

**United States – Measures Affecting
the Cross-Border Supply of Gambling and Betting Services
(AB-2005-1)**

**EXECUTIVE SUMMARY OF THE OTHER APPELLANT SUBMISSION
OF ANTIGUA AND BARBUDA**

24 January 2004

1. Antigua and Barbuda (“Antigua”) is pleased with the decision of the Panel in its final report on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (the “Final Report”). If the United States had not appealed certain aspects of the Final Report, Antigua would have not lodged an appeal either. However, given the United States’ appeal, Antigua decided it important to appeal certain decisions contained in the Final Report.

2. Antigua’s appellate points fall into three broad categories:

- First, with respect to the “measures,” the Panel erred in concluding that Antigua had not identified what has come to be known as the “total prohibition” in Antigua’s request for the establishment of a panel (the “Panel Request”), and further erred in its conclusion that even had Antigua identified the “total prohibition” in the Panel Request, the “total prohibition” could not be evaluated by the Panel as a “measure.”
- Second, with respect to GATS Article XVI, the Panel erred in its conclusion that Article XVI:1 is limited by Article XVI:2¹ and in its conclusion that measures preventing consumers from using services offered from another WTO Member through cross-border supply do not violate Articles XVI:2(a) and (c).
- Third, with respect to GATS Article XIV, the Panel erred in its decision to consider the defence by the United States under Article XIV, which was asserted extraordinarily late in the proceedings. Consideration of Article XIV by the Panel under the circumstances deprived Antigua of the right to adequately respond to the defence and, in the event, resulted in the Panel improperly constructing the defence on behalf of the United States. Having made the defence for the United States, the Panel erred in its application and assessment of Articles XIV(a) and (c) to the defence in a number of material respects. Finally, the Panel erred in its consideration of the “chapeau” under Article XIV, both in the decision to evaluate the case under the chapeau at all, and also in its application and evaluation of the chapeau.

¹ This appellate point is raised conditionally as set forth in paras. 16 through 18 below.

I. POINTS RELATED TO THE MEASURES

A. The Panel erred in concluding that Antigua had not identified the “total prohibition” as a measure in the Panel Request and thus was not entitled to rely upon it as a measure in the dispute.

3. The United States admits that the cross-border provision of gambling and betting services is *totally prohibited*. For example, prior to the Panel Request:

- The United States Department of Justice (“DOJ”) commented, in an official context, that United States “*state and federal laws prohibit the operation of sportsbooks and Internet gambling within the United States.*”
- The United States confirmed during the consultations meeting held by the parties, in response to Antigua’s own description of the total prohibition, that “*it is the consistent view of the U.S. Justice Department that internet gambling is prohibited under U.S. law.*”

4. Relying on the United States’ public position and statements during negotiations, Antigua framed the Panel Request on the basis of the “total prohibition.”

5. The Panel, however, concluded that Antigua did not identify the “total prohibition” as a measure in and of itself, it is not entitled to rely upon it as a ‘measure’ in this dispute.” This finding is in error.

6. Under GATS Article XXVIII(a), “measure” is defined very broadly as any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, *or any other form*.

7. The total prohibition was properly identified as a measure in the Panel Request. The words “total prohibition” and “prohibiting all” *are* expressly and unambiguously used in the Panel Request.

8. While prior to this case GATS Article XXVIII(a) had not itself been the subject of a panel or Appellate Body report, WTO jurisprudence has been expansive in assessing what can constitute

a “measure” for purposes of Article 6.2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”).

