WORLD TRADE ORGANIZATION

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

AB-2005-1

Report of the Appellate Body

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Short Title	Full Case Title and Citation
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Mexico – Corn Syrup	

Short Title	Full Case Title and Citation
US	

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

United States, *Appellant/Appellee*
Antigua, *Appellant/Appellee*

Canada, *Third Participant*
European Communities, *Third Participant*
Japan, *Third Participant*
Mexico, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*

AB-2005-1

Present:

Sacerdoti, Presiding Member
Abi-Saab, Member
Lockhart, Member

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inconsistently with its obligations under its GATS Schedule[4], as well as under Articles VI, XI, XVI, and XVII of the GATS.[5]

3.

had been "sufficiently identified [by Antigua] so as to warrant a substantive examination by the Panel"[13]:

(A) Federal laws:

(i) Section 1084 of Title 18 of the United States Code (the "Wire Act");

(ii) Section 1952 of Title 18 of the United States Code (the "Travel Act"); and

(iii) Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act", or "IGBA").

(B) State laws:

(i) Colorado: Section 18-10-103 of the Colorado Revised Statutes;

(ii) Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);

(iii) Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;

(iv) Minnesota: Section 609.755(1) and Subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated);

(v) New Jersey: Paragraph 2 of Section VII of Article 4 of the New Jersey Constitution, and Section 2A:40-1 of the New Jersey Code;

(vi) New York: Section 9 of Article I of the New York Constitution and Section 5-401 of the New York General Obligations Law;

(vii) South Dakota: Sections 22-25A-1 through 22-25A-15 of the South Dakota Codified Laws; and

(viii) Utah: Section 76-10-1102 of the Utah Code (Annotated).[14]

5. After evaluating Antigua's claims with respect to these federal and state measures, the Panel concluded that:

(a)

intention to make a statement at the oral hearing as a third participant, and Canada notified its intentionoto mappariat the oral hearing as a third participant,. Tj 2428 525 TD F0 1675 TDf .375 Tc 0 Tw (629 T

Appellate Body found the panels in *Japan – Agricultural Products II* and *Canada – Wheat Exports and Grain Imports* to have erred.[32] The United States further contends that the Panel mistakenly found support for its approach in the Appellate Body decisions in *Canada – Autos* and *Thailand – H-Beams*.[33] The Panel is said to have further erred in referring to a purported admission by the United States that "federal and state laws are applied and enforced so as to prohibit what it describes as the 'remote supply' of most gambling and betting services"[34], when the United States never conceded that any particular measure had this effect. The United States maintains that the approach taken by the Panel in this case—namely identifying a subset of United States measures from the "remarkably broad" list of "possibly relevant"[35] laws in Antigua's panel request, and assembling arguments regarding their meaning, application and consistency with Article XVI—unfairly deprived the United States of any opportunity to respond and defend those specific measures.

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addition to" this error[39], the United States argues that the Panel's resolution of Antigua's claims was inconsistent with the Panel's obligations under Article 11 of the DSU. Should the Appellate Body find error on either ground, the United States requests that the Appellate Body determine that the remaining Panel findings are "without legal effect".[40]

2. United States' Schedule of Specific Commitments

14. The United States appeals the Panel's finding that the United States' Schedule to the GATS includes specific commitments on gambling and betting services under subsector 10.D, entitled "other recreational services (except sporting)". The United States maintains that it expressly excluded "sporting", the ordinary meaning of which includes gambling, from the United States' commitment for recreational services. In the United States' submission, the Panel misinterpreted the ordinary meaning of "sporting" and improperly elevated certain preparatory work for the GATS to the status of context for the interpretation of the relevant United States' commitment.

15. According to the United States, in concluding that the ordinary meaning of "sporting" does not cover gambling, the Panel misapplied the customary rules of treaty interpretation and disregarded relevant WTO decisions. The Panel is said to have disregarded numerous English dictionaries that confirm that "sporting" in English includes activity pertaining to gambling and, thus, failed to give the word "sporting" in the United States' Schedule this ordinary English-language meaning, as required by the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").[41] Furthermore, the United States contends that the Panel erred in relying on the meaning of the term "sporting" in French and Spanish, because the cover page of the United States' Schedule clarifies that "[t]his is authentic in English only".[42]

16. The United States also asserts that the Panel erred in treating two documents, referred to in the Panel Report as "W/120"[43] and the "1993 Scheduling Guidelines"[44], as context instead of as negotiating documents that constitute preparatory work. The United States points out that Members never agreed to memorialize W/120 and the 1993 Scheduling Guidelines, and that the disagreement of parties to the Uruguay Round services negotiations as to the content of these two documents prepared by the Secretariat is apparent in the divergent approaches adopted by Members in scheduling their

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[39]United States' appellant's submission, heading II.A.10, p. 23.

[40]*Ibid*., para. 3. (footnote omitted)

[41]Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

[42]United States' appellant's submission, para. 51.

[43]Services Sectoral Classification List: Note by the Secretariat, MTN.GNS/W/120, 10 July 1991.

[44]Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993.

specific commitments. Therefore, the United States asserts, neither W/120 nor the 1993 Scheduling Guidelines reflects an "agreement between the parties" or an "agreement made by all participants", within the meaning of Article 31(2) of the *Vienna Convention.*

17. According to the United States, the characterization of these documents carries important implications because, under Articles 31 and 32 of the *Vienna Convention*, context has primary interpretative significance, whereas preparatory work is merely a supplementary means of interpretation. A panel may look to preparatory work only to confirm an interpretation made in accordance with Article 31 of the *Vienna Convention,* or if such interpretation leaves the meaning ambiguous or unclear or leads to a result that is manifestly absurd or unreasonable. In this case, however, the Panel is said to have erred in using W/120 and the 1993 Scheduling Guidelines, which aml i-n-0.0eeTj effhe c 5 t Ttyeaning

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construing any purported ambiguity against the United States and failing to acknowledge that there was no mutual understanding between the parties to the services negotiations as to the coverage of gambling in the United States' Schedule. In the United States' submission, such an approach, if upheld, would allow Members to expand negotiated commitments through dispute settlement.

20. The United States therefore requests the Appellate Body to reverse the Panel's finding that the United States undertook specific commitments on gambling and betting services in its GATS Schedule. Should the Appellate Body reach this issue and reverse the Panel's finding, the United States requests that the Appellate Body determine that the remaining Panel findings are "without legal effect."[48]

3. Article XVI:2(a) and XVI:2(c) of the GATS – "limitations ... in the form of"

21. The United States challenges the Panel's finding that the United States acts inconsistently with paragraphs (a) and (c) of Article XVI:2 by failing to accord services and service suppliers of Antigua "treatment no less favourable than that provided for" in the United States' Schedule. According to the United States, the Panel erred in converting two of the prohibitions on *specific forms* of market access limitations set out in Article XVI:2 into *general prohibitions* on any measure having an effect similar to that of a "zero quota", regardless of form.

22. The United States contends that, in interpreting Article XVI, the Panel failed to give meaning to the text and expanded the obligations set out in that provision. The Panel is said to have ignored the fact that Article XVI "represents a precisely defined constraint on certain problematic limitations specifically identified by Members"[49] and that measures not caught by Article XVI remain subject to disciplines set out elsewhere in the GATS, including in Article XVII and Article VI. According to the United States, these errors are revealed in the Panel's misinterpretation of sub-paragraphs (a) and (c) of Article XVI:2.

23. As to Article XVI:2(a), the United States argues that the Panel misunderstood the ordinary meaning of this provision because the Panel ignored the requirement that limitations be "in the form of numerical quotas". In particular, the United States contends, the Panel erroneously found that "a measure that is not expressed in the form of a numerical quota or economic needs test may still fall within the scope of Article XVI:2(a)" if it has the "effect" of a zero quota.[50] In the United States' submission, a limitation that has only the "effect" of limiting to zero the number of s by failing to adinary(a), the Uni

the GATS. Should the Appellate Body so decide, the United States requests the Appellate Body to determine that the remaining Panel findings are "without legal effect."[52]

4. Article XIV of the GATS: General Exceptions

28. The United States appeals the Panel's findings that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are not justified under paragraph (a) or (c) of Article XIV of the GATS and are inconsistent with the requirements of the chapeau of Article XIV.

(a) Paragraphs (a) and (c) of Article XIV: "Necessary"

29. According to the United States, the Panel erroneously interpreted the term "necessary" in Article XIV(a) and XIV(c) to require the United States to "explore and exhaust reasonably available WTO-consistent alternatives"[53] that would ensure the same level of protection as the prohibition on the remote supply of gambling and betting services. The United States contends that the Panel then misunderstood this obligation, in conjunction with the specific market access commitments set out in the United States' Schedule, as requiring the United States to hold consultations with Antigua before and while imposing the prohibition on the remote supply of gambling and betting services.

30. The United States underlines that the Panel erroneously read a "procedural requirement" of consultation or negotiation into Article XIV(a) and XIV(c).[54] Such a requirement is said to find no support in either the text of Article XIV or in previous decisions of GATT panels and the Appellate Body. Pointing to Articles XII:5 and XXI:2(a) of the GATS, the United States asserts that the treaty drafters were explicit when they intended to impose a prerequisite of consultations before a Member could take certain actions, and that no such explicit requirement is found in the text of Article XIV. The United States also contends that, when examining whether a WTO-consistent alternative was reasonably available, the Panel departed from previous GATT and WTO decisions interpreting the term "necessary" under Article XX of the GATT and, in particular, from the decision of the Appellate Body in *Korea – Various Measures on Beef*.[55] According to the United States, these decisions clarified that alternatives that are only "theoretical"[56]—such as a *possible* negotiated outcome following consultations—cannot be regarded as "reasonably available".

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31. Furthermore, the United States argues that a *possible* negotiated outcome following consultations does not qualify as a legitimate "alternative" in this case because it could not ensure the same level of protection vis-a-vis the remote supply of gambling. If the United States were to withdraw its prohibition and purs6c -i9875nstead,e because it cguaranteees arg Tw (isksfollowing) Tj 0 Tc 0 75 -isAnsure th85 (-) -401.25 -19.1721D -0.09079TD -0.1sought toobw avoid3d hyot enalifyedmo WTjO15.1

domestically and services supplied from other Members, in and of itself, does not necessarily constitute arbitrary or unjustifiable discrimination, or a disguised restriction on trade in services.[57]

36. The United States additionally contends that the Panel improperly made the rebuttal for Antigua under the chapeau of Article XIV. The United States emphasizes that, in its analysis under Article XIV, the Panel "recycled" certain evidence and argumentation brought forward by Antigua in the context of its national treatment claim under Article XVII[58], as to which the Panel exercised judicial economy. Given the distinct legal standard of the chapeau—in particular, its focus only on discrimination that is "arbitrary" or "unjustifiable"—the United States argues that reliance on Antigua's argumentation and evidence in relation to its national treatment claim is inapposite when analyzing the United States' defence under Article XIV.[59]

37. Furthermore, the United States alleges that, "[a]s a matter of law"[60], the fact that three domestic service suppliers have not been prosecuted under United States law, and that an Antiguan supplier has been prosecuted, does not rise to the level of "arbitrary or unjustifiable discrimination" or a "disguised restriction on trade" under the chapeau of Article XIV, and the Panel erred in finding otherwise. In addition, the United States contends that a relatively small sampling of cases, where a government has not prosecuted allegedly criminal acts, is not probative because "neutral considerations", such as resource limitations, prevent prosecutors from pursuing *all* violations of the law in a given jurisdiction.[61]

38. The United States also claims that the Panel failed to satisfy its obligations under Article 11 of the DSU in its evaluation of the evidence relating to the chapeau of Article XIV. According to the United States, the Panel erred in assessing the United States' enforcement of certain federal laws because the Panel did not take into account "uncontroverted" evidence of the overall enforcement of United States law.[62] The Panel is said to have also erred by failing to recognize that the Interstate Horseracing Act ("IHA") could not repeal pre-existing criminal statutes, including those challenged by Antigua and found by the Panel to be inconsistent with Article XVI of the GATS.

39. Should the Appellate Body reverse the Panel's findings under the chapeau, the United States requests that the Appellate Body complete the analysis and find that the Wire Act, the Travel Act, and

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[57]United States' appellant's submission, para. 183.

[58]*Ibid*., para. 188.

[59]*Ibid*., para. 189.

[60]*Ibid*., para. 184.

[61]*Ibid*., para. 185.

[62]*Ibid*., para. 194.

the Illegal Gambling Business Act meet the requirements of the chapeau of Article XIV and are thus justified under Article XIV of the GATS.

5. "Practice" as a "Measure"

40. The United States challenges the

allegation that the United States acts inconsistently with Article XVI of the GATS as a result of this prohibition.

43. Antigua contests the argument that the United States has been denied a fair opportunity to defend itself in this case. The United States admitted on several occasions—

Antigua submits that the Panel properly analyzed these classifications and found that the

53. Antigua emphasizes that the 1993 Scheduling Guidelines and the Schedules of the United States and other WTO Members confirm that the United States' "narrow"

Antigua requests that the Appellate Body so find and that it complete the analysis and find the "total prohibition" to be inconsistent with Article XVI of the GATS.

63. According to Antigua, the Panel erroneously concluded that Antigua had not identified the "total prohibition" as a "measure" in the panel request. Antigua states that its characterization of the prohibition as "total" was "nothing but a description"[76] that did not alter the focus of Antigua's challenge from the outset of the dispute, which was the undisputed prohibition on the cross-border supply of gambling and betting services. Although it did not expressly state in the panel request that the "total prohibition" is a measure "in and of itself", Antigua submits that it clearly identified the "total prohibition" in the panel request in a manner consistent with panel requests previously examined by panels and the Appellate Body. In the alternative, Antigua contends that any ambiguity regarding its challenge to the "total prohibition", in and of itself, was resolved by reading its first submission to the Panel.

