

BEFORE THE APPELLATE BODY  
OF THE  
WORLD TRADE ORGANISATION

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

AB-2005-1

MEETING OF THE DIVISION

21 FEBRUARY 2005

OPENING STATEMENT OF ANTIGUA AND BARBUDA

1. Mr. President and Members of the Division, I am Dr. Errol Cort, the Minister of Finance and Economy of Antigua and Barbuda. Among the responsibilities of my Ministry is the financial services industry in our country, including the directorate of offshore gaming. I am honoured to be before you today, representing Antigua in this most important matter.
2. I would first like to introduce the members of our delegation. The Permanent Representative of Antigua to the World Trade Organisation is H.E. Ambassador Dr. John Ashe. The Deputy Permanent Representative of Antigua to the WTO is H.E. High Commissioner Dr. Carl Roberts. Ms. Kaye McDonald is the Director of Gaming of Antigua. Our legal team is headed by Mr. Mark Mendel, and also includes Mr. Lode Van Den Hende and Mr. Richard Butterwick.

3. At the outset, I wish to reiterate what we told the Panel and what we have consistently maintained throughout. Antigua has not brought this case on behalf of the global Internet gambling industry. Further, Antigua has always taken the position that gambling services should be properly regulated. Since developing our domestic industry almost ten years ago, we have continually improved our own regulatory scheme. We believe that any resolution to this dispute will see our two countries developing a scheme reasonably acceptable to both of us that allows Antiguan operators fair competitive access to consumers in the United States. Although the United States is apparently not ready to negotiate with Antigua at this time, we are hopeful that upon Antigua prevailing in this appeal, the United States will consider constructive engagement with us to achieve a speedy and comprehensive solution.
4. Although both the United States and Antigua have a number of appellate points, substantially all fall under one of four broad topics—*first* the “measures,” *second* the US Schedule of Commitments, *third* Article 16 of the General Agreement on Trade in Services, or the “GATS,” and *fourth* Article 14 of the GATS. The appellate points have been quite thoroughly discussed by Antigua, the United States and certain of the third parties in submissions spanning almost 300 pages. I would like in this presentation to highlight some of the issues and address certain matters that we believe to merit further discussion or elaboration.

## THE MEASURES

5. The most baffling aspect of this case to Antigua is the protracted debate regarding the “measures” and whether we have made a “prima facie” case regarding the existence of any US measures. Antigua believes the WTO dispute resolution procedures to be about resolving trade disputes. Despite its dubious attempts late in the case to distance itself from its unambiguous early concessions to Antigua and indeed the entire dispute settlement body, clearly the United States prohibits the services that Antigua wishes to provide. In fact, the US once again confirmed this in its appellee submission.<sup>1</sup>
6. Nevertheless, the United States continues to say there is no “total prohibition.” It continues to maintain that Antigua has not made a “prima facie” case that *any* US measure prohibits the services that the United States itself says may not be lawfully provided by Antiguan operators to US consumers. This stance is difficult for Antigua to comprehend. We cannot recall a WTO dispute where the issues were more clear-cut than they are here. Yet the US would still have us believe that it does not understand what this dispute is about.
7. Whatever you call it, a “total prohibition” of services, services “prohibited by law” or services “prohibited by one or more discrete United States laws,” they are all one and the same thing. As we pointed out in our response to question 10 from the Panel, in the context of this case it makes no sense to make a distinction between individual provisions, the application of these provisions, US practice based on those provisions and the effect of those provisions. All of the parties understand what is at issue here—the provision of “gambling

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<sup>1</sup> Appellee Submission of the United States, para. 19.

and betting services” as we understand them—services involving the transmission on a cross-border basis of real bets and wagers.<sup>2</sup>