9. There have been a number of analogous disputes under the DSU where – like in the present matter – the complaining party has asserted an overall effect or concept in its panel request, together with some accompanying references to statutory, regulatory, administrative or other material, and the panel request was deemed sufficient for identification purposes. For example:

- In *EC – Bananas III* the EC argued that the panel request of the complaining parties failed to comply with the requirements of DSU Article 6.2, noting that “the request refers specifically to only one EC regulation and describes that regulation and related, but unspecified, measures as a “regime.” The panel, in a ruling affirmed by the Appellate Body, determined that the complaining parties’ reference to a “regime” in their panel request was sufficient for Article 6.2.
- In *US – FSC* the measure at issue was “the FSC scheme” which was identified by the EC in its panel request as such, together with references to certain United States laws. The panel determined the panel request was sufficient.
- In *EC – Computer Equipment*, the panel request of the United States was said by the EC to be insufficient for failure to identify a number of measures that the EC argued were required to resolve the dispute. The panel request had complained of “applying tariffs” and “customs authorities’ actions” but identified only one specific measure. The Appellate Body ruled the measures in dispute were properly identified.
- In *US – Oil Country Tubular Goods Sunset Reviews*, Argentina in its panel request had alleged, among other things, that a sunset review by the United States violated certain WTO agreement provisions because it was based on a “virtually irrefutable presumption” under US law that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. The Appellate Body concluded that the panel request with respect to the alleged “irrefutable presumption” was sufficient.

10. The unambiguous wording of Antigua’s Panel Request as a “total prohibition” cannot be distinguished substantively from the foregoing panel requests which were deemed sufficient. As such, the “total prohibition” was properly identified and the Panel’s contrary finding is in error.

B. The Panel erred in concluding that, even had Antigua identified the “total prohibition” as a measure in the Panel Request, the “total prohibition” cannot constitute a measure that can be challenged in and of itself.

11. In addition to deciding that the total prohibition could not be a measure because Antigua had not identified it in the Panel Request, the Panel determined that the “total prohibition” could not be a measure that can be challenged in and of itself. This determination is legally erroneous.

12. For instance, one of the Panel’s principal reasons for determining that the total prohibition could not be a measure was based on an improper interpretation of *US – Corrosion Resistant Steel* advanced by the United States – that a measure must be an “instrument,” and that the total prohibition “is a description of an effect rather than an instrument containing rules or norms.”

13. The Panel misinterpreted *US – Corrosion Resistant Steel*, which contains perhaps the most expansive description of what a “measure” can be for purposes of WTO dispute resolution. The Appellate Body in *US – Corrosion Resistant Steel* noted that any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.

14. Furthermore, the Panel relied upon an improper test in conducting its review of the total prohibition as a measure. In its assessment, rather than relying on the threshold test established by the Appellate Body in *EC – Bananas III* and followed thereafter, the Panel applied its own “three-part test” without recourse to the *EC – Bananas III* test.

15. Antigua clearly identified the existence and established the effect of the total prohibition. The Panel erred by failing to assess Antigua’s claims of GATS violations on the basis of the total prohibition. Accordingly, Antigua requests the Appellate Body to complete the analysis and assess the total prohibition for consistency with GATS Article XVI.

II. POINTS RELATED TO GATS ARTICLE XVI

A. Conditional Appeal Regarding GATS Article XVI – In the event the Appellate Body were to find in favour of the United States and reverse the Panel’s conclusion in paragraph 7.2(b) of the Final Report, Antigua seeks review of the Panel’s erroneous legal conclusion that the first paragraph of Article XVI is limited by its second paragraph.

16. The United States has appealed the Panel’s interpretation of GATS Article XVI:2(a) and Article XVI:2(c). The United States argues that the Panel should have adopted a narrow and strictly text based interpretation and concluded that (i) Article XVI:2(a) only catches measures explicitly expressed in the form of “numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test” and that (ii) Article XVI:2(c) only catches limitations “expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test.”

17. In the event the Appellate Body were to find in favour of the United States on this matter and reverse the Panel’s conclusion, Antigua seeks review of the Panel’s legal conclusion that the first paragraph of Article XVI is limited by its second paragraph. The Panel concluded that Article XVI only catches the type of measures listed in its second paragraph and that therefore the second paragraph of Article XVI limits the first. That interpretation cannot be sustained if Article XVI is to be interpreted purely on the basis of its text, as argued by the United States in its appeal concerning Article XVI:2.