64. Antigua also contests the Panel's legal conclusion that, in any event, the "total prohibition" does not constitute a measure that could be challenged in and of itself in WTO dispute settlement proceedings. According to Antigua, the Panel misinterpreted *US – Corrosion-Resistant Steel Sunset Review* in finding 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."[77] According to Antigua, in that case, the Appellate Body regarded *any* act or omission attributable to a WTO Member as a "measure".

65. In addition, Antigua argues that the United States admitted not only the existence of the "total prohibition", but also its effect as prohibiting the cross-border supply of gambling and betting services in the United States.[78] The Panel's failure to accord weight to this admission is inconsistent with the Panel's obligation under Article 11 of the DSU to "make an objective assessment of the facts of the case". Antigua asserts that, on the basis of the United States' admission and the other evidence submitted to the Panel, it had met its burden of proving the existence of the "total prohibition" and its effect, and that it was entitled to proceed in making out a case that the "total prohibition", as such, is inconsistent with the United States' obligations under the GATS.

2. Article XVI:1 of the GATS – Conditional Appeal

66. Should the Appellate Body reverse the Panel's legal interpretation of Article XVI:2(a) and XVI:2(c) of the GATS, as requested by the United States in its appeal, Antigua seeks reversal of

[76]Antigua's opening statement at the oral hearing.

[77]Antigua's other appellant's submission, para. 24 (referring to Panel Report, para. 6.176).

[78]*Ibid*., para. 45.

the Panel's erroneous conclusion that Article XVI:2 exhaustively defines those measures that would be inconsistent with the obligation in Article XVI:1. As a result of the Panel'

4. Article XIV of the GATS: General Exceptions

71. Antigua challenges the Panel's decision to consider the defence raised by the United States under Article XIV of the GATS. Antigua also argues that the Panel erroneously relieved the United States of its burden of proof with respect to Article

provision. Although the United States raised only *two* concerns regarding public morals or public order—organized crime and underage gambling—the Panel examined Article XIV(a) in relation to *five* concerns, including money laundering, fraud, and health concerns. Thus, the Panel added to the United States' defence three concerns that the United States itself never raised.[82]

75. Antigua argues that the Panel also erred in taking into account health concerns in its Article XIV(a) discussion because such concerns expressly come under the scope of Article XIV(b). With respect to Article XIV(c), Antigua contends that the United States did not identify sufficiently the RICO statute and its relevance for the United States' defence under Article XIV(c). Finally, Antigua claims that the Panel should not have addressed the chapeau of Article XIV at all, because the argumentation and evidence contained in the Panel's discussion under the chapeau was not submitted by the United States in the context of its Article XIV defence.

(c) Paragraph (a) of Article XIV

76. With regard to Article XIV(a), Antigua submits that the Panel erred in three respects: (i) it failed to consider the entire text of Article XIV(a); (ii) it improperly assessed the United States' defence under Article XIV(a), particularly in the light of the standard set out by the Appellate Body in *Korea – Various Measures on Beef*; and (iii) it failed to make an objective assessment of the evidence before it.

77. Antigua asserts that the Panel's analysis of Article XIV(a) is incomplete because, although the Panel recognized the relevance of footnote 5 to Article XIV(a) when interpreting the provision, the Panel failed to assess whether the interests that the United States purports to protect through its challenged measures meet the standard set forth in that footnote.

78. Furthermore, Antigua contends that the Panel misinterpreted the Appellate Body's decision in *Korea – Various Measures on Beef*, with respect to the standards and the level of scrutiny to be employed by a panel reviewing a defence. More specifically, in that decision, the Appellate Body established a "weighing and balancing" test with three particular components to assess whether a measure is "necessary". Yet, the Panel's analysis of the three components in this dispute falls short of the demanding inquiry outlined by the Appellate Body in that decision. Most notably, according to Antigua, in the absence of a factual finding that the United States' concerns as regards "remote" gambling relate to "actually existing" risks, the measures at issue are not justifiable under Article XIV(a).[83]

[82]Antigua's other appellant's submission, para. 81.

[83]*Ibid*., para. 96.

79. Antigua also argues that the Panel failed to make an objective assessment of the facts and evidence before it when applying the "weighing and balancing" test mandated by the Appellate Body in *Korea – Various Measures on Beef*. First, in its analysis of whether the measures at issue are designed to protect public morals or maintain public order, the Panel considered only evidence submitted by the United States, without discussing or taking into account the contrary evidence submitted by Antigua. Secondly, as to the importance of the interests or values protected, the Panel "ignored" a contemporary assessment by the United States Supreme Court of the prevailing attitude in the United States towards gambling, while taking into account Congressional hearings and political statements made more than 40 years ago.[84] Thirdly, the Panel relied on no evidence at all when concluding that the challenged measures contributed to the realization of the ends that the United States claimed are pursued through those measures. Finally, with respect to the trade impact of the measures, Antigua objects to the fact that none of the evidence cited by the Panel relates to factual matters involving the cross-border gambling and betting services provided specifically by Antigua.

81. Finally, Antigua claims that, as in its analysis under Article XIV(a), the Panel did not satisfy its obligations under Article 11 of the DSU, because the Panel's conclusions were premised either on "unsubstantiated"[87] or "conclusory"[88] statements of United States government officials, or on no evidence at all.

(e) The Chapeau of Article XIV

82. With respect to the chapeau of Article XIV, Antigua argues that the Panel erred, first, in deciding to continue its evaluation of the United States' defence under the chapeau, even though the Panel had found that none of the federal laws was provisionally justified under paragraph (a) or (c) of Article XIV. Secondly, Antigua contends that the Panel improperly "segmented" the gambling industry and limited its discussion to the *remote* supply of gambling services. Instead, the Panel should have examined how the United States addresses the supply of gambling services with respect to the entire industry and compared this treatment with that given to foreign suppliers of gambling services. Finally, Antigua alleges that the Panel failed to comply with its obligations under Article 11 of the DSU by again drawing its conclusions on the basis of "unsubstantiated assertions"[89] of the United States, rather than on the "independent"[90] evidence submitted by Antigua, and thereby effectively "shift[ing]"[91] the burden of proof to Antigua.

83. For these reasons, Antigua requests the Appellate Body to find that the Panel erroneously considered the defence by the United States under Article XIV and, in doing so, also relieved the effe

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85. The United States submits that Antigua did not challenge, in its panel request, the "total prohibition" as a distinct measure because the panel request makes clear that, in discussing a "prohibition", Antigua was referring to the *effect* of one or more laws listed in the Annex. According to the United States, therefore, the Panel correctly concluded that a challenge to the "total prohibition" as a distinct measure was beyond its terms of reference.

86. The United States claims that the Panel's conclusion—

3. Article XVI:2(a) and XVI:2(c) of the GATS – Measures Aimed at Consumers

89. The United States supports the Panel's interpretation that sub-paragraphs (a) and (c) of Article XVI:2 do not cover measures addressed to *consumers* of services rather than to service *suppliers* or *output*. The United States emphasizes that sub-paragraphs (a) and (c) of Article

(b) Burden of Proof

92. The United States agrees with Antigua that panels cannot make the case for a complaining party. The United States argues that, contrary to Antigua's arguments, the United States met its burden of proof and did not leave it to the Panel to prove the Article XIV defence. In addition, the United States contests Antigua's submission that the Panel acted inconsistently with the principles of due process and the equality of arms, and with Article 11 of the DSU.

93. The United States asserts that it provided evidence of how the relevant statutes were enacted and the operation and purpose of each statute. The United States also contends that it made arguments regarding the relevant legal standards under Article XIV and provided argumentation and evidence that the specific measures satisfy the legal requirements of an Article XIV defence.

94. According to the United States, all five concerns acknowledged by the Panel with respect to gambling activities had been identified by the United States in its submissions to the Panel. Thus, in recognizing these concerns, the Panel did nothing more than what the United States requested it to do. With respect to the "health concerns", the United States asserts that the health risks associated with addiction to gambling fall within the scope of protection of public morals and/or public order under Article XIV(a), and the Panel was correct in so finding. Finally, regarding the chapeau of Article XIV, the United States asserts that it did allege that the United States' measures satisfy the requirements set out in the chapeau of Article XIV and referred the Panel to evidence in support of its claim.[97]

(c) Paragraph (a) of Article XIV

95. The United States disagrees with Antigua's allegations of error regarding certain aspects of the Panel's analysis under paragraph (a) of Article XIV. The United States contends that it provided specific evidence of grave threats to public morals and public order, and made an argument that the evidence provided met the specific requirements of Article XIV(a), including its footnote 5. According to the United States, the Panel fully understood and applied the requirements laid down in footnote 5 of Article XIV, as is evident from its discussion in the Panel Report. Furthermore, the Panel correctly applied the "weighing and balancing" test from the Appellate Body's decision in *Korea – Various Measures on Beef*. The United States argues that, in doing so, the Panel found, first, that the concerns identified by the United States "actually did exist"[98] with respect to the remote

[97]United States' appellee's submission, para. 48 (referring to United States' appellant's submission, para. 187, and United States' second submission to the Panel, paras. 117-122).

[98]*Ibid*., para. 55.

supply of gambling services; secondly, that prohibiting this activity contributes to the realization of the ends pursued; and thirdly, that potential alternatives to the measures at issue existed.[99]

(d) Paragraph (c) of Article XIV

96. In the same vein, the United States argues that the Appellate Body should dismiss Antigua's appeal with respect to the Panel's findings under Article XIV(c). The United States contests Antigua's

E. *Arguments of the Third Participants*

in services. Such a measure may include a prohibition on the consumption of a given service, which, although directed at consumers, has the effect of restricting the activity of suppliers. The European Communities finds no limitation in sub-paragraph (a) or (c) that suggests that measures may not be covered "by reason of their impact".

102. Regarding Article XIV of the GATS, the European Communities contends that this Article seeks to preserve the right of WTO Members to regulate the supply of services. The European Communities contends that Article XIV is to be interpreted in the light of the pertinent *acquis* with regard to Article XX of the GATT 1994, as the wording and function of the two Articles correspond closely. Should the Appellate Body reach this issue, the European Communities requests that it make a "full review" of the Panel's reasoning and of the justification for the Article XIV defence, based on the uncontested facts and evidence on record.[103]

103. The European Communities asserts that consultations with other Members "cannot be an absolute condition to justify a measure under GATS Article XIV".[104] Contrary to the finding of the Panel, neither Article XIV nor the United States' market access commitment in its Schedule supports such a conclusion. Nevertheless, a respondent may rely on a good faith attempt to negotiate a resolution with other Members as evidence in support of its claim that it explored reasonably available WTO-consistent alternatives before adopting a particular WTO-inconsistent measure. According to the European Communities, however, such evidence would be insufficient, on its own, to show that reasonable alternatives were exhausted.

104. With respect to the Panel's conclusions on the chapeau of Article XIV, the European Communities emphasizes that evidence of a limited number of cases of non-enforcement against domestic business operators in comparable situations would not *ipso facto* rebut a *prima facie* case of consistency of a measure with the chapeau. The European Communities contrasts that situation with one where a complaining party demonstrates a discernible pattern of application of a measure to the detriment of foreign operators in comparable situations. Although enforcement in all cases may not be practicable for a number of legitimate reasons, Members' authorities can and should be expected to intervene and correct enforcement that has occurred on a discriminatory basis against foreign operators.

[103]European Communities' third participant's submission, para. 49.

[104]*Ibid*., paras. 14 and 91.

2. Japan

105. Japan agrees with the Panel's conclusions relating to the commitments in the United States' Schedule and the interpretation of Article XVI:1 and XVI:2. Japan contends that the Panel erred, however, with respect to its interpretation and application of Article XIV.

106. Japan submits that W/120 and the 1993 Scheduling Guidelines are "context" or "preparatory work" for the interpretation of Members' GATS Schedules. In the absence of language in the United States' Schedule expressly indicating a departure from W/120 or providing an alternative definition, the Panel was correct to turn to W/120 and the corresponding CPC numbers in order to give meaning to the terms in the United States' Schedule. In doing so, however, the Panel should not have referred to French and Spanish translations of "sporting", because the United States' Schedule clearly indicates it to be "authentic in English only". Nevertheless, Japan supports the Panel's conclusion that the United States undertook in its Schedule a commitment regarding gambling and betting services.

107. Japan submits that the Panel properly understood the relationship between Article XVI:1 and XVI:2, namely, that the limitations specified in Article XVI:2 are exhaustive of the measures covered by Article XVI:1. In addition, Japan agrees with the Panel that measures having the *effect*—even if not the form—of a quota may also be prohibited by virtue of sub-paragraphs (a) and (c) of Article XVI:2, but that these provisions do not cover measures imposed on service *consumers*

Measures on Beef and the Panel's improper reliance on the unadopted report of the GATT panel in *US – Tuna (Mexico)*. Japan emphasizes that this new requirement would go well beyond the negotiated commitments of WTO Members.

110. Japan also disagrees with the Panel's findings that Members invoking the affirmative defence of Article XIV must enter into multilateral consultations to identify less trade-restrictive alternatives. According to Japan, the Panel's approach is a "substantial departure"[107] from the obligations contained in the covered agreements and from the relevant GATT and WTO decisions.

3. Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

111. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requests the Appellate Body to reverse the Panel's findings that the prohibitions of Article XVI:2(a) and XVI:2(c) include all measures that may have an "effect" on the Member's market access commitments. Furthermore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requests that the Appellate Body reverse the Panel's erroneous conclusion under Article XIV(a) and XIV(c) that Members are required to consult with other Members concerning possible alternative WTO-consistent measures.

112. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu supports the United States' reading of Article XVI:2(a) and XVI:2(c). The text of these provisions suggests that the treaty drafters did not intend to cover *all* measures that can have an effect on market access. Although the Panel appeared to recognize this understanding when it found that Article VI and Article XVI are mutually exclusive provisions, the Panel "contradict[ed]"[108] itself by subsequently concluding that a measure with *any* effect on market access falls within the scope of Article XVI:2. Furthermore, the Panel disregarded the fact that the United States' measures "*in totality* regulate the means of supply for a specific sector, rather than creating a quota system" for foreign service suppliers, as would be required in order to bring the measures within the text of Article XVI:2(a) and XVI:2(c).[109]

113. In addition, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu disagrees with the Panel's interpretation of the term "necessary" in Article XIV(a) and (c) as requiring Members to conduct consultations with other Members to identify alternative WTO-consistent measures. The Panel erroneously found that the standard for the "necessity" test in paragraphs (a) and (c) of Article XIV is whether a reasonably available WTO-consistent alternative has been "explored and

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[107]Japan's third participant's submission, para. 14.

[108]Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, para. 6.

[109]*Ibid*., para. 9. (original emphasis)

exhausted"[110] by the Member in question. This interpretation contravenes the Appellate Body rulings in *EC – Asbestos* and *Korea – Various Measures on Beef*. Based on this erroneous understanding of the "necessity" requirement, the Panel constructed a similarly erroneous requirement of consultations. In addition, the Panel erred in basing its conclusion, in part, on the fact that a commitment has been undertaken in the United States' Schedule. The S

(b) State laws:

(1) Colorado: Section 18-10-103 of the Colorado Revised Statutes;

(2) Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);

(3) Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;

(4) Minnesota: Section 609.755(1) and Subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated);

(5) New Jersey: Paragraph 2 of Section VII of Article 4 of the New Jersey Constitution, and Section 2A:40-1 of the New Jersey Code;

(6) New York: Section 9 of Article I of the New York Constitution and Section 5-

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(a) in finding that a prohibition on the remote supply of gambling and betting services constitutes a "zero quota" on the supply of such services by particular means, and that such a "zero quota" is a limitation that falls within sub-paragraphs (a) and (c) of Article XVI:2;

(b) in finding that measures imposing criminal liability on *consumers* of cross

compliance with laws or regulations which are not inconsistent with the GATS, within the meaning of Article XIV(c); and

(v) whether the Panel erred in finding that the United States did not demonstrate that the Wire Act, the Travel Act, and the IGBA satisfy the requirements of the chapeau of Article XIV.

IV. Measures at Issue

115. We begin with the participants' appeals relating to the measures at issue. First, we review the Panel's finding that the "'total prohibition' on the cross-border supply of gambling and betting services" (the "total prohibition"[111]) cannot constitute an autonomous measure that can be challenged *per se*.[112] Next, we consider whether the Panel erred in stating that "'practice' can be considered as an autonomous measure that can be challenged in and of itself".[113] Finally, we evaluate the United States' allegation that Antigua failed to make a *prima facie* case of inconsistency with Article XVI with respect to certain federal and state laws and that, therefore, the Panel should not have ruled on these claims.

A. *"Total Prohibition" as a Measure*

116. In its panel request, Antigua identified the "total prohibition" as the "effect" of various United States federal and state laws.[114] In its first written submission, Antigua claimed that it was not necessary to show that these laws produced the effect of a "total prohibition" because the United States Ambassador had acknowledged, during the DSB meeting considering Antigua's first panel request, the existence of such a prohibition.[115] Therefore, Antigua asserted, "[t]he 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."[116]

117. In the course of responding to a United States request for preliminary rulings, prompted by alleged deficiencies in Antigua's description of the measures it was challenging, the Panel stated:

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[111]The Panel refers throughout the Panel Report to the "'total prohibition' on the cross-border supply of gambling and betting services" as the "total prohibition". (See, for example, Panel Report, paras. 6.139 and 6.154) In this Report we use the term "total prohibition" in the same manner.

[112]Panel Report, para. 6.175.

[113]*Ibid*., para. 6.197.

[114]Request for Establishment of a Panel by Antigua and Barbuda, WT/DS285/2, 13 June 2003, p. 1.

[115]Antigua's first written submission to the Panel, para. 136 (citing Minutes of the DSB Meeting held on 24 June 2003, WT/DSB/M/151, p. 11).

[116]*Ibid*., para. 136. (original emphasis)

> Antigua and Barbuda emphasised that it is effectively challenging the overall and cumulative effect of various federal and state laws which, together with various policy statements and other governmental actions, constitute a complete prohibition of the cross-border supply of gambling and betting services.[117]

In its responses to the Panel's first set of questions, and in its second written submission to the Panel, Antigua asserted that it was challenging the "total prohibition" as a "measure in and of itself".[118] Antigua disputed the United States' contention that the "total prohibition" could not constitute a measure *per se* for purposes of WTO dispute settlement.[119]

118. In its report, the Panel found that, "in the circumstances of this case", a "total prohibition" could not constitute a "measure" *per se*.[120] The Panel based its conclusion on three factors. First, the Panel found that the "total prohibition" did not constitute an "instrument containing rules or norms".[121] Secondly, the Panel stated that Antigua had not sufficiently identified the "total prohibition" in its panel request as a measure at issue, including the precise relevant United States laws that give rise to this prohibition.[122] Thirdly, the Panel stated that it "fail[ed] to see how the United States could be requested to implement a DSB recommendation to bring a 'prohibition' into compliance with the GATS pursuant to Article 19.1 of the DSU when an imprecisely defined 'puzzle' of laws forms the basis of the 'total prohibition'."[123]

119. Antigua appeals the Panel's finding and emphasizes that Article XXVIII(a) of the GATS defines a "measure" broadly, as do the Appellate Body's decisions in *US – Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Reviews*. Antigua also relies on the alleged "concessions"[124] made by the United States Ambassador during DSB meetings in her statements responding to Antigua's panel requests. Antigua argues that, in the light of this statement, the Panel erred in not proceeding to evaluate Antigua's challenge on the basis of the "total prohibition". Antigua therefore requests the Appellate Body to reverse the Panel's finding that

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[117]Panel's decision on the United States' request for preliminary rulings, para. 17, Panel Report, p. B-4. The Panel did not grant the United States' request to invite Antigua to file another submission detailing with greater specificity the measures being challenged. The Panel also made no ruling relating to the "total prohibition" as a measure *per se*.

[118]Antigua's response to Question 10 posed by the Panel, Panel Report, p. G-34; Antigua's second written submission to the Panel, para. 8.

[119]Antigua's second written submission to the Panel, paras. 9-18.

[120]Panel Report, para. 6.175.

[121]*Ibid*., 6.176 (citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-82 and 88).

[122]*Ibid*., paras. 6.177-6.180.

[123]*Ibid*., para. 6.182 (quoting Antigua's response to Question 32 posed by the Panel, Panel Report, p. C-58).

[124]Antigua's other appellant's submission, para. 48.

Antigua was not entitled to rely on the "total prohibition" as a measure *per se* in this dispute. Antigua further requests the Appellate Body to complete the analysis with respect to the consistency of the "total prohibition" with Article XVI.[125]

120. The question before us, therefore, is whether an alleged "total prohibition" on the cross-border supply of gambling and betting services constitutes a measure that may be challenged under the GATS.[126]

121.

124. Viewed in this light, the "total prohibition" described by Antigua does not, in itself, constitute a "measure". As Antigua acknowledged before the Panel[131] and on appeal[132], the "total prohibition" is the *collective effect* of the operatio

C. *Antigua's Prima Facie Case*

133. We examine next the United States' claim on appeal that Antigua failed to establish a *prima facie* case of inconsistency with Article XVI of the GATS, with respect to the eight state laws and the three federal laws that the Panel determined were the measures that it should examine.

134. Antigua's panel request listed nine federal laws and eighty-four other laws from all fifty states, as well as from the District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands.[140] In seeking to identify, from this list, the measures that were the sub0 TD -0.1634 ea, Gua9 Tw (

137. The United States contends that, in taking this approach, the Panel itself improperly made Antigua's *prima facie* case of inconsistency with Article XVI of the GATS. The United States claims that Antigua did not argue before the Panel how the laws eventually selected for review by the Panel constituted a "total prohibition" on the cross-border supply of gambling services. Finally, the United States argues, as Antigua's case throughout the panel proceedings was based on the existence

simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency.[152] Nor may a complaining party simply allege facts without relating them to its legal arguments.

141. In the context of the sufficiency of panel requests under Article 6.2 of the DSU, the Appellate Body has found that a panel request:

> ... must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits.[153]

Given that such a requirement applies to panel requests at the outset of a panel proceeding, we are of the view that a *prima facie* case—made in the course of submissions to the panel—demands no less of the complaining party. The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.

142. Antigua's case focused on Article XVI:2 of the GATS and, in particular, its sub-paragraphs (a) and (c). The relevant provisions provide:

> 2. 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;
>
> ...
>
> (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 .... (footnotes omitted)

152

143. This text suggests that Antigua was required to make its *prima facie* case by first alleging that the United States had undertaken a market access commitment in its GATS Schedule; and,

> - Several laws or regulations expressly grant exclusive or special rights to operators of domestic origin
>
> - Several state laws require the physical presence of the operator within the territory of the state and, in doing so, constitute a zero quota for cross-border supply.[159] (footnotes omitted)

147. We begin our examination of the challenged measures with the three federal laws, namely, the Wire Act, the Travel Act, and the IGBA. We observe that Antigua submitted the texts of these statutes and explained its understanding of them.[160] In support of its argument that the three federal statutes prohibited certain kinds of cross-border supply of gambling services, Antigua submitted to the Panel a report by the United States General Accounting Office[161] on internet gambling, and a letter from a Deputy Assistant Attorney General of the Department of Justice informing an industry association of broadcasters that internet gambling violates the three federal statutes.[162]

148. In addition, as we noted above[163], Antigua, in its second written submission, alleged the "[f]ederal laws" prohibiting cross-border supply to be inconsistent with Article XVI. The United States argues that Antigua never "specifically alleged" the inconsistency of the three specific federal statutes with Article XVI.[164] Although, Antigua did not expressly mention these statutes by name when alleging inconsistency with Article XVI, we are of the view that, in the context of Antigua's

[159] Antigua's second written submission to the Panel, para. 37. The footnotes omitted from this excerpt contain no reference to specific laws of the United States.

[160] Antigua's statement at the first substantive panel meeting, para. 21, 10 December 2003; Antigua's written submission in response to the United States' request for preliminary rulings, footnote 18 to para. 18, 22 October 2003. See also Antigua's response to Question 12 posed by

previous statement clearly identifying these three statutes[165] and the Panel's subsequent questioning on these particular measures[166], the reference to "[f]ederal laws" clearly covered the Wire Act, the Travel Act, and the IGBA. As a result, in our view, Antigua's arguments and evidence were sufficient to identify the Wire Act, the Travel Act, and the IGBA, and to make a *prima facie* case of their inconsistency with sub-paragraphs (a) and (c) of Article XVI:2.

149. As to the eight state laws reviewed by the Panel, we note that Antigua made no mention of them in the course of its argument that the United States acts inconsistently with Article XVI of the GATS. In none of Antigua's submissions to the Panel was the way in which these measures operate explained in a manner that would have made it apparent to the Panel and to the United States that an inconsistency with Article XVI was being alleged with respect to these measures. Thus, we see no basis on which we can conclude that Antigua sufficiently connected the eight state laws with Article XVI and thereby established a *prima facie* case of inconsistency with that provision.

150. In Antigua's first written submission to the Panel and in its opening statement at the first substantive panel meeting, none of the eight state laws was named in the context of Antigua's substantive claims.[167] In its second written submission, Antigua alleged merely that "state laws"—

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[165]Antigua's statement at the first substantive panel meeting, para. 21, 10 December 2003. In its opening statement at the first substantive panel meeting, Antigua discussed "three federal statutes", which it identified as follows:

> - The 'Wire Act' (18 U.S.C § 1084), which prohibits gambling businesses from knowingly receiving or sending certain types of bets or information that assist in placing bets over interstate and international wires;
> - The 'Travel Act' (18 U:S:C § 1952), which imposes criminal penalties for those who utilize interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity, including gambling considered unlawful in the United States;
> - The 'Illegal' Gambling Business Act' (18 U.S.C § 1955), which makes it a federal crime to operate a gambling business that violates the law of the state where the gambling takes place (provided that certain other criteria are fulfilled such as the involvement of at least five people and an operation during more than 30 days).

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exhibits, we see no arguments in any submissions that would have clearly informed the Panel and the United States how those two laws would form part of Antigua's claims under Article XVI:2(a) and XVI:2(c). It follows that, without providing a stronger link between the particular state law being

155. Furthermore, because the Panel erred in ruling on claims relating to these state laws, where no *prima facie* case of inconsistency had been made out by Antigua, we *reverse* the Panel's finding, in paragraphs 6.421(b) and 7.2(b)(ii) of the Panel Report, that the following state laws are inconsistent with ArThermore, b Tf u.TD 0 Tc 0.1875 Tw ( ) Tj -35.25D -0.1168 2245.4824 T12

V. Interpretation of the Specific Commitments Made by the United States in its GATS Schedule

158. The Panel found, at paragraph 7.2(a) of the Panel Report, that:

> ... the United States' Schedule under the GATS includes specific commitments on gambling and betting services under subsector 10.D.[180]

The United States appeals this finding. According to the United States, by excluding "sporting" services from the scope of subsector 10.D of its GATS Schedule, it excluded gambling and betting services from the scope of the specific commitments that it undertook therein. The United States argues that the Panel misinterpreted the ordinary meaning of the text of subsector 10.D, "Other recreational services (except sporting)", and erroneously found that the ordinary meaning of "sporting" does not include gambling. The United States also contends that the Panel erred in its identification and analysis of the context in which the terms of subsector 10.D must be interpreted. In particular, the Panel is alleged to have mistakenly elevated certain documents used in the preparation of GATS Schedules (W/120 and the 1993 Scheduling Guidelines) to the status of "context", when they are in fact "mere 'preparatory work'"[181], and, as such, cannot be relied upon when they suggest a meaning at odds with the unambiguous ordinary meaning of the text. According to the United States, the Panel relied on an "erroneous presumption" that, unless the United States "expressly'" departed from W/120, the United States could be "assumed to have relied on W/120 and the corresponding CPC references'".[182] Finally, the United States argues T'pre07s9es 4romeparationD -0.1 TD - Tjs

Sector or subsector	Limitations on market access
10. RECREATIONAL, CULTURAL, & SPORTING SERVICES	
A. ENTERTAINMENT SERVICES (INCLUDING THEATRE, LIVE BANDS	

dictionary definitions of the terms to be interpreted.[191] But dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation[192], as they typically aim to catalogue *all* meanings of words—be those meanings common or rare, universal or specialized.