8. The Panel suggested that our position on this issue changed or evolved over the course of the proceeding.<sup>3</sup> But this is not the case. The word “total” is nothing but a description. Antigua maintained that one or more of a group of US laws prohibit the provision of services, and while there may be other laws that we were unable to identify, all of these laws do the same thing—prohibit the provision of gambling services from Antigua to the United States.
9. Put simply Antigua’s position is this. In a situation where (i) the legislation of a defendant in WTO dispute settlement outlaws trade in a specific good or service; (ii) the defending Member agrees that its legislation outlaws this trade; and (iii) the prohibition is replicated in a very high number of laws adopted at different levels of the constitutional structure of the defending Member—it should be possible for a complainant to challenge the complete prohibition; that is *all* the laws that replicate the prohibition, without of necessity specifically identifying *all* the relevant provisions of *all* those laws.
10. In Antigua’s view this raises an issue of good faith interpretation and application of WTO law. From the consultations meeting until its appellee submission the United States has repeated that it prohibits the supply of gambling and betting services from Antigua. Simultaneously it says Antigua cannot challenge the full extent of this prohibition until it has specifically identified all the laws that replicate it. In our view this is precisely the sort of

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<sup>2</sup> See Final Report of the Panel, paras. 6.162-6.163.

<sup>3</sup> See Final Report, paras. 6.156-6.157.

approach that the Appellate Body decided against when it stated that “[The] procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.”<sup>4</sup>

11. This issue also concerns the effectiveness and the accessibility of dispute settlement. Some WTO Members have vast resources, are very large, have complex state structures and sometimes different official languages in different regions. In situations such as this one, a complainant could only *start* a dispute settlement case following a very extensive study of domestic legislation, even if there was no doubt at all that the trade at issue was prohibited. For the small and poor countries that form the majority of WTO Members, the lack of legal resources is already a very significant barrier to participation in dispute settlement. This is not a problem that the Appellate Body can solve. It should nevertheless be noted that adopting the extremely legalistic approach put forward by the United States will make WTO dispute settlement rigid, formalistic, imposing and materially more burdensome than necessary to assure fair resolution of a dispute. In Antigua’s view any evolution of WTO dispute settlement in that direction should be avoided.
12. As we have conceded, there may be situations where genuine disagreement exists over the scope and effect of measures of the defending party where an examination and analysis of the precise legal measures are required for a panel

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<sup>4</sup> Appellate Body Report on *United States – Tax Treatment of “Foreign Sales Corporations,”* WT/DS108/AB/R, para. 166.

to determine whether a complainant's allegations are true. But, of course, that is not the case here.

13. Regardless, as the Panel determined, Antigua presented significant evidence of specific US laws that prohibit the provision of the services at issue in this dispute. Despite the repeated and incorrect statements of the United States that Antigua never alleged or established that any one law prohibits the services that the US admits it prohibits, that is clearly wrong. Our submissions comprehensively and definitively so establish.
14. The United States claims that it was prejudiced by the Panel's finding that certain laws identified by Antigua prohibit the provision of gambling and betting services. It also claims that it would be prejudiced were it determined by the Appellate Body that the claim could proceed on the basis of the total prohibition. It is impossible for us to see how the US could suffer prejudice. The US has admitted categorically that it prohibits the cross-border provision of gambling and betting services. It has never argued that any of the dozens of laws cited by Antigua in its Panel Request *do not* prohibit the provision of gambling and betting services. As the Panel observed, all US laws that prohibit or act to prohibit the services are based upon the same policy concerns, regardless of whether enforced through state or federal laws.<sup>5</sup> The US explicitly recognised that most of the state laws prohibiting gambling were

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<sup>5</sup> Final Report, para. 6.453. *See also* Second Written Submission of the United States, para. 86 and Exhibit US-34.

included in the list of laws—with text and summaries—submitted by Antigua in this proceeding.<sup>6</sup>

