\text{322}\) The United States also expressed “grave concerns over the financial and social risks posed by such activities to its citizens, particularly but not exclusively children.”\(^\text{323}\) Antigua also notes that in a note by the WTO Secretariat entitled “The work programme on electronic commerce,” dated 16 November 1998 it is stated, with regard to the protection of public morals and the maintenance of public order under Article XIV, that

> “Measures to curb obscenity or to prohibit internet gambling might well be justified on these grounds.”\(^\text{324}\)

203. Article XIV of the GATS is an “affirmative defence” and, if the United States were to invoke it, the burden of proof would be on the United States.\(^\text{325}\) Therefore it is for the United States to make its case under Article XIV and for Antigua to respond. In the interest of procedural efficiency, Antigua nevertheless submits a number of general considerations on the interpretation of Article XIV of the GATS. Of course, Antigua will only be able to respond in full to a possible Article XIV defence when (and if) the United States presents one.

6.2. **GENERAL CONSIDERATIONS ON ARTICLE XIV OF THE GATS**

6.2.1. **A two-tiered analysis**

204. Article XIV of the GATS provides as follows:

*General Exceptions*

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

\(^\text{322}\) WT/DSB/M/151, para. 47.
\(^\text{323}\) WT/DSB/M/151, para. 47.
\(^\text{324}\) S/C/W/68, para. 26.
\(^\text{325}\) Appellate Body Report on *US – Shirts and Blouses*, p. 16 (with regard to Article XX of the GATT 1994).
(a) necessary to protect public morals or to maintain public order;\textsuperscript{326}

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

205. Article XIV of the GATS has not yet been interpreted by panels or the Appellate Body. However, the interpretation and application of Article XX of the GATT 1994 (the corresponding GATT provision) by the Appellate Body, WTO panels and GATT panels provides useful and relevant guidance,\textsuperscript{328} particularly so because the text of Article XIV of the GATS and Article XX of the GATT 1994 is largely identical. The “chapeau” of both provisions is identical but for the reference to “trade in services” in Article XIV of the GATS

\textsuperscript{326} (original footnote) “5 The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”

\textsuperscript{327} (original footnote) “6 Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

(i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or

(ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or

(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or

(iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or

(v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or

(vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.”

\textsuperscript{328} See the discussion at paragraph 179 above and also the Appellate Body Report on EC – Bananas, para. 231.
(as opposed to the reference to “international trade” in Article XX of the GATT 1994). The subparagraphs of Article XIV of the GATS that the United States may try to invoke in this case use the pivotal term “necessary” to establish a connection between the subparagraph and the chapeau. The term “necessary” is used in a similar way in some of the subparagraphs of Article XX of the GATT 1994.

206. In view of the similarity between Article XIV of the GATS and Article XX of the GATT 1994, Antigua submits that, just like Article XX of the GATT 1994, Article XIV of the GATS requires a two-tiered analysis: first, provisional justification of a measure as “necessary” under one of the subparagraphs and, second, further assessment of the measure under the “chapeau.”

6.2.2. “Necessary”

207. In Korea – Beef the Appellate Body confirmed the “necessary” test adopted by the Panel in US – Section 337, i.e. that a measure is not “necessary” when:

> “a WTO-consistent alternative measure which the Member concerned could ‘reasonably be expected to employ’ is available, or whether a less WTO-inconsistent measure is ‘reasonably available’.”

208. In Korea – Beef the Appellate Body has also “outlined” a weighing and balancing process that is comprehended in the “reasonable alternative” test of the GATT Panel report US – Section 337:

> “It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as ‘necessary’ a measure designed as an enforcement instrument.

There are other aspects of the enforcement measure to be considered in evaluating that measure as ‘necessary’. One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be ‘necessary’. Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce, that is, in respect of a measure inconsistent with Article III:4, restrictive effects on imported goods. A measure with a relatively slight impact upon imported products might more easily be considered as ‘necessary’ than a measure with intense or broader restrictive effects.