18. There is nothing in the text of Article XVI that suggests that paragraph 1 is merely an introductory clause without any legal effect or significance of its own. In fact, such an interpretation would reduce paragraph 1 to redundancy and therefore cannot be correct. If it becomes necessary for the Appellate Body to rule on this aspect of Antigua’s other appeal,

Antigua therefore requests the Panel to reverse the Panel's legal findings on Article XVI:1 and complete the analysis by finding that the United States measures violate Article XVI:1.

B. The Panel erred in its conclusion that measures that prohibit consumers from using the gambling services offered by Antiguan operators through cross border supply do not violate GATS Article XVI:2(a) and Article XVI:2(c).

19. The Panel found that measures that prohibit consumers from buying services supplied on a cross border basis to consumers in the United States from Antigua are not caught by subparagraphs 2(a) and 2(c) of GATS Article XVI because they are not directed at "service suppliers" for the purposes of subparagraph 2(a) nor to "service operations" and "service output" for the purposes of subparagraph 2(c). Antigua submits that these conclusions by the Panel are legally wrong.

20. More specifically the Panel erred in placing too much emphasis on the text of subparagraphs 2(a) and 2(c) of GATS Article XVI by making a distinction between prohibitions directed at consumers and prohibitions directed at suppliers. The Panel's interpretation would allow a Member that has made a full commitment on cross-border supply of a particular service to prohibit its citizens and companies from purchasing from anyone who seeks to supply via remote communication. In doing so that Member would in fact eliminate the possibility of cross-border supply, even without any express restrictions on the service supplier, but it would not be violating its obligations under Article XVI.

21. The proper rule is that any Member that would want to maintain such a prohibition should either make that clear in its Schedule or undertake no commitments in the sector concerned.

III. POINTS RELATED TO GATS ARTICLE XIV

- A. The Panel erred in its decision to consider the defence asserted by the United States under GATS Article XIV, which was only raised by the United States at the end of the second substantive meeting of the Panel with the parties. The Panel further erred by constructing and completing the Article XIV defence on behalf of the United States, thus relieving the United States of its burden of proof. Both of these errors are contrary to due process, the principle of equality of arms and the terms of DSU Articles 3.10 and 11.**

22. GATS Article XIV is an affirmative defence, and as such the United States bears the burden of proving it. Despite the clarity of the WTO on the need for a party asserting a defence to raise it and prove it in a timely manner, the United States did not even *mention* Article XIV in its first submission or its first oral statement to the Panel. It first addressed the issue in its second written submission, but even then, insisted that it was *not* raising the defence. Indeed, until the end of the final session with the Panel, whether or not the United States was actually asserting Article XIV as a defence remained ambiguous. The prejudice to Antigua and the Panel of this failure of the United States to clearly and timely detail its defence is apparent. Antigua was arguably chided by the Panel for not advancing “much argumentation in response to the submissions made and evidence adduced by the United States in support of its defence under Article XIV.” The Panel, on the other hand, stretched barely three pages of United States discussion on Article XIV(a) in its second submission to more than 19 pages of densely packed discussion in the findings section of the Final Report. It is patently obvious from reading the Article XIV discussion in the Final Report that the Panel simply did not have adequate presentation of Article XIV before it to properly and clearly assess the issue.

23. Taking into consideration the facts outlined above, the Panel erred in its decision to consider the United States’ defence in this proceeding at all. The extraordinary delay of the United States in affirmatively invoking the defence greatly prejudiced Antigua’s ability to respond

and rebut the defence. Due process mandates that a party be given fair opportunity to respond to the claims made and evidence submitted by the other party in a WTO dispute.