165. In this case, in examining definitions of "sporting", the Panel surveyed a variety of dictionaries and found a variety of definitions of the word.[193] All of the dictionary definitions cited by the Panel define "sporting" as being connected to—in the sense of "related to", "suitable for", "engaged in" or "disposed to"—sports activities. Some dictionaries also define "sporting" as being connected to gambling or betting, but others do not. Of those that do, several note that the word is mainly used in this sense in the phrase "a sporting man", or in a pejorative sense, and some note that the word is used in this sense only when the gambling or betting activities pertain to sports. Based on this survey of dictionary definitions, as well as the fact that "gambling" does not fall within the meaning of the Spanish and French words that correspond to "sporting", namely "déportivos" and "sportifs"[194], the Panel made its finding that "the *ordinary* meaning of 'sporting' does not include gambling".[195]

166. We have three reservations about the way in which the Panel determined the ordinary meaning of the

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170. The Panel found that:

> ... both W/120 and the 1993 Scheduling Guidelines were agreed upon by Members with a view to using such documents, not only in the negotiation of their specific commitments, but as interpretative tools in the interpretation and application of Members' scheduled commitments. As such, these documents comprise the "context" of GATS Schedules, within the meaning of Article 31 of the *Vienna Convention* and the Panel will use them for the purpose of interpreting the GATS, GATS schedules and thus the US Schedule.[200]

171. Before turning to the specifics of the United States' appeal, we observe that the second paragraph of Article 31 of the *Vienna Convention* defines "context" as follows:

> 2.

by the others as such".[207] To reach this finding, the Panel reasoned that, although the documents were "technically" drafted by the GATT Secretariat:

> ... they can be considered "agreement[s] ... made between all [Members]" or ... "instrument[s] ... made by one or more [Members]" but accepted by all of them as such within the meaning of Article 31:2(a) and (b) of the Vienna Convention. In this regard, it may be recalled that the two documents were prepared by the – then – GATT Secretariat, at the behest of the Uruguay Round participants. The *participants* can thus be considered to be the "intellectual" authors of the documents. Besides, both documents were the object of a series of formal and informal consultations during which Members had the opportunity to amend them and to include changes. Both were circulated as formal "green band" documents with the agreement of the participants.[208] (footnotes omitted)

175. We note that Article 31(2) refers to the *agreement* or *acceptance* of the parties. In this

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composition of the list was not a matter for negotiations".[210] Similarly, the Explanatory Note that prefaces the Scheduling Guidelines itself appears to contradict the Panel in this regard, as it expressly provides that, although it is intended to assist "persons responsible for scheduling commitments", that assistance "should not be considered as an authoritative legal interpretation of the GATS."[211]

177. The Panel also reasoned that:

> .... both W/120 and the 1993 Scheduling Guidelines were agreed upon by Members with a view to using such documents, *not only in the negotiation* of their specific commitments, but *as interpretative tools* in the interpretation and application of Members' scheduled commitments.[212] (emphasis added)

In our opinion, the Panel's description of how these documents were created and used may suggest that the parties agreed to use such documents in the negotiations of their specific commitments. The Panel cited no evidence, however, directly supporting its further conclusion, in the quotation above,

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[210]Note on the Meeting of 27 May to 6 June 1991, MTN.GNS/42, para. 19 (24 June 1991) (quoted in Panel Report, para. 3.41 and footnote 117 thereto). The paragraphs of this Note cited by the United States are taken from the minutes from a meeting that was held *after* the Secretariat had circulated its first draft classification list, but *before* the final version of W/120 had been circulated. The content of those paragraphs is as follows:

> 18. The representatives of the European Communities, Canada, Chile, the United States, Japan, Poland, Sweden on behalf of the Nordic countries and Mexico found that the proposed classification contained in the informal note by the secretariat constituted an improvement over the list contained in MTN.GNS/W/50. There was confirmation of the agreement to base the classification of services sectors and subsectors as much as possible on the Central Product Classification (CPC) list. There was some agreement that putting together a classification list of services was an on-going work which required coordination with efforts undertaken in other fora. The representative of Austria stressed the need to involve statistical experts in the work since the classification list resulting from the GNS would in the future serve as the basis for the compilation of statistics on services. The representative of Japan said not only statistical but also sectoral experts should take part in drawing up the list.
>
> 19. The representative of the United States did not wish to have extensive discussions on the matter and stressed that the composition of the list was not a matter for negotiations. This view was shared by the representative of the European Communities. The representatives of the United States, Poland, Malaysia and Austria said that the list should be illustrative or indicative and not bind parties to any specific nomenclature. The representative of Malaysia suggested that it would be important to have the definitions behind individual items in the list, especially where there was a high degree of aggregation.

[211]1993 Scheduling Guidelines, p. 1.

[212]Panel Report, para. 6.82.

that the agreement of the parties encompassed an agreement to use the documents "as interpretative tools in the interpretation and application of Members' scheduled commitments."

178. In our opinion, therefore, the Panel erred in categorizing W/120 and the 1993 Scheduling Guidelines as "context" for the interpretation of the United States' GATS Schedule. Accordingly, we set aside this part of the Panel's examination of "context". There is, however, additional context referred to by the Panel and the participants that we must consider, namely: (i) the remainder of the United States' Schedule of specific commitments; (ii) the substantive provisions of the GATS; (iii) the provisions of covered agreements other than the GATS; and (iv) the GATS Schedules of *other* Members.

179. We begin by examining the immediate context in which the relevant entry is found, that is, the United States' Schedule as a whole. The United States admits that it "generally followed the W/120 *structure* in its Schedule of specific commitments."[213] The Schedule makes no reference to CPC codes. The Schedule does, however, refer to W/120 in two instances[214], apparently in order to make clear that the United States' commitment corresponds to only *part* of a subsector listed in W/120. This suggests that, at least for some of its entries, the United States also expressly referred to W/120 in order to define the *content* of a Schedule entry and, thereby, limit the *scope* of its specific commitment.[215] At the same time, the context provided by the United States' Schedule as a whole does not indicate clearly the scope of the commitment in subsector 10.D.

180. We move, therefore, to examine the context provided by the structure of the GATS itself. The agreement defines "services" very broadly, as including "*any* service in *any* sector except services supplied in the exercise of governmental authority".[216] In addition, the GATS definition of "sector" provides that any reference to a "sector" means—unless otherwise specified in a Member's Schedule—a reference to *all* of the subsectors contained within that sector.[217] Many of the obligations in the GATS apply only in sectors in which a Member has undertaken specific

[213]United States' response to Question 5 posed by the Panel, Panel Report, p. C-26. (original emphasis)

[214]Sector B of the Schedule

commitments.[218] To us, the structure of the GATS necessarily implies two things. First, because the GATS covers *all* services except those supplied in the exercise of governmental authority, it follows that a Member may schedule a specific commitment in respect of *any* service. Secondly, because a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or subsector within which that service falls, a specific service cannot fall within two different sectors or subsectors. In other words, the sectors and subsectors in a Member's Schedule must be mutually exclusive.[219]

Schedule

185. We also find unpersuasive the arguments of the United States with respect to subsector 10.E, "Other".[228] Only one Member clearly scheduled gambling and betting services in subsector 10.E, and it used specific words to do so.[229] Another Member specifically excluded "gambling and gambling related services" from the scope of its commitment under subsector 10.A.[230] From these examples it appears that different Members have dealt with gambling and betting services in different subsectors of their Schedules. But the examples also suggest that Members have used specific language in order to make clear the location of their commitments within their own Schedules. Furthermore, as the Panel noted[231], the United States' argument that gambling and betting services fall under subsector 10.E appears to contradict its argument that gambling and betting services are comprised in the ordinary meaning of "sporting services" under subsector 10.D. As we have observed above, the same service cannot be covered in two different subsectors within the *same* Schedule.[232]

186. Overall, we find it significant that the entries made by many Members in sector 10 of their Schedules contain text additional to the text found in the headings and sub-headings used by the United States (and used in W/120). Such Members disaggregated their entries beyond the five subsectors identified in W/120 as falling within sector 10. There is a broad range of ways in which this was accomplished. Some Members used CPC codes with more digits than the codes used in W/120, (that is, indicating a more disaggregated service category) and some used (e.g. as is classified in

recreational services" or within the category of "sporting services". Accordingly, we turn to the object and purpose of the GATS to obtain further guidance for our interpretation.

188. The Panel referred to the requirement of "transparency" found in the preamble to the GATS, as supporting the need for precision and clarity in scheduling, and underlining the importance of having Schedules that are "readily understandable by all other WTO Members, as well as by services suppliers and consumers".[233] The Panel also referred to the Appellate Body Report in *EC – Computer Equipment* as follows:

> The Appellate Body found that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of GATT 1994." This confirms the importance of the security and predictability of Members' specific commitments, which is equally an object and purpose of the GATS.[234] (footnote omitted)

189. We agree with the Panel's characterization of these objectives, along with its suggestion that they reinforce the importance of Members' making clear commitments. Yet these considerations do not provide specific assistance for determining where, in the United States' Schedule, "gambling and betting services" fall. Accordingly, it is necessary to continue our analysis by examining other elements to be taken into account in interpreting treaty provisions.

190. In addition to context, the third paragraph of Article 31 of the *Vienna Convention* directs a treaty interpreter to take into account, *inter alia*, subsequent practice establishing the agreement of the parties regarding the interpretation of the treaty. Antigua argues that the "subsequent practice" of Members demonstrates that W/120 and the Scheduling Guidelines must be used to interpret the United States' GATS Schedule.[235] Antigua asserts that such relevant subsequent practice is found in the 2001 Scheduling Guidelines[236], in a submission made by the United States regarding the

[233]Panel Report, para. 6.107.

[234]*Ibid*., para. 6.108.

[235]Antigua's response to Question 1 posed by the Panel, Panel Report, pp. C-1 to C-3.

[236]Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services, S/L/92. The 2001 Scheduling Guidelines serve, in the current round of services negotiations, the same function as the 1993 Scheduling Guidelines served in the Uruguay Round negotiations. The former reproduce the 1993 Scheduling Guidelines almost in their entirety, and contain some additional provisions. The 2001 Scheduling Guidelines were adopted by the Council for Trade in Services on 23 March 2001.

classification of energy services[237], as well as in a publication by the United States International Trade Commission ("USITC").[238] The Panel did not reach these arguments by Antigua as it had found W/120 and the 1993 Scheduling Guidelines to be context.

191. In *Japan – Alcoholic Beverages II* and *Chile – Price Band System*, respectively, the Appellate Body referred to "practice" within the meaning of Article 31(3)(b) as:

> ... a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation.[239]

> ... a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of [the relevant provision][240]

192. Thus, in order for "practice" within the meaning of Article 31(3)(b) to be established: (i) there must be a common, consistent, discernible pattern of acts or pronouncements; *and* (ii) those acts or pronouncements must imply *agreement* on the interpretation of the relevant provision.

193. We have difficulty accepting Antigua's position that the 2001 Scheduling Guidelines constitute "subsequent practice" revealing a common understanding that Members' specific commitments are to be construed in accordance with W/120 and the 1993 Scheduling Guidelines. Although the 2001 Guidelines were explicitly adopted by the Council for Trade in Services, this was in the context of the negotiation of *future* commitments and in order to assist in the preparation of offers and requests in respect of such commitments. As such, they do not constitute evidence of

[237]Antigua referred to document S/CSC/W/27, a proposal submitted by the United States concerning the classification of energy services

Members' understanding regarding the interpretation of *existing* commitments. Furthermore, as the United States emphasized before the Panel, in its Decision adopting the 2001 Guidelines, the Council for Trade in Services explicitly stated that they were to be "non-binding" and "shall not modify any rights or obligations of the Members under the GATS".[241] Accordingly, we do not consider that the 2001 Guidelines, in and of themselves, constitute "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention.*

194. Nor do the two other documents relied on by Antigua constitute "subsequent practice". Although they may be relevant in identifying the United States' practice, they do not establish a common, consistent, discernible pattern of acts or pronouncements by Members as a whole. Nor do they demonstrate a common understanding *among Members* that specific commitments are to be interpreted by reference to W/120 and the 1993 Scheduling Guidelines. Accordingly, we do not find that Antigua has identified any relevant subsequent practice that can assist us in the interpretation of subsector 10.D of the United States' Schedule.

195. The above reasoning leads us to the conclusion—contrary to the Panel[242]—that application of the general rule of interpretation set out in Article 31 of the *Vienna Convention* leaves the meaning

B. *Interpretation of Subsector 10.D in Accordance with Supplementary Means of Interpretation: Article 32 of the Vienna Convention*

196. We observe, as a preliminary matter, that this appeal does *not* raise the question whether W/120 and the 1993 Scheduling Guidelines constitute "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion". Both participants agree that they do, and we see no reason to disagree.[244]

197. The United States argues, however, that, because the "ordinary meaning" of subsector 10.D of its Schedule is clear from an examination of the text, context (not including W/120 and the 1993 Scheduling Guidelines) and object and purpose, it is neither necessary nor appropriate to have recourse to Article 32 of the *Vienna Convention*. We disagree. As we have explained, the Panel erred in characterizing W/120 and the 1993 Scheduling Guidelines as "context". Yet, we have also seen that a proper interpretation pursuant to the principles codified in Article 31 of the *Vienna Convention* does not yield a clear meaning as to the scope of the commitment made by the United States in the entry "Other recreational services (except sporting)". Accordingly, it is appropriate to have recourse to the supplemental means of interpretation identified in Article 32 of the *Vienna Convention*. These means include W/120, the 1993 Scheduling Guidelines, and a cover note attached to drafts of the United States' Schedule.