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331 Appellate Body Report on Korea – Beef, para. 166.
332 (original footnote) \"105 We recall that the last paragraph of the Preamble of the GATT of 1994 reads as follows: ‘Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.’ (emphasis added)\"
In sum, determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.\textsuperscript{333}

209. *Korea – Beef* concerned the application of Article XX(d) of the GATT 1994. When the Appellate Body interpreted Article XX(b) in *EC – Asbestos*, it referred back to its analysis of “necessary” in *Korea – Beef*.\textsuperscript{334} This shows that the Appellate Body’s analysis in *Korea – Beef* does not exclusively apply to Article XX(d) of the GATT 1994 but is likely to apply by analogy to all similar necessity tests, including those of Article XIV of the GATS.

6.2.3. **Further assessment under the chapeau**

210. In its report on *US – Shrimp* the Appellate Body described Article XX of the GATT 1994 as requiring the following:

“(...) a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences."\textsuperscript{335}

211. In *US – Shrimp* the Appellate Body found that the United States regulation at issue did not meet the chapeau’s test because:

- it imposed a “rigid and unbending” standard that left no scope for taking into account other specific policies and measures that an exporting country may have adopted to protect the general interest objective at issue,\textsuperscript{336}

- it imposed a “rigid and unbending” standard on other countries that did not take into account the conditions prevailing in the exporting countries;\textsuperscript{337}

- it had made no effort to pursue international cooperation with relevant countries in order to deal with the policy concerns at issue before imposing an import ban.\textsuperscript{338}

212. In *US – Gasoline* the Appellate Body found that the words “discrimination between countries,” in the chapeau of Article XX of the GATT 1994 covers discrimination between

\textsuperscript{333} Appellate Body Report on *Korea – Beef*, para. 162-164.
\textsuperscript{334} Appellate Body Report on *EC – Asbestos*, para. 171-172.
\textsuperscript{335} Appellate Body Report on *United States – Shrimp*, para. 156.
\textsuperscript{336} Id., para., 163.
\textsuperscript{337} Id., para. 177.
\textsuperscript{338} Id., para. 171.
the exporting and importing country (national treatment) as well as discrimination between exporting countries (most favoured nation treatment).339

7. CONCLUSIONS

7.1. FINDINGS REQUESTED BY ANTIGUA

213. In the light of the considerations set out above, Antigua respectfully requests the Panel to find that the United States prohibition on the cross-border supply of gambling and betting services and its measures restricting international money transfers and payments relating to gambling and betting services are inconsistent with the United States Schedule of Specific Commitments and Articles XVI:1, XVI:2, XVII:1, XVII:2, XVII:3, VI:1, VI:3 and XI:1 of the GATS.

214. According to Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. Thus, Antigua requests the Panel to find that the United States prohibition on cross-border supply of gambling and betting services nullifies or impairs benefits accruing to Antigua under the GATS.

7.2. RECOMMENDATIONS REQUESTED BY ANTIGUA

215. Article 19.1 of the DSU provides that, where a panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. Accordingly, Antigua requests the Panel to recommend that the DSB request the United States to bring the measures at issue into conformity with the GATS.

List of Exhibits

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<td>Joe Weinert, “U.S. Gambling Losses Hit $68.7B Last Year,” <em>The Press of Atlantic City (New Jersey)</em> (17 August 2003)</td>
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<td>2</td>
<td>United Kingdom Department for Culture, Media &amp; Sport, <em>The Future regulation of remote gambling: a DCMS position paper</em> (April 2003)</td>
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<td>Electronically accessed complaint form on Antigua Gaming Directorate Website: <a href="http://www.antiguagaming.gov.ag/complaints.asp">http://www.antiguagaming.gov.ag/complaints.asp</a></td>
</tr>
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Chart entitled “Overview of gambling in the United States”


David G. Schwartz, Suburban Xanadu: The Casino Resort on the Las Vegas Strip and Beyond (Routledge 2003) [Extracts]

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La Fleur’s 2001 World Lottery Almanac

“Match Made in heaven—Lotteries and tracks have proven to be a great partnership with VLTs,” *International Gaming and Wagering Business*, July 2003


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Extract from the TVG website at: www.tvgnetwork.com/about/faq.asp

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Report of the Committee to Study the Feasibility of Instituting Sports Gaming Activities at Existing Gaming Venues in Delaware: To the House of Representatives of the 142nd General Assembly of Delaware (30 May 2003)

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