15. Most significantly, Antigua does not understand why the United States feels it could not defend the laws that Antigua submitted in its Panel Request, the texts of which were provided to the Panel and the US by Antigua early in the proceeding. We made clear that we were *challenging all* of those laws—what prevented the United States from *defending all* of those laws? Whether or not the US believed that Antigua had adequately described those laws for the purposes of this proceeding, what was preventing the US from defending them? In any event, it would be interesting to see what the defence would be—that these laws did *not* prohibit the services?
16. This brings us to a secondary issue involving the measures. The US appears to argue that Antigua must show how the text of each specific law violates a specific provision of the GATS. In doing so, the United States misses a step. The inquiry starts with what a law *does*. What does it do? It prohibits the provision of the services. Does that prohibition violate a provision of the GATS? Yes, or no? Although it may not like the word, the US fails to see that it is the *effect* of a measure that is critical.
17. A related point is the United States' assertion that we never expressly alleged that any or each of the “discrete” American laws violated Article 16 of the GATS. Even a quick review of the Panel Request contradicts the US in that regard. Our point is that a law prohibiting the cross-border supply of gambling and betting services violates Article 16. Thus, to the extent a law

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<sup>6</sup> US Second Written Submission, para. 97.

prohibits the cross-border supply it violates the GATS. This is not a complicated proposition. We note in this context that the 1993 Scheduling Guidelines instruct Members to briefly discuss in their GATS schedules where and how a specific measure it maintains violates the applicable GATS provision. Obviously, a treatise is not called for, and Members—including the United States—routinely have done this with simple one-line sentences.<sup>7</sup>

18. A final point on the measures. The Panel concluded that “the ability of an instrument to be brought into conformity with a WTO Agreement is an important consideration in determining whether or not a measure has been sufficiently identified for the purposes of the DSU and the GATS.”<sup>8</sup> This simply cannot be correct. Correction of inconsistent measures must come *after* a determination that a measure is contrary to the GATS. If “ease of correction” were to be a component of whether something had been sufficiently identified as a measure, Members would be encouraged to adopt complex legal schemes to avoid accountability for GATS violations. The Panel’s discussion of this issue is particularly ironic, given its acknowledgement of our uncontested evidence that in fact under the US legal system, correction of the prohibition of the provision of gambling and betting services from Antigua would be relatively simple.<sup>9</sup>

## THE COMMITMENTS

19. Of all issues in this case, Antigua believes the matter of the US commitments under its GATS schedule is the clearest and most thoroughly discussed. We

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<sup>7</sup> Appellee Submission of Antigua and Barbuda, para. 64.

<sup>8</sup> Final Report, paras. 6.181-6.182.

<sup>9</sup> Final Report, para. 6.183.

would like to make only one further observation.

20. We submit that the United States' belief that the "ordinary meaning" of the word "sporting" includes gambling and betting services is best refuted by the fact that every classification system we have found is directly to the contrary—the UN's CPC, W/120, the US' own Standard Industry Classification System and the 2002 North American Industry Classification System—none of these include gambling and betting services under the "sporting" classification. If gambling and betting services were so clearly within the "ordinary meaning" of "sporting," we would have to wonder why not one of these systems so classified them.

**GATS ARTICLE 16.**

21. As with the subject of the commitments, Antigua thinks that little remains to be said regarding Article 16. But again, we have a few points we feel deserve further observation.
22. The Panel correctly found that measures equivalent to a "zero quota" are caught by subparagraphs 2(a) or 2(c) of Article 16. As we explained in our appellee submission this is further confirmed by context to which the Panel did not explicitly refer—the GATS schedules of numerous Members. These contain abundant measures, listed as limitations on Article 16, that would not be caught by the United States' very restrictive interpretation of subparagraphs 2(a) and 2(c). It is difficult to think of a better expression of the common intention of the parties about the scope of Article 16 than these numerous entries in Members' schedules.