198. Turning to the question of how the subsector 10.D entry "Other recreational services (except sporting)" is to be interpreted in the light of W/120 and the Scheduling Guidelines, we consider it useful to set out the relevant parts of both documents. The relevant section of W/120 is as follows:

SECTORS AND SUB-SECTORS		CORRESPONDING CPC
[...]		
10.	RECREATIONAL, CULTURAL AND SPORTING SERVICES (other than audiovisual services)	
A.	Entertainment services (including theatre, live bands and circus services)	9619

[244]Some of the reasoning employed by the Panel in order to conclude (erroneously in our view) that these documents constituted "context" nevertheless confirms that they constitute "preparatory work", and arei.067s5So " 6.12

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B.	News agency services	962
C.	Libraries, archives, museums and other cultural services	963
D.	Sporting and other recreational services	964
E.	Other	

199. Thus, W/120 clearly indicates that its entry 10.D—"Sporting and other recreational services"—corresponds to CPC Group 964. W/120 does not, however, contain any explicit indication of: (i) whether the reference to Group 964 necessarily incorporates a reference to *each and every sub-category* of Group 964 within the CPC; or (ii) how W/120 relates to the GATS Schedules of individual Members.

200. With respect to the first issue, we observe that W/120 sets out a much more aggregated t1.153911 Tc 0 i908s28911 hTrr0h56 TD 0 Tc 0.1875 Tw ( ) Tj 15es"75 0 first iag649Th44 Trtn the31 152.

> Example: A Member wishes to indicate an offer or commitment in the subsector of map-making services. In the Secretariat list, this service would fall under the general heading "Other Business Services" under "Related scientific and technical consulting services" (see item l.F.m). By consulting the CPC, map-making can be found under the corresponding CPC classification number 86754. In its offer/schedule, the Member would then enter the subsector under the "Other Business Services" section of its schedule as follows:
>
> Map-making services (86754)
>
> *If a Member wishes to use its own subsectoral classification or definitions it should provide concordance with the CPC in the manner indicated in the above example. If this is not possible, it should give a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment.* (emphasis added; footnote omitted)

203. The Scheduling Guidelines thus underline the importance of using a common format and terminology in scheduling, and express a clear preference for parties to use W/120 and the CPC classifications in their Schedules. At the same time, the Guidelines make clear that parties wanting to use their own subsectoral classification or definitions—that is, to disaggregate in a way that diverges from W/120 and/or the CPC—were to do so in a "sufficiently detailed" way "to avoid any ambiguity as to the scope of the commitment." The example given in the Scheduling Guidelines illustrates how to make a positive commitment with respect to a discrete service that is more disaggregated than a service subsector identified in W/120. It is reasonable to assume that the parties to the negotiations expected the same technique to be applied to *exclude* a discrete service from the scope of a commitment, when the commitment is made in a subsector identified in W/120 and the excluded service is more disaggregated than that subsector.

204. In our view, the requisite clarity as to the scope of a commitment could not have been achieved through mere omission of CPC codes, particularly where a specific sector of a Member's Schedule, such as sector 10 of the United States'

the entry must be read as *including* within the scope of its commitment services corresponding to CPC 9649, "Other recreational services", including Sub-class 96492, "Gambling and betting services".

209. Finally, we consider briefly the United States' challenge to the Panel's use, in interpreting the United States' Schedule, of a document published by the USITC. The United States submits that the Panel's reliance on this document "reflects a misguided and erroneous attempt to exaggerate the importance of a document that has no relevance under the customary rules *of interpretation* of international law".[250]

210. The Office of the United States Trade Representative delegated to the USITC responsibility for maintaining and updating, as necessary, the United States' Schedule. In 1997, the USITC published an explanatory text that, *inter alia*, explained the relationship between United States' Schedule entries and the CPC. One stated purpose of the document is to clarify *"how the service sectors referenced in the GATT Secretariat's list, the CPC System, and the U.S. Schedule correspond*".[251] The table of concordance set out in that document clearly indicates that subsector 10.D of the United States' Schedule "corresponds" to CPC 964.[252]

211. The Panel did not explain clearly how it used this document in interpreting the United States' Schedule. The Panel considered that, although the USITC Document did not constitute a "binding interpretation", it nevertheless "has probative value as to how the US government views the structure and the scope of the US Schedule, and, hence, its GATS obligations."[253] The document was dealt with under the heading "Other supplementary means of interpretation". In this context, the Panel observed that "Article 32 of the *Vienna Convention* is not necessarily limited to preparatory material, but may allow treaty interpreters to take into consideration other relevant material".[254] Yet the Panel also referred to the principle of "acquiescence" and to a commentator's statement that "Article 31:3(b)

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[250]United States' appellant's submission, para. 83. (original emphasis)

[251]Panel Report, para. 6.132 (quoting from p.viii of the USITC document). (emphasis added by the Panel) The USITC document also explains, on the same page, that:

> In preparing national schedules, countries were requested to identify and define sectors and subsectors in accordance with the GATT Secretariat's list, which lists sectors and their respective CPC numbers. Accordingly, foreign schedules frequently make explicit references to the CPC numbers. The U.S. Schedule makes no explicit references to CPC numbers, but it corresponds closely with the GATT Secretariat's list.

[252]*US Schedule of Commitments under the General Agreement on Trade in Services*, United States International Trade Commission, May 1997, p. 25.

[253]Panel Report, para. 6.133.

[254]*Ibid*., para. 6.122.

[of the *Vienna Convention*] might also apply".[255] Notwithstanding these ambiguities, it is clear from the Panel's reasoning that it used the USITC publication to "confirm" its interpretation of subsector 10.D in the United States' Schedule.[256] In other words, the Panel's interpretation did not depend on its treatment of the USITC document.

212. We have already determined that the Panel committed certain errors in interpreting the United States' Schedule. Nevertheless, we have determined that a proper interpretation according to the principles codified in Articles 31 and 32 of the *Vienna Convention* leads to the same result that the Panel reached, namely, that subsector 10.D of the United States' GATS Schedule includes a specific commitment with respect to gambling and betting services. In the light of this finding, we need not decide whether the Panel erred in its treatment of the USITC Document.

C. *Summary*

213. Based on our reasoning above, we reject the United States' argument that, by excluding [illegible]

215. The Panel found that the United States' Schedule includes specific commitments on gambling

(3) South Dakota: Section 22-25A-8 of the South Dakota Codified Laws; and

(4) Utah: Section 76-10-1102(b) of the Utah Code (Annotated).[259]

A. *Preliminary Matters*

218. The United States appeals both the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI, as well as its application of those provisions to the measures at issue. We have already determined that the Panel should not have made findings under Article XVI with respect to certain state laws because Antigua had not made out a *prima facie* case in respect of these measures. Having already reversed the Panel's findings regarding these state laws[260], we need not consider them further in our assessment of this part of the United States' appeal. Accordingly, our analysis below is limited to a review of the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2, as well as to its application of that interpretation to the three *federal* i2.187 Soutrmined tse(a)te, rdiepedient TD 0.375 Tc (10)14 assessme

the oral hearing, the United States confirmed that its appeal focuses on the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2[263], and we shall limit our examination accordingly.

B.

definitions provided by the United States, the meaning of the word "numerical" includes "characteristic of a number or numbers".[267] The word "quota" means, *inter alia*, "the maximum number or quantity belonging, due, given, or permitted to an individual or group"; and "numerical limitations on imports or exports".[268] Thus, a "numerical quota" within Article XVI:2(a) appears to

fourth type of limitation, too, suggests that the words "in the form of" must not be interpreted as prescribing a rigid mechanical formula.

232. This is not to say that the words "in the form of" should be ignored or replaced by the words "that have the effect of". Yet, at the same time, they cannot be read in isolation. Rather, when viewed as a whole, the text of sub-paragraph (a) supports the view that the words "in the form of" must be read in conjunction with the words that precede them—"limitations on the *number* of service suppliers"—as well as the words that follow them, including the words "*numerical* quotas". (emphasis added) Read in this way, it is clear that the thrust of sub-paragraph (a) is not on the *form* of limitations, but on their *numerical*, or *quantitative*, nature.

233. Looking to the context of sub-paragraph (a), we observe that the chapeau to Article XVI:2, refers to the purpose of the sub-paragraphs that follow, namely, to define the measures which a Member shall not maintain or adopt for sectors *where market access commitments are made*. The chapeau thus contemplates circumstances in which a Member's Schedule *includes* a commitment to allow market access, and points out that the function of the sub-paragraphs in Article XVI:2 is to define certain limitations that are prohibited unless specifically entered in the Member's Schedule. Plainly, the drafters of sub-paragraph (a) had in mind limitations that would impose a maximum limit of *above* zero. Similarly, Article II:1(b) of the GATT 1994 prohibits Members from imposing duties "in excess of" the bound duty rate. Such bound duty rate will usually be *above* zero. Yet this does not mean that Article II:1(b) does not also refer to bound rates set at zero.

234. It follows from the above that we find the following reasoning of the Panel to be persuasive:

> [t]he fact that the terminology [of Article XVI:2(a)] embraces lesser limitations, in the form of quotas greater than zero, cannot warrant the conclusion that it does not embrace a greater limitation amounting to zero. Paragraph (a) does not foresee a "zero quota" because paragraph (a) was not drafted to cover situations where a Member wants to maintain full limitations. If a Member wants to maintain a full prohibition, it is assumed that such a Member would not have scheduled such a sector or subsector and, therefore, would not need to schedule any limitation or measures pursuant to Article XVI:2.[270]

235. As for the first paragraph of Article XVI, we note that it does not refer expressly to any requirements as to form, but simply links a Member's market access obligations in respect of scheduled services to 'the terms, limitations and conditions agreed and specified in its Schedule".

[270]Panel Report, para. 6.331.

Neither this provision, nor the object and purpose of the GATS as stated in its preamble[271], readily assists us in answering the question whether the reference in Article XVI:2(a) to "limitations on the number of service suppliers ... in the form of numerical quotas" encompasses the type of measure at issue here, namely, a prohibition on the supply of a service in respect of which a specific commitment has been made.

236. In our view, the above examination of the words of Article XVI:2(a) read in their context and in the light of the object and purpose of the GATS suggests that the words "in the form of" do not impose the type of precisely defined constraint that the United States suggests. Yet certain ambiguities about the meaning of the provision remain. The Panel, at this stage of its analysis, observed that any suggestion that the "form" requirement must be strictly interpreted to refer *only* to limitations "explicitly couched in numerical terms" leads to "absurdity".[272] In either circumstance, this is an appropriate case in which to have recourse to supplementary means of interpretation, such as preparatory work.

237. We have already determined

committed sector[275], and limitations on one or more means of cross-border delivery for a committed service[276]—we therefore, *uphold* the Panel's finding that:

> [a prohibition on one, several or all means of delivery cross-border] is a "limitation on the number of service suppliers in the form of numerical quotas" within the meaning of Article XVI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in mode 1.[277]

2. Sub-paragraph (c) of Article XVI:2

240. In interpreting sub-paragraph (c) of Article XVI:2, the Panel observed that the wording of the provision "might perhaps be taken to imply that any quota has to be expressed in terms of designated numerical units".[278] However, after further analysis and, in particular, after comparing the English version of the provision with its French and Spanish counterparts, the Panel found that sub-paragraph (c) does *not* mean that any quota must be expressed in terms of designated numerical units if it is to fall within the scope of that provision. Instead, according to the Panel, the "correct reading of Article XVI:2(c)" is that limitations referred to under that provision may be: (i) in the form of designated numerical units; (ii) in the form of quotas; *or* (iii) in the form of the requirement of an economic needs test.[279]

241. The Panel then found that, where a specific commitment has been undertaken in respect of a service, a measure prohibiting one or more means of delivery of that service is:

> ... a limitation "on the total number of service operations or on the total quantity of service output ... in the form of quotas" within the meaning of Article XVI:2(c) because it ... results in a "zero quota" on one or more or all means of delivery include[d] in mode 1.[280]

242. The United States asserts that, in so finding, the Panel used an incorrect reading of the French and Spanish texts to arrive at an interpretation that is inconsistent with the ordinary meaning of the English text. Specifically, the Panel relied upon the presence of commas in the French and Spanish versions of the text—but not in the English version—in order to find that sub-paragraph (c) identifies *three* types of limitations. The United States argues that, when properly interpreted, sub-paragraph (c) identifies only *two* types of limitations. The United States adds that the measures at issue in this case

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[275]Panel Report, para. 6.335.

[276]*Ibid*., para. 6.338.

[277]*Ibid*.

[278]*Ibid*., para. 6.343.

[279]*Ibid*., para. 6.344.

[280]*Ibid*., para. 6.355.

cannot in any way be construed as falling within the scope of either of the *two* limitations defined in sub-paragraph (c).

243. Sub-paragraph (c) refers to the following measures:

> 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.