24. With the United States having raised its Article XIV defence so late in the proceedings, the Panel had little to go on. What it did then was to construct the defence for the United States on its own initiative and effort. By constructing the defence for the United States, the Panel denied Antigua the ability to respond to the defence in violation of due process. The Panel erred in creating the United States' Article XIV defence where no such defence was asserted or proved.

B. The Panel erred in its application and assessment of GATS Article XIV(a), including a failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

25. The Panel's errors in assessing Article XIV(a) fall into three broad categories—*first* the failure of the Panel to consider the complete text of Article XIV(a), *second*, an improper analysis and assessment of Article XIV(a), including under the standards adopted by the Appellate Body in *Korea – Various Measures on Beef*, and *third* the failure of the Panel to objectively assess the evidence before it.

26. Footnote 5 to Article XIV(a) provides that:

“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.”

The Panel, however, failed to take footnote 5 into account at all in assessing whether the interests the United States purported to protect rose to a level to withstand scrutiny under Article XIV(a).

27. The seminal GATT Article XX case is *Korea – Various Measures on Beef* in which set out a “weighing and balancing” test with three particular components to assess whether a measure is “necessary” to, in the context of this case, protect the public morals or maintain the public order. Yet in this case the Panel never performed the required analysis of the three components of the test.

28. The Panel also failed to make an objective of assessment of the facts and evidentiary matters before it with respect to the Article XIV defence. The first objection to the Panel’s evidentiary assessment is that none of the cited evidence relates to factual matters involving the cross-border gambling and betting services provided by Antigua. The entire discussion is a consideration of five types of concerns (the “Five Concerns”) in the abstract with no actual assessment of factual evidence regarding the Antiguan gambling and betting services at issue. Nowhere in the Final Report did the Panel conclude that the United States had established the actual existence of the Five Concerns in the context of Antigua gambling services, but rather it simply concluded that the United States has a number of “concerns,” some of which the Panel believes are specific only to the “remote” supply of gambling and betting services. The second objection to the evidence regarding the Five Concerns is that substantially all of it is unsupported, unsubstantiated statements of American government employees or elected public officials evaluated by the Panel either without consideration of Antiguan evidence at all or with an unobjective assessment of Antiguan evidence.

C. The Panel erred in concluding that the United States had sufficiently identified the RICO statute for consideration under GATS Article XIV(c).

29. The Panel developed its own methodology for determining whether specific United States laws listed in the Panel Request had been sufficiently identified by Antigua (the “Measures Test”). In the event the Appellate Body retains the Panels’ reasoning with respect to the Measures Test intact, Antigua submits that the Panel erred in assessing the RICO statute under GATS Article XIV(c), as the United States failed to sufficiently identify the RICO statute under the standards of the Measures Test.

D. The Panel erred in its application and assessment of GATS Article XIV(c), including a failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

30. The Panel made three fundamental errors in its consideration of Article XIV(c). *First* the Panel should not have considered the RICO statute under Article XIV(c) because the Panel had already determined that the state statutes on which the RICO statute relies were not properly before the Panel, *second* the discussion is without application because the Panel had already determined that the United States had been unable to demonstrate that the only one of the Five Concerns that the RICO statute addresses-organised crime-is a specific “concern” related to “remote” gambling, and *third* making findings in its Article XIV(c) analysis, the Panel failed to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

E. The Panel erred in its consideration, application and assessment of the chapeau to GATS Article XIV, including a failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

31. The Panel erred in its consideration, application and assessment of the chapeau in three material respects. *First* in assessing the chapeau at all in the absence of a “preliminary justification” under either GATS Article XIV(a) or (c), *second* in its decision to focus on only certain narrow segments of the gambling industry in its assessment of the chapeau, and *third* by failing to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

IV. CONCLUSION

32. Antigua respectfully requests that the Appellate Body conclude that the findings and conclusions of the Panel listed in its Notice of Appeal and further discussed in Antigua’s other appellant submission are in error and should be reversed accordingly.