23. On the other hand, these schedules also demonstrate that the Panel erred in its conclusion that a prohibition imposed on *consumers* does not also violate Article 16. Several members, including the United States itself, listed restrictions on consumers as limitations on market access under Article 16.<sup>10</sup> We would also observe that one of the modes of supply specifically covered by the GATS is “consumption abroad.” Restrictions on this mode of supply will inevitably come in the form of restrictions on consumers, yet under the Panel’s interpretation these kinds of restrictions would never be caught by Article 16. This cannot be correct. Paragraph 1 of Article 16 specifically provides that it applies “with respect to market access through the modes of supply identified in Article I,” including of course “consumption abroad” as well as “cross-border supply.”
24. The US justifies its very restrictive interpretation of subparagraphs 2(a) and 2(c) of Article 16 with the argument that a measure prohibiting “all foreign services” would violate Article 17 and thus still be caught by the GATS.<sup>11</sup> But this is not correct. Article 17 is a different provision with a different scope. With regard to the same service Members can, and have, made different commitments under Articles 16 and 17. In such a situation reducing the scope of Article 16 cannot be remedied by an expansive reading of Article 17. Further, unlike Article 16, Article 17 requires different treatment of like services or like service suppliers.

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<sup>10</sup> See, e.g., Canada (in GATS/SC/16) in subsector 7.A(c) (in relation to the purchase of reinsurance services); India (in GATS/SC/42) in subsector 7.A5(a)(ii) (in relation to the purchase of reinsurance or retrocession services); Italy (in GATS/SC/31) in subsector 7.B (“Residents in Italy need authorization to purchase or sell abroad unrefined gold”).

<sup>11</sup> US Appellant Submission, para 110; US Appellee Submission, para. 31.

25. Take the example of the developed country that prohibits all supply of computer services over the Internet. The US would argue that it does not matter that this is not caught by Article 16 because it would nevertheless be caught by Article 17.<sup>12</sup> However, the developed country could simply prohibit supply of computer services via remote communication or require a physical presence for the supply of computer services. In the US interpretation this kind of prohibition would not be caught by Article 16 because it does not have one of the forms listed in subparagraph 2 of Article 16. As to the application of Article 17 in such a case, the US would no doubt argue—as it has done here—that there is no less favourable treatment of like services or service suppliers because both foreign and domestic suppliers are subject to the ban on remote communication or the requirement of physical presence.
26. As a further example, there could well be a service for which there are (for neutral reasons) no domestic providers. Under the US interpretation, a prohibition of the cross-border supply of all of these services would not be caught by Article 16, but an Article 17 violation would be avoided as well as there is no comparative domestic market.
27. We also note that the 1993 Scheduling Guidelines are clear that a “zero quota” would violate Article 16 and, despite its efforts to distance itself from the guidelines, the United States still cites them for authority on another issue in footnote 217 of its appellee submission. Further, the fact that the 1993 Scheduling Guidelines are expressly contrary to the interpretation of Article

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<sup>12</sup> US Appellee Submission, para. 31

16 that the United States submits is “clear” obviously refutes any claim to the “clarity” of the United States’ interpretation.

28. Antigua has conditionally appealed the Panel’s conclusion that the first paragraph of Article 16 is limited by the second. In its appellee submission the US argues that accepting Antigua’s conditional appeal would deprive the second paragraph of Article 16 of any useful effect.<sup>13</sup> However, that would be even more so the case for the first paragraph if the very restrictive reading of paragraph 2 is accepted without giving a separate effect to the first paragraph. Paragraph 1 must have *some* meaning and in Antigua’s view it is either *(i)* an introductory clause that instructs the interpretation of the second paragraph, which implies that the United States’ very restrictive interpretation of the second paragraph is wrong, or *(ii)* a clause with a meaning and application of its own. Either way, the US measures violate Article 16.

#### **GATS ARTICLE 14**

29. If the debate on the measures is baffling, the situation with Article 14 is absolutely problematic. As we said in our submissions, not only was the defence presented extremely late, but it was so poorly done that the panel was compelled to entirely create the US defence for it. Each of these facts alone violates the requirements of due process and, accordingly, Articles 3.10 and 11 of the DSU. That the panel did *both* puts the violation of Antigua’s due process rights beyond doubt.
30. We would first like to say a few words about the position of the US in its appellee submission that *it* was prejudiced in its Article 14 defence by the alleged failure of

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<sup>13</sup> US Appellee Submission, para. 25.