244. The Panel essentially determined that, *notwithstanding* the absence of a comma between "terms of designated numerical units" and "in the form of quotas" in the *English* version, the phrase should, in order to be read in a manner consistent with the French and Spanish versions, be read *as if* such a comma existed—that is, as if expressed in "terms of designated numerical units" and "in the form of quotas" were disjunctive phrases, each of which modifies the word "limitations" at the beginning of the provision. The Panel relied on the fact that such a comma *does* exist in both the French and Spanish versions of the provision.[281] The United States argues, however, based on a detailed analysis of French grammar, that the existence of the comma in the French version is, in fact, consistent with the absence of a comma in the English version, and that both versions mean that Article XVI:2(c) identifies only *two* limitations.[282]

245. Ultimately, we are not persuaded that the key to the interpretation of this particular provision is to be found in a careful dissection of the use of commas within its grammatical structure. Regardless of which language version is analyzed, and of the implications of comma placement (or lack thereof), *all* three language versions are grammatically ambiguous. All three can arguably be read as identifying two limitations on the total number of service operations or on the total quantity of service output.[283] All three can also arguably be read as identifying *three* limitations on the total number of service operations or on the total quantity of service output.[284] The mere presence or absence of a comma in Article XVI:2(c) is not determinative of the issue before us.

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[281]The French version reads "limitations concernant le nombre total d'opérations de services ou la quantité totale de services produits, exprimées en unités numériques déterminées, sous forme de contingents ou de l'exigence d'un examen des besoins économiques"; and the Spanish version reads "limitaciones al número total de operaciones de servicios o a la cuantía total de la producción de servicios, expresadas en unidades numéricas designadas, en forma de contingentes o mediante la exigencia de una prueba de necesidades económicas".

[282]United States' appellant's submission, paras. 114-120.

[283]That is: (i) limitations ... expressed in terms of designated numerical units in the form of quotas; or (ii) limitations ... expressed in terms of the requirement of an economic needs test.

[284]That is: (i) limitations ... expressed in terms of designated numerical units; (ii) limitations ... expressed ... in the form of quotas; or (iii) limitations ... expressed in terms of the requirement of ... an economic needs test.

246. We find it more useful, and appropriate, to look to the language of the provision itself for its meaning. Looking at the provision generally, we see that the first clause of sub

as opposed to *suppliers* of gambling services—had not been shown to be inconsistent with the United States' market access commitments.[289]

254. In paragraphs 149 to 155 of this Report, we expressed our view that, with respect to the eight state laws reviewed by the Panel, Antigua had failed to establish a *prima facie* case of inconsistency

> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform --
>
> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
>
> (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.
>
> (b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling ... in violation of the laws of the State in which they are committed or of the United States.[297]

261. The Panel determined that "the Travel Act prohibits gambling activity that entails the supply of gambling and betting services by 'mail or any facility' to the extent that such supply is undertaken by a 'business enterprise involving gambling' that is prohibited under state law and provided that the other requirements in subparagraph (a) of the Travel Act have been met."[298] The Panel further opined that the Travel Act prohibits service suppliers from supplying gambling and betting services through the mail, (and potentially other means of delivery), as well as services operations and service output through the mail (and potentially other means of delivery), in such a way as to amount to a "zero" quota on one or several means of delivery included in mode 1.[299] For these reasons, the Panel found that "the Travel Act contains a limitation 'in the form of numerical quotas' within the meaning of Article XVI:2(a) and a limitation' in the form of a quota' within the meaning of Article XVI:2(c)."[300]

262. The Panel considered the relevant part of the Illegal Gambling Business Act to be the following:

> (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
>
> (b) As used in this section –

[297] Section 1952(a) and (b) of Title 18 of the United States Code (quoted in Panel Report, para. 6.366).

[298] Panel Report, para. 6.370. See also para. 6.367.

[299] *Ibid*., paras. 6.368-6.370.

[300] *Ibid*., para. 6.371.

(1) 'illegal gambling business' means a gambling business which –

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business;

States has inscribed "None" in the first row of the market access column for subsector 10.D. In these circumstances, and for the reasons given in this section of our Report, we also *uphold* the Panel's ultimate finding, in paragraph 7.2(b)(i) of the Panel Report, that, by maintaining the Wire Act, the Travel Act, and the Illegal Gambling Business Act, the United States acts inconsistently with its obligations under Article XVI:1 and Article XVI:2(a) and (c) of the GATS.

VII. Article XIV of the GATS: General Exceptions

266. Finally, we turn to the Panel's analysis of the United States' defence under Article XIV of the GATS. We found above that Antigua failed to make a *prima facie* case of inconsistency with Article XVI in relation to the eight state laws examined by the Panel.[304] The Panel found that no other state laws had been sufficiently identified by Antigua as part of its claims in this dispute.[305] We therefore limit our discussion to the Panel's treatment of the defence asserted by the United States with respect to the three federal laws—the Wire Act, the Travel Act, and the Illegal Gambling Business Act ("IGBA")—under Article XIV.

267. The United States and Antigua each raises multiple allegations of error with respect to the Panel's analysis under Article XIV. We begin with Antigua's claim that the Panel erred in examining the merits of the United States' defence, notwithstanding that the United States did not raise it until its second written submission to the Panel. Next, we consider the participants' allegations that the Panel erred by taking it upon itself to construct the defence or rebuttal for the other party. We then turn to the participants' claims of error in relation to the Panel's analysis under paragraphs (a) and (c) of Article XIV, and under the chapeau, or introductory paragraph, of Article XIV.

A. *Did the Panel Err in Considering the United States' Defence Under Article XIV?*

268. Antigua argues that "the Panel erred in its decision to consider the United States' defence in this proceeding at all" and thereby failed to satisfy its obligations under Article 11 of the DSU.[306] Antigua points out that the United States did not raise its defence under Article XIV of the GATS until its second written submission to the Panel, which was filed on the same day as Antigua's second written submission. Antigua submits that this delayed invocation by the United States of its defence was a "simple litigation tactic"[307], and that, because the United States did not invoke the defence at an

[304] *Supra*, paras. 149-155.

[305] Panel Report, paras. 6.211-6.249.

[306] Antigua's other appellant's submission, para. 72.

[307] *Ibid*.

earlier stage of the panel proceeding, Antigua was "deprived of a full and fair opportunity to respond to the defence."[308]

269. Article 6.2 of the DSU requires that the legal basis for a dispute, that is, the *claims*, be identified in a panel request with specificity sufficient "to present the problem clearly," so that a responding party will be aware, at the time of the establishment of a panel, of the claims raised by the complaining party to which it might seek to respond in the course of the panel proceedings. In contrast, the DSU is silent about a deadline or a method by which a responding party must state the legal basis for its defence.[309] This does not mean that a responding party may put forward its defence whenever and in whatever manner it chooses. Article 3.10 of the DSU provides that "all Members will engage in these procedures in good faith in an effort to resolve the dispute", which implies the identification by each party of relevant legal and factual issues at the earliest opportunity, so as to provide other parties, including third parties, an opportunity to respond.

270. At the same time, the opportunity afforded to a Member to respond to claims and defences made against it is also a "fundamental tenet of due process".[310] A party must not merely be given *an* opportunity to respond, but that opportunity must be meaningful in terms of that party's ability to defend itself adequately. A party that considers it was not afforded such an opportunity will often raise a due process objection before the panel.[311] The Appellate Body has recognized in numerous cases that a Member's right to raise a claim[312] or objection[313], as well as a panel's exercise of discretion[314], are circumscribed by the due process rights of other parties to a dispute. Those due process rights similarly serve to limit a responding party's right to set out its defence at *any* point during the panel proceedings.

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[308]Antigua's other appellant's submission, para. 73.

[309]The issue before us, therefore, is distinct from that addressed by the Appellate Body in *EC – Bananas III*, where a *responding party* challenged the panel's consideration of *claims* mentioned by certain complaining parties in the panel request, but not supported by any arguments until the second written submission before the panel. (Appellate Body Report, *EC – Bananas III*, paras. 145-147; see also Appellate Body Report, *Chile – Price Band System*, paras. 158-162) Here, we address a complaining party's challenge to a *defence* invoked by the responding party.

[310]Appellate Body Report, *Australia – Salmon*, para. 278. See also Appellate Body Report, *Chile – Price Band System*, para. 176.

[311]Appellate Body Report, *US – FSC*, paras. 165-166. See also Appellate Body Report, *Thailand – H-Beams*, para. 95.

[312]See, for example, Appellate Body Report, *EC – Tariff Preferences*, para. 113; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 161; and Appellate Body Report, *Thailand – H-Beams*, para. 88.

[313]Appellate Body Report, *US – Carbon Steel*, para. 123; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50; Appellate Body Report, *US – FSC*, para. 166; and Appellate Body Report, *US – 1916 Act*, para. 54.

[314]See, for example, Appellate Body Report, *US – 1916 Act*, para. 150; and Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 243.

271. Due process may be of particular concern in cases where a party raises *new facts* at a late stage of the panel proceedings. The Appellate Body has observed that, under the standard working procedures of panels[315], complaining parties should put forward their cases—with "a full presentation of the facts on the basis of submission of supporting evidence"—during the *first* stage of panel proceedings.[316] We see no reason why this expectation would not apply equally to responding parties, which, once they have received the first written submission of a complaining party, are likely to be aware of the defences they might invoke and the evidence needed to support them.

272. It follows that the principles of good faith and due process oblige a responding party to articulate its defence promptly and clearly. This will enable the complaining party to understand that a specific defence has been made, "be aware of its dimensions, and have an adequate opportunity to address and respond to it."[317] Whether a defence has been made at a sufficiently early stage of the panel proceedings to provide adequate notice to the opposing party will depend on the particular circumstances of a given dispute.

273. Furthermore, as part of their duties, under Article 11 of the DSU, to "make an objective assessment of the matter" before them, panels must ensure that the due process rights of parties to a dispute are respected.[318] A panel may act inconsistently with this duty if it addresses a defence that a responding party raised at such a late stage of the panel proceedings that the complaining party had no meaningful opportunity to respond to it. To this end, panels are endowed with "sufficient flexibility" in their working procedures, by virtue of Article 12.2 of the DSU, to regulate panel proceedings and, in particular, to adjust their timetables to allow for additional time to respond or for additional submissions where necessary.[319]

274. In the present case, the United States made no mention of Article XIV of the GATS until its second written submission, filed on 9 January 2004.[320] Antigua did not refer to Article XIV in its second written submission, filed on the same day, although Antigua had, in its first written

[315]Appendix 3 to the DSU. We note that the Panel in this dispute operated under Working Procedures, drawn up in consultation with the parties, that provided for "all factual evidence [to be submitted] to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of Tc 7.

submission, referred to the possibility that the United States might seek to invoke Article XIV.[321] Both parties discussed issues relating to Article XIV in their opening statements at the second substantive panel meeting on 26 January 2004.[322]

275. At the hearing in this appeal, Antigua acknowledged that it "had the opportunity to respond" to the United States' defence, and had "responded sufficiently", during its opening st

278. Antigua argues that the Panel acted inconsistently with its obligations under Article 11 of the DSU because it "constructed the GATS Article XIV defence on behalf of the United States."[326] First, with respect to Article XIV(a), Antigua claims that the United States identified only *two* interests relating to "public morals" or "public order", namely: (i) organized crime; and (ii) underage gambling. Antigua argues that the Panel, however, identified an additional three concerns on its own initiative: (i) money laundering[327], (ii) fraud[328], and (iii) public health.[329] Secondly, Antigua contends that the Panel erred in its analysis of the United States' defence under the chapeau of Article XIV because the United States' arguments assessed by the Panel were not taken from the United States' submissions relating to Article XIV, but rather, from the United States' response to Antigua's national treatment claim under Article XVII of the GATS.

279. In its appeal, the United States submits that it established its case that the Wire Act, the Travel Act, and the IGBA are justified under Article XIV, but that the Panel improperly constructed a rebuttal under the chapeau to that provision when Antigua itself had failed to do so. The United States alleges, in particular, that the Panel did so "by recycling evidence and argumentation that Antigua had used to allege a national treatment violation under Article XVII as if those arguments had been made in the context of the Article XIV chapeau."[330]

280. We begin our analysis by referring to the Appellate Body's view that:

> ... nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties - or to develop its own legal reasoning - to support its own findings and conclusions on the matter under its consideration.[331]

281. However, a panel enjoys such discretion only with respect to specific claims that are properly before it, for otherwise it would be considering a matter not within its jurisdiction. Moreover, when a panel rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU.[332]

282. In the context of affirmative defences, then, a responding party must invoke a defence and put forward evidence and arguments in support of its assertion that the challenged measure satisfies the

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[326]Antigua's other appellant's submission, para. 80.

[327]Panel Report, paras. 6.499-6.505.

[328]*Ibid*., paras. 6.506-6.509.

[329]*Ibid*., paras. 6.510-6.514.

[330]United States' appellant's submission, para. 188.

[331]Appellate Body Report, *EC – Hormones*, para. 156. See also Appellate Body Report, *US – Certain EC Products*, para. 123.

[332]Appellate Body Report, *Chile – Price Band System*, para. 173.

requirements of the defence. When a responding party fulfils this obligation, a panel may rule on whether the challenged measure is justified under the relevant defence, relying on arguments advanced by the parties or developing its own reasoning. The same applies to rebuttals. A panel may not take upon itself to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so.

283. Turning to the issues on appeal, we begin with the three protected interests that the Panel allegedly identified on its own in examining the United States' defence under paragraph (a) of Article XIV, namely, health concerns, and combating money laundering and fraud. In both its first and second written submissions to the Panel, the United States, in responding to one of Antigua's claims under the GATS, identified five "concerns associated with the remote supply of gambling [services]."[333] These "concerns" relate to: (1) organized crime[334]; (2) money laundering[335]; (3) fraud[336]; (4) risks to youth, including underage gambling[337]; and (5) public health.[338] When subsequently arguing that the Wire Act, the Travel Act, and the IGBA are justified under Article XIV(a), the United States explicitly referred back to the discussion, earlier in its second written submission to the Panel, of all these interests *except* for that relating to public health.[339]

284. In other words, four of the five interests mentioned by the Panel were plainly discussed or referred to by the United States as part of its defence under Article XIV(a). The fifth interest—relating to public health—was prominently identified by the United States in a previous discussion of the protected interests relating to the remote supply of gambling services and, therefore, was not an invention of the Panel.[340] In our view, the fact that this fifth interest was not *explicitly* raised *again* in the context of the United States' Article XIV arguments should not have precluded the Panel from

[333]United States' second written submission to the Panel, para. 45.

[334]United States' first written submission to the Panel, paras. 10-11; United States' second written submission to the Panel, paras. 46-49.

[335]United States' first written submission to the Panel, paras. 12-13; United States' second written submission to the Panel, para. 50.

[336]United States' first written submission to the Panel, paras. 14-15; United States' second written submission to the Panel, para. 51.

[337]United States' first written submission to the Panel, paras. 16-18; United Sta0.18.75 0 34 Tw (S (337) T0.895

considering it as part of its analysis under Article XIV(a). We therefore dismiss this ground of Antigua's appeal.

285. We turn now to the participants' arguments relating to the Panel's treatment of the burden of proof in its analysis under the chapeau of Article XIV. Antigua had advanced a claim before the Panel under Article XVII of the GATS, alleging that the United States fails to accord to Antiguan services and service suppliers, treatment no less favourable than that accorded to like domestic services and service suppliers.[341] Throughout the panel proceedings, the United States disputed this assertion, consistently arguing that United States laws on gambling make no distinction between domestic and foreign services, or between domestic and foreign service suppliers.[342] The Panel exercised judicial economy with respect to Antigua's claim under Article XVII.[343] Nevertheless, in the course of considering whether the Wire Act, the Travel Act, and the IGBA satisfy the conditions of the chapeau of Article XIV, the Panel examined arguments put by the parties in relation to Antigua's Article XVII claim.[344]

286. On appeal, both participants contest the Panel's use of such arguments. Antigua contends that the Panel's reliance on the United States' arguments on Article XVII demonstrates that the Panel constructed a defence for the United States, whereas the United States points to the Panel's reliance on Antigua's arguments on Article XVII as proof that the Panel improperly assumed Antigua's responsibility to rebut the United States' defence.

287. In arguing its Article XIV defence before the Panel, the United States asserted that its measures satisfy the requirements of the chapeau of Article XIV because they do not discriminate *at all*. In particular, the United States contended:

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[341]Antigua's first written submission to the Panel, paras. 110-111, 117-118, 122-123, 125-128, and 188; Antigua's second written submission to the Panel, para. 39; Antigua's statement at the 0 6.755a 0311 n particuat t 0 TD 412

> The restrictions in [the Wire Act, the Travel Act, and the IGBA] meet the requirements of the chapeau. None of these measures introduces any discrimination on the basis of nationality. On the contrary, *as the United States has repeatedly observed*, they apply equally

292. Article XIV of the GATS, like Article XX of the GATT 1994, contemplates a "two-tier analysis" of a measure that a Member seeks to justify under that provision.[352] A panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. This requires that the challenged measure address the particular interest specified in that paragraph and that there be a sufficient nexus between the measure and the interest protected. The required nexus—or "degree of connection"—between the measure and the interest is specified in the language of the paragraphs themselves, through the use of terms such as "relating to" and "necessary to".[353] Where the challenged measure has been found to fall within one of the paragraphs of Article XIV, a panel should then consider whether that measure satisfies the requirements of the chapeau of Article XIV.

1. Justification of the Measures Under Paragraph (a) of Article XIV

293. Paragraph (a) of Article XIV covers:

> ... measures ... necessary to protect public morals or to maintain public order. (footnote omitted)

294. In the first step of its analysis under this provision, the Panel examined whether the measures at issue—the Wire Act, the Travel Act, and the IGBA—are "designed" to protect public morals and to maintain public order.[354] As a second step, the Panel determined whether these measures are "necessary" to protect public morals or to maintain public order, within the meaning of Article XIV(a).[355] The Panel found that:

> ... the United States has not been able to provisionally justify, under Article XIV(a) of the GATS, that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) are necessary to protect public morals and/or public order within the meaning of Article XIV(a). We, nonetheless, acknowledge that such laws are designed so as to protect public morals or maintain public order.[356] (footnotes omitted)

295. Our review of this conclusion proceeds in two parts. We address first Antigua's challenge to the Panel's finding that the three federal statutes are "measures that are designed to 'protect public

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[352]Appellate Body Report, *US – Shrimp*, para. 147. See also Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20.

[353]Appellate Body Report, *US – Gasoline*, pp. 17-18, DSR 1996:I, 3, at 16.

[354]Panel Report, paras. 6.47:8

order" to include the standard in footnote 5, and then applied that definition to the facts before it to conclude that the measures "are designed to 'protect public morals' and/or 'to maintain public order'"[365], the Panel was not required, in addition, to make a separate, explicit determination that the standard of footnote 5 had been met.

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302. Each of the participants appeals different aspects of the analysis undertaken by the Panel in

> ... comprehended in the determination of whether 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".[375]

306. The process begins with an assessment of the "relative importance" of the interests or values furthered by the challenged measure.[376] Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be "weighed and balanced". The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel's determination of the "necessity" of a measure, although not necessarily exhaustive of factors that might be considered.[377] One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.

307. A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this "weighing and balancing" and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is "necessary" or, alternatively, whether another, WTO-consistent measure is "reasonably available".

313. The Panel set out, in some detail, how the United States' evidence established a specific connection between the remote supply of gambling services and each of the interests identified by the United States[382], except for organized crime.[383] In particular, the Panel found such a link in relation to money laundering[384], fraud[385], compu

the United States had not established that its measures are "necessary" and, therefore, provisionally justified under Article XIV(a).[392]

316. In its appeal of this finding, the United States argues that "[t]he Panel relied on the 'necessity' test in Article XIV as the basis for imposing a procedural requirement on the United States to consult or negotiate with Antigua before the United States may take measures to protect public morals [or] protect public order".[393] The United States submits that the requirement in Article XIV(a) that a measure be "necessary" indicates that "necessity is a property of the measure itself" and, as such, "necessity" cannot be determined by reference to the efforts undertaken by a Member to negotiate an alternative measure.[394] The United States further argues that in previous disputes, the availability of alternative measures that were "merely theoretical" did not preclude the challenged measures from being deemed to be "necessary".[395] Similarly, the United States argues, the fact that measures might theoretically be available after engaging in consultations with Antigua does not preclude the "necessity" of the three federal statutes.

317. In our view, the Panel's "necessity" analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives regarding the pr

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United States regulatory measures.[397] Antigua also alleges that the Panel erred by examining only those measures that had been explicitly identified by Antigua even though "Antigua was never given the opportunity to properly rebut the Article XIV defence."[398]

320. We observe, first, that the Panel did not state that it was limiting its search for alternatives in the manner alleged by Antigua. Secondly, although the Panel *began* its analysis of alternative measures by considering whether the United States already employs measures less restrictive than a prohibition to achieve the same objectives as the three federal statutes[399], its inquiry did not end there. The Panel obviously did consider alternatives *not* currently in place in the United States, as evidenced by its (ultimately erroneous) emphasis on the United States' alleged failure to pursue consultations with Antigua.[400] Finally, we do not see why the Panel should have been expected to continue its analysis into additional alternative measures, which Antigua itself failed to identify. As we said above[401], it is not for the responding party to identify the universe of alternative measures against which its own measure should be compared. It is only if such an alternative is raised that this comparison is required.[402] We therefore dismiss this aspect of Antigua's appeal.

321. In our analysis above, we found that the Panel erred in assessing the necessity of the three United States statutes against the possibility of consultations with Antigua because such consultations, in our view, cannot qualify as a reasonably available alternative measure with which a challenged measure should be compared.[403] For this reason, we *reverse* the Panel's finding, in paragraph 6.535 of the Panel Report, that, because the United States did not enter into consultations with Antigua:

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[397] Antigua's other appellant's submission, para. 103.

[398] *Ibid*., para. 104.

[399] See Panel Report, paras. 6.497-6.498. This type of approach was expressly encouraged by the Appellate Body in *Korea*

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elements upon which the United States based its assertion that the three federal statutes are "indispensable".[413]

324. The Panel further, and in our view, tellingly, stated that

> ... the United States has legitimate specific concerns with respect to money laundering, fraud, health and underage gambling that are specific to the remote supply of gambling and betting services, *which suggests that the measures in question are "necessary" within the meaning of Article XIV(a)*.[414] (emphasis added)

325. From all of the above, and in particular from the summary of its analysis made in paragraphs 6.533 and 6.534 of the Panel Report, we understand the Panel to have acknowledged that, *but for* the United States' alleged refusal to accept Antigua's invitation to negotiate, the Panel would have found that the United States had made its *prima facie* case that the Wire Act, the Travel Act, and the IGBA are "necessary", within the meaning of Article XIV(a). We thus agree with the United States that the "sole basis" for the Panel's conclusion to the contrary was its finding relating to the requirement of consultations with Antigua.[415]

326. Turning to the Panel's analysis of alternative measures, we observe that the Panel dismissed, as irrelevant to its analysis, measures that did not take account of the specific concerns associated with *remote* gambling.[416] We found above that the Panel erred in finding that consultations with Antigua constitutes a measure reasonably available to the United States.[417] Antigua raised no other measure that, in the view of the Panel, could be considered an alternative to the prohibitions on remote gambling contained in the Wire Act, the Travel Act, and the IGBA. In our opinion, therefore, the record before us reveals no reasonably available alternative measure proposed by Antigua or examined by the Panel that would establish that the three federal statutes are not "necessary" within the meaning of Article XIV(a). Because the United States made its *prima facie* case of "necessity", and Antigua failed to identify a reasonably available alternative measure, we conclude that the United States demonstrated that its statutes are "necessary", and therefore justified, under paragraph (a) of Article XIV.

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[413]Panel Report, para. 6.534.

[414]*Ibid*., para. 6.533.

[415]United States' appellant's submission, para. 137.

[416]Panel Report, paras. 6.497-6.498.

[417]*Supra*, para. 317.

327. For all these reasons, we *find* that the Wire Act, the Travel Act, and the IGBA are "measures ... necessary to protect public morals or to maintain public order", within the meaning of paragraph (a) of Article XIV of the GATS.[418]

(c) Allegations of Error Under Article 11 of the DSU

328. Antigua and the United States also challenge several aspects of the Panel's analysis under Article XIV(a) as inconsistent with a panel's duty, pursuant to Article 11 of the DSU, to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case".

329. In several instances, Antigua claims that the Panel failed to comply with Article 11 of the DSU because the Panel relied solely or primarily on evidence submitted by the United States, including statements of United States officials and the United States Congress, without taking into consideration contrary evidence submitted by Antigua.[419] Antigua's arguments in this respect rely on the fact that the Panel did not discuss or mention certain pieces of evidence submitted by Antigua. Although Antigua alleges an "*unobjective* assessment of Antiguan evidence"[420], it provides no examples or arguments in support of this assertion to establish that the Panel somehow exceeded its discretion.

330. As the Appellate Body has pointed out on several occasions:

> Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.[421]

As a result, unless a panel "has exceeded the bounds of its discretion ... in its appreciation of the evidence"[422], the Appellate Body will not interfere with the findings of the panel.[423]

331. Antigua's arguments on this issue appear to us to amount to mere disagreement with the Panel's exercise of discretion in selecting which evidence to rely on when making its findings. This is

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[418]We address in the next sub-section of this Report the appeals raised by Antigua and the United States under Article 11 of the DSU, with respect to the Panel's analysis under Article XIV(a) of the GATS, and find them to be either without merit or not necessary to rule on in order to resolve this dispute.

[419]Antigua's other appellant's submission, paras. 107-110 and 113-118.

[420]*Ibid*., para. 113. (emphasis added)

[421]Appellate Body Report, *EC – Hormones*, para. 132.

[422]Appellate Body Report, *US – Wheat Gluten*, para. 151. See also Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 181.

[423]Appellate Body Report, *Japan – Apples*, para. 221 (referring in footnote to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 170, and Appellate Body Report, *US – Carbon Steel*, para. 142).

not a basis on which we may conclude, on appeal, that the Panel failed to make an "objective assessment of the facts of the case".

332. Antigua additionally contends that the Panel acted inconsistently with Article 11 of the DSU because it undertook no assessment of factual evidence relating specifically to *Antiguan* gambling

2. Justification of the Measures Under Paragraph (c) of Article XIV

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable

(a) Did the Panel Err in Making Findings Under the Chapeau of Article XIV?

342. In deciding whether to assess whether measures satisfy the requirements

(b) Did the Panel Improperly "Segment" the Gambling and Betting Industry in its Analysis?

346. In examining whether discrimination exists in the United States' application of the Wire Act, the Travel Act, and the IGBA, the Panel found that "some of the concerns the United States has identified are specific only to the remote supply of gambling and betting services."[435] As a result, the Panel determined that it would have been "inappropriate", in the context of determining whether WTO-consistent alternative measures are reasonably available, to compare the United States' treatment of concerns relating to the *remote* supply of gambling services, with its treatment of concerns relating to the *non*-remote supply of such services. Antigua characterizes this approach as an improper "segment[ation]" of the gambling industry, the result of which was to "exclude[] a substantial portion of gambling and betting services from any analysis at all."[436]

347. We have already observed that the Panel found, on the basis of evidence adduced by the United States, that the *remote* supply of gambling services gives rise to particular concerns.[437] We see no error in the Panel's maintaining such a distinction for purposes of analyzing any discrimination in the application of the three federal statutes. Such an approach merely reflects the view that the distinctive characteristics of the remote supply of gambling services may call for distinctive regulatory methods, and that this could render a comparison between the treatment of remote and non-remote supply of gambling services inappropriate.