Antigua to argue and prove that any specific United States law was contrary to the GATS. As noted above in the discussion regarding the measures, we don't know why the US was unable to prepare its defence based upon all of the applicable statutes that Antigua listed in its Panel Request. After all, this finite list was known to and in the possession of the US for months.

### ***The Late Defence***

31. With respect to the late assertion of the Article 14 defence, the US says that Antigua should have requested additional time from the Panel to respond to it.<sup>14</sup> We have three things to say to this. *First* the DSU expressly provides for expedited review of trade disputes. The timetable for dispute resolution set out in the Working Procedures is quite specific, as was the timetable determined by the Panel. As Antigua noted during the Panel proceedings, time is of the essence, as US efforts to enforce its laws against our industry continue unabated, with significant adverse effect. For the United States to present an important defence such as those available under Article 14 with the expectation that it is incumbent upon Antigua to further extend the process is simply untenable, if not unconscionable. A party cannot misuse the process to present another party with a Hobson's choice
32. *Second*, as noted by the European Communities, the late assertion of the Article 14 defence precluded the third parties from any chance to contribute to the discussion of the issue. Antigua agrees with the EC that third party participation is an important and valuable feature of the dispute resolution process that should not be discounted. As

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<sup>14</sup> *Id.*, paras.35 and 38.

demonstrated by the thoughtful comments made by the EC in its submission to the Appellate Body, undoubtedly the Panel could have benefited from the EC's participation.

33. *Third* Antigua submits that it in fact *did* respond, in its second oral statement to the Panel, to the defense as made the United States.<sup>15</sup> What we were *not* able to do, however, was respond to the defence as ultimately constructed by the Panel.

### ***Insufficiency of the Defence***

34. Antigua has argued to the Appellate Body that the United States' Article 14 defence, such as it was, was clearly insufficient to constitute a *prima facie* case. The best indication of how underdeveloped the US Article 14 defence was is its discussion of Article 14(a), set out in paragraphs 107 through 116 of the US' second written submission to the Panel. These paragraphs primarily deal with organized crime. In just one paragraph the US turns to other issues-it mentions youth gambling and acknowledges that "adults can be expected to exercise their own moral judgment." Nowhere in the discussion on Article 14(a) did the US raise the issues of health, fraud or money laundering. In its appellee submission the US argues that by using terms such as "*various forms of criminal activity*, especially organized crime" and "organized crime and *other forms of criminality*" it also made a case under Article 14(a) with regard to money laundering, fraud and other consumer crimes.<sup>16</sup> Even if this tenuous point were sustainable, the United States, on any analysis, exerted little effort to make and develop its case-in its own words, its "heavy burden" under Article 14(a).

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<sup>15</sup> AB Second Oral Statement, paras 68-83.

<sup>16</sup> US Appellee Submission, para 44.

35. In response to the assertion of Antigua in our other appellant submission that the Panel utterly failed to find any evidence of the existence of the “five concerns” or organised crime, under-age gambling, money laundering, fraud and risks to adult health, the United States remarkably contends that no such finding is required.<sup>17</sup> This clearly cannot be the case. In the absence of a demonstration of an actual harm, or real risk of harm, Article 14 becomes meaningless. A Member could, as the US had done in this case, make a “mere assertion” of “concerns” and all a panel would have to do is determine, as the Panel apparently did here, that the Member indeed has “concerns,” completely devoid of context or meaning.
36. The United States says that “even if there were such a requirement” the Panel found that such risks actually did exist.<sup>18</sup> While the Panel arguably found that some of the “*concerns*” existed, in no event did it actually find that the concerns presented an *actual risk* to the American public. And of course, Antigua submits it would be impossible for the Panel to have so found should it have conducted the inquiry, as there was absolutely no evidence to support such a finding.
37. Taking this concept a bit further, Antigua believes it was also incumbent upon the United States to prove that the risks were actually present in the gambling and betting services provided to US consumers from Antigua. It is undisputed that the US presented no evidence regarding the association of any of the concerns with the Antiguan gaming industry. Yet, it maintains that it was unnecessary for it to do so on the basis that the

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<sup>17</sup> US Appellee Submission, para 54.

<sup>18</sup> *Id.*, para.55.

“concerns” are “not related to the national origin of the service or supplier”.<sup>19</sup> While we would agree that to be true in the case of a product scientifically recognised as inherently dangerous, such as asbestos fibres, the same logic does not carry over to services, which can possess significantly diverse characteristics.

38. This is particularly important in this matter, where Antigua has made its regulatory scheme and other legal efforts a hallmark of its case. We note that in most of the instances where US referred to possible concerns associated with Internet gambling, lack of regulation has either been expressly assumed or the adverse features cited are of a character that can commonly be addressed through regulation and government oversight—much as the US attempts in its own domestic gambling industry. Although Antigua presented much evidence to the Panel of actual instances where this regulatory framework has failed in the United States’ domestic industry, the United States presented no similar evidence with respect to Antigua.
39. Two more brief comments on the issue of “concerns.” First, we would like to point out the US submits that the Panel correctly viewed its “concerns” about gambling as contemporaneous on the basis of 2003 testimony before the US Congress.<sup>20</sup> The Appellate Body should note, however, that this 2003 testimony relates to the proposed “Unlawful Internet Gambling Funding Prohibition Act” which to date has failed to be adopted in the Congress. If anything, this demonstrates that the US’ current “concerns” about Internet gambling are limited and that the Internet gambling does not pose the

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<sup>19</sup> *Id.*, para.56.

<sup>20</sup> US Appellee Submission, para . 65.

tremendous risks the United States says it does-otherwise it would be expected that the Congress would have adopted this legislation.

40. Additionally, much of the discussion regarding the United States' laws that it attempts to justify under Article 14 is completely without any relationship to this dispute. This is most apparent in the US' lengthy argumentation in response to Antigua's argument that the so-called "RICO statute" cannot be relevant under Article 14(c) because it relies on state laws that were not before the Panel and because it relates to organized crime, which the Panel did not view as a "concern" that the United States had proven.<sup>21</sup> This broad-ranging discussion deals with organised crime and what the United States calls "racketeering." Antigua finds it very difficult to follow this discussion and to understand its relevance for the matter at issue in this dispute-the cross-border supply of gambling and betting services from Antigua

***The Segmentation of the Industry-“Remote” and “Non-Remote”***

41. One of the more confusing aspects of the Panel report is the apparent segmenation of gambling and betting services industry into “remote” and “non-remote” categories. The US latched onto this concept of the “remote” supply of gambling and betting services that allows it to discriminate against all cross-border supply while allowing a massive domestic industry. The effect of this is to totally bar foreign supply of the services. Yet the overwhelming evidence in this case shows that there is no basis for this distinction and the US was unable to justify this distinction by any independent evidence.

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<sup>21</sup> US Appellee Submission, para. 68-73.

42. At the point in the Panel proceedings that it appeared Article 17 of the GATS was going to figure prominently in the case, Antigua submitted vast amounts of evidence regarding actual occurrences of events associated with the “five concerns” in the US domestic industry to show that there is no basis for distinguishing between the Antiguan services and US domestic services on the basis of the “five concerns.”
43. Nonetheless, the Panel followed the US lead, and segmented the gambling industry into “remote” and “non-remote” categories. Throughout its Article 14 analysis the Panel then linked certain “concerns” specifically to “remote” gambling. This distinction is a crucial one in the approach of the Panel because it seems to establish the dividing line between “good” and “bad” gambling. The only place in the Final Report where the Panel explained its distinction is paragraph 6.591, in which the Panel where the Panel simply adopts a definition of remote and non-remote supply put forward by the US. By consequence the Panel segmented the gambling industry into “good” and “bad” without an objective foundation. On that basis it arrived at conclusion that are completely at odds with reality. For instance, the Panel concluded that “identification” is more problematic in the case of “remote” gambling than for “non-remote” gambling.<sup>22</sup>
44. However, there is absolutely no evidence in the record that individuals who gamble with, for instance, US casinos, lotteries or horse race betting operators are asked to identify themselves. In fact, the evidence suggests that individuals are only asked to identify themselves in the case of “remote” gambling. It is ironic, in fact, that the only evidence in the record is of problems associated with “good” gambling and not “bad” gambling.

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<sup>22</sup> Final Report, para. 6.591.

45. This unsupported distinction cause the Panel further difficulties. In paragraph 6.164 of the Final Report, the Panel concluded that the United States laws at issue prohibit all “remote” supply. We pointed this out to the Panel in paragraphs 30 through 34 of our second written submission. This discussion, which was not denied by the US, is very important.
46. The federal laws considered by the Panel in the Article 14 context were simply not designed to address any of the “five concerns.” These 40-year old statutes vastly pre-date the Internet and electronic commerce. In one of the Congressional debates or findings cited by the US in its discussion of these laws is reference made to the “five concerns” in relation to “remote” gambling. What the US has done in this case is take these statutes and apply them in context vastly different than that in which they arose.
47. The purpose of these laws, in fact, was to enable each US state to set its own policy with respect to gambling. As we told the Panel, none of the federal laws:
- Requires states to regulate gambling within their borders at all
  - Requires state to prohibit gambling within their borders at all
  - Prohibits telephonic, electronic, Internet or other forms of “remote” gambling within the borders of any state at all.
48. The reality is that under current federal law every state in the US could, if it chose, offer completely unregulated Internet gambling to every person located within the state, yet Antigua would still be unable to provide any gambling or betting services-regulated or not-into the US on a cross-border basis.
49. The Panel did not address this fact at all in its decision that the US Federal laws at issue

were designed to address the supposed “concerns” of “remote” gambling services as compared to “non-remote.” We further demonstrated to the Panel that not only is there significant “remote” gambling on horse racing in the United States that crosses state lines, but there is also significant *intra-state* “remote” gambling occurring within the US.<sup>23</sup>

50. We have a couple more points in this regard. *First* the United States would argue that from its description of the number of prosecutions of gambling related crimes in the US it is actively prosecuting cross-border gambling within the US. Yet, not only does the United States not specify what exactly each prosecution was for, but it cannot refute the fact that the current dominant Internet-based horse race gambling sites in the United States—including one owned by the State of New York—have not been prosecuted. It also did not dispute the fact that some of these operators have been providing telephonic betting—which even by the definition used by the US is “remote”—for over 30 years. *Second*, the fact that a service is supplied only *intra-state* clearly does not make them “non-remote.” The supposed ills of “remote” gambling alleged by the US are not creatures of boundaries but rather of separation between the supplier and the consumer.
51. Obviously, the US federal measures at issue effectively function as *border measures*, aimed at restricting access to consumers in any one state from suppliers outside of that state—and therefore also from outside of the United States.
52. As measures aimed at preventing cross-border-*not* “remote”—supply of gambling and betting services, the laws at issue not only violate the commitments of the US under

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<sup>23</sup> See, e.g., AB First Oral Statement, para. 92; AB Second Oral Statement, para. 63; AB Response to Panel Question 19.

GATS, but certainly cannot be justified by the US under Article 14, and the Panel correctly rejected the defence.

## **CONCLUSION**

53. Mr. President and members of the Division, we thank you for your attention. For all of the reasons expressed in our submissions to you, as further elaborated on in our presentation today, Antigua respectfully requests that the Appellate Body make the findings and conclusions that we have requested and dismiss the appeal of the United States in this matter. Again, thank you very much, and we remain available to answer any question you might have.