(c) Did the Panel Fail to Take Account of the "Arbitrary" or "Unjustifiable" Nature of the Discrimination Referred to in the Chapeau?

348. We consider next whether, contrary to the United States' allegations, the Panel accurately described and applied the correct interpretation of the chapeau of Article XIV. On the basis of the arguments advanced by Antigua, the Panel examined certain instances of alleged discrimination in the application of the Wire Act, the Travel Act, and the IGBA.[438] In the course of this analysis, the Panel found that the United States had not prosecuted certain domestic remote suppliers of gambling services[439], and that a United States statute (the Interstate Horseracing Act) could be understood, on its

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face, to permit certain types of remote betting on horseracing within the United States.[440] On the basis of these two findings, the Panel concluded that:

> ... the United States has not demonstrated that it applies its prohibition on the remote supply of these services in a *consistent manner* as between those supplied domestically and those that are supplied from other Members. Accordingly, we believe that the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.[441] (emphasis added)

349. The United States contends that the Panel's reasoning, in particular its standard of "consistency", reveals that the Panel, in fact, assessed only whether the United States treats domestic service suppliers differently from foreign service suppliers. Such an assessment is inadequate, the United States argues, because the chapeau also requires a determination of whether differential treatment, or discrimination, is "arbitrary" or "unjustifiable".

350. The United States based its defence under the chapeau of Article XIV on the assertion that the measures at issue prohibit the remote supply of gambling and betting services by *any supplier*, whether domestic or foreign. In other words, the United States sought to justify the Wire Act, the a determw (cons

chapeau of Article XIV as one of "consistency".[443] Rather, the Panel determined that Antigua had rebutted the United States' claim of no discrimination *at all* by showing that domestic service suppliers are permitted to provide remote gambling services in situations where foreign service suppliers are not so permitted.

gambling services.[452] We therefore *reverse* the Panel's finding, in paragraph 6.589 of the Panel Report, that

> ... the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau.

(e) Did the Panel Fail to Comply with Article 11 of the DSU in its Analysis of Video Lottery Terminals, Nevada Bookmakers, and the Interstate Horseracing Act?

358. The United States and Antigua each alleges that the Panel did not comply with its obligations under Article 11 of the DSU in its analysis under the chapeau of Article XIV. We examine first Antigua's appeal relating to video lottery terminals and Nevada bookmakers, and then consider the United States' appeal concerning the Interstate Horseracing Act.

359. The Panel examined Antigua's allegations that several states in the United States permit video lottery terminals[453], and that Nevada permits bookmakers to offer their services over the internet and telephone.[454] The Panel rejected both of these allegations. Antigua contends that the Panel made these findings notwithstanding that Antigua had submitted evidence and the United States had submitted none, and that, by so finding, the Panel effectively "reversed" the burden of proof.[455]

360. Antigua is correct that the burden of proof is on the United States, as the responding party invoking the Article XIV defence. Once the United States established its defence with sufficient evidence and arguments, however, it was for Antigua to rebut the United States' defence.[456] In rejecting Antigua's allegations relating to video lottery terminals and Nevada bookmakers, we understand the Panel to have determined that Antigua failed to rebut the United States' asserted

361. We now turn to the United States' Article 11 claim relating to the chapeau. The Panel examined the scope of application of the Interstate Horseracing Act ("IHA").[457] Before the Panel, Antigua relied on the text of the IHA, which provides that "[a]n interstate off-track wager *may be accepted* by an off-track betting system" where consent is obtained from certain organizations.[458] Antigua referred the Panel in particular to the definition given in the statute of "interstate off-track wager":

> [T]he term ... 'interstate off-track wager' means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes 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.[459] (emphasis added)

Thus, according to Antigua, the IHA, on its face, authorizes *domestic* service suppliers, but not *foreign* service suppliers, to offer remote betting services in relation to certain horse races.[460] To this extent, in Antigua's view, the IHA "exempts"[461] domestic service suppliers from the prohibitions of the Wire Act, the Travel Act, and the IGBA.[462]

362. The United States disagreed, claiming that the IHA—a civil statute—cannot "repeal"[463] the Wire Act, the Travel Act, or the IGBA—which are criminal statutes—*by implication*, that is, merely

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[457]We understand the Panel to have predicated its examination of the IHA on its view that the services under the IHA include services subject to the specific commitment undertaken by the United States in subsector 10.D of its Schedule.

[458]Section 3004 of Title 15 of the United States Code, Exhibit AB-82 submitted by Antigua to the Panel. (emphasis added)

[459]Section 3002 of Title 15 of the United States Code, Exhibit AB-82 submitted by Antigua to the Panel.

[460]Antigua submitted additional evidence in support of its reading of the IHA. See, for example, Panel Report, footnote 1061 to para. 6.599 and footnote 1062 to para. 6.600 (citing, *inter alia*, Congressional Record, House of Representatives Proceedings and Debates of the 106th Congress, Second Session (26 October 2000) 146 Cong. Rec. H 11230, 106th Cong. 2nd Sess. (2000), Exhibit AB-124 submitted by Antigua to the Panel); and United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (December 2002), Appendix II, Exhibit AB-17 submitted by Antigua to the Panel.

[461]Panel Report, para. 6.595 (quoting Antigua's statement at the first substantive panel meeting, para. 92).

[462]The Wire Act, the Travel Act, and the IGBA prohibit a broad range of gambling and betting activities when they involve foreign or interstate commerce. (Panel Report, paras. 6.362, 6.367, and 6.375)

[463]Panel Report, para. 6.597 (quoting United States' response to Question 21 posed by the Panel, Panel Report, p. C-50).

by virtue of the IHA's adoption *subsequent* to that of the Wire Act, the Travel Act, and the IGBA.[464] Rather, under principles of statutory interpretation in the United States, such a repeal could be effective only if done *explicitly*, which was not the case with the IHA.[465]

363. Thus, the Panel had before it conflicting evidence as to the relationship between the IHA, on the one hand, and the measures at issue, on the other. We have already referred to the discretion accorded to panels, as fact-finders, in the assessment of the evidence.[466] As the Appellate Body has observed on previous occasions, "not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts."[467]

364. In our view, this aspect of the United States' appeal essentially challenges the Panel's failure to accord sufficient weight to the evidence submitted by the United States with respect to the relationship under United States lawu3 wej 14alS 0656 T 1.8441 d sufficient weight to the evid/ TD -0.0236 T

of Article XIV[469], we *need not rule* on the United States' additional ground of appeal, namely that, in arriving at this finding, the Panel acted inconsistently with its duty under Article 11 of the DSU.

366. In sum, we *find* that none of the challenges under Article 11 of the DSU relating to the chapeau of Article XIV of the GATS has succeeded.

(f) Conclusion under the Chapeau

367. In paragraph 6.607 of the Panel Report, the Panel expressed its overall conclusion under the chapeau of Article XIV as follows:

> ... the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.

368. This conclusion rested on the Panel's findings relating to two instances allegedly revealing that the measures at issue discriminate between domestic and foreign service suppliers, contrary to the defence asserted by the United States under the chapeau. The first instance found by the Panel was based on "inconclusive" evidence of the alleged non-enforcement of the three federal statutes.[470] We have reversed this finding.[471] The second instance found by the Panel was based on "the ambiguity relating to" the scope of application of the IHA and its relationship to the measures at issue.[472] We have upheld this finding.[473]

369. Thus, *our* conclusion—that the Panel did not err in finding that the United States has not shown that its measures satisfy the requirements of the chapeau—relates solely to the possibility that the IHA exempts only *domestic* suppliers of remote betting services for horse racing from the prohibitions in the Wire Act, the Travel Act, and the IGBA. In contrast, the *Panel's* overall conclusion under the chapeau was broader in scope. As a result of our reversal of one of the two findings on which the Panel relied for its conclusion in paragraph 6.607 of the Panel Report, we must *modify* that conclusion. We *find*, rather, that the United States has not demonstrated that—in the

[469] *Supra*, para. 357.

[470] Panel Report, paras. 6.589 and 6.607.

[471] *Supra*, para. 357.

[472] Panel Report, para. 6.607.

[473] *Supra*, paras. 364 and 366.

light of the existence of the IHA—the Wire Act, the Travel Act, and the IGBA are applied consistently with the requirements of the chapeau. Put another way, we uphold the Panel, but only in part.

4. Overall Conclusion on Article XIV

370. Our findings under Article XIV lead us to modify the overall conclusions of the Panel in paragraph 7.2(d) of the Panel Report.[474] The Panel found that the United States failed to justify its measures as "necessary" under paragraph (a) of Article XIV, and that it also failed to establish that those measures satisfy the requirements of the chapeau.

371. We have found instead that those measures satisfy the "necessity" requirement. We have also upheld, but only in part, the Panel's finding under the chapeau. We explained that the only inconsistency that the Panel could have found with the requirements of the chapeau stems from the fact that the United States did not demonstrate that the prohibition embodied in the measures at issue applies to both foreign *and* domestic suppliers of remote gambling services, notwithstanding the IHA—which, according to the Panel, "does appear, on its face, to permit"[475] *domestic* service suppliers to supply remote betting services for horse racing. In other words, the United States did not establish that the IHA does not alter the scope of application of the challenged measures, particularly vis-à-vis domestic suppliers of a specific type of remote gambling services. In this respect, we wish to clarify that the Panel did not, and we do not, make a finding as to whether the IHA does, in fact, permit domestic suppliers to provide certain remote betting services that would otherwise be prohibited by the Wire Act, the Travel Act, and/or the IGBA.

372. Therefore, we *modify* the Panel's conclusion in paragraph 7.2(d) of the Panel Report. We *find*, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the IGBA fall within the scope of paragraph (a) of Article XIV, but that it has not shown, in the light of the IHA, that the prohibitions embodied in these measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing. For this reason alone, we *find* that the United States has not established that these measures satisfy the requirements of the chapeau. Here, too, we uphold the Panel, but only in part.

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[474]See also Panel Report, para. 6.608.

[475]*Ibid*., para. 6.599.

VIII. Findings and Conclusions

373. For the reasons set out in this Report, the Appellate Body:

(A) with respect to the measures at issue,

(i) *upholds* the Panel's finding, in paragraph 6.175 of the Panel Report, that "the alleged 'total prohibition' on the cross-border supply of gambling and betting services ... cannot constitute a single and autonomous 'measure' that can be challenged in and of itself";

(ii) *finds* that the Panel *did not err* in examining whether the following three federal laws are consistent with the United States' obligations under Article XVI of the GATS:

(a) Section 1084 of Title 18 of the United States Code (the "Wire Act");

(b) Section 1952 of Title 18 of the United States Code (the "Travel Act"); and

(c) Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act");

(iii) *finds* that the Panel *erred* in examining whether eight state laws, namely, those of Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota and Utah, are consistent with the United States' obligations under Article XVI of the GATS;

(B) with respect to the United States' GATS Schedule,

(i) *upholds*, albeit for different reasons, the Panel's finding that subsector 10.D of the United States' Schedule to the GATS includes specific commitments on gambling and betting services;

(C) with respect to Article XVI of the GATS,

(i) *upholds* the Panel's findings that a prohibition on the remote supply of gambling and betting services is a "limitation on the number of service suppliers" within the meaning of Article XVI:2(a), and that such a prohibition is also a "limitation on the total number of service operations or on the total quantity of service output" within the meaning of Article XVI:2(c);

(b) *reverses* the Panel's finding that, because the United States did not enter into consultations with Antigua, the United States was not able to justify the Wire Act, the Travel Act and the Illegal Gambling Business Act as "necessary" to protect public morals or to maintain public order;

(c) *finds* that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are "measures ... necessary to protect public morals or to maintain public order"; and

(d) *finds* that the Panel *did not fail* to "make an objective assessment of the facts of the case", as required by Article 11 of the DSU;

(iv) as regards paragraph (c) of Article XIV,

(a) *reverses* the Panel's finding that, because the United States did not enter into consultations with Antigua, the United States was not able to justify the Wire Act, the Travel Act and the Illegal Gambling Business Act as "necessary" to secure compliance with the Racketeer Influenced and Corrupt Organizations statute; and

(b) *need not determine* whether the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures justified under paragraph (c) of Article XIV;

(v) as regards the chapeau of Article XIV,

(a) *reverses* the Panel's finding, in paragraph 6.589 of the Panel Report, that "the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau";

(b) *finds* that the Panel *did not fail* to "make an objective assessment of the facts of the case", as required by Article 11 of the DSU; and

(c) *modifies* the Panel's conclusion in paragraph 6.607 of the Panel Report and *finds*, rather, that the United States has not demonstrated that—in the light of the existence of the Interstate Horseracing Act—

the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the chapeau;

(vi) as regards Article XIV in its entirety,

(a) *modifies* the Panel's conclusion in paragraph 7.2(d) of the Panel Report and *finds*

Signed in the original in Geneva this 23rd day of March 2005 by:

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Giorgio Sacerdoti
Presiding Member

_____ _____

Georges Abi-Saab
Member

John Lockhart
Member

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the U.S. schedule to the GATS includes specific commitments on gambling and betting services under subsector 10.D, "other recreational services (except sporting)." This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations with respect to the provisions of the U.S. schedule to the GATS. These errors are contained in, *inter alia*, paragraphs 6.49-6.138, 6.356, 6.527, and 7.2-7.4 of the Panel Report.

3. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the United States fails to accord services and service suppliers of Antigua treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in the U.S. schedule, contrary to Article XVI:1 and Article XVI:2 of the GATS. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations with respect to Article XVI of the GATS. These erroneous findings include, for example, the following:

(a) The Panel's findings that any limitation that has the *effect* of limiting the number of

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ANNEX II

WORLD TRADE ORGANIZATION

WT/DS285/7
16 February 2005

(05-0613)

Original: English

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

Notification of Other Appeal by Antigua and Barbuda
under Article 16.4 and Article 17 of DSU, and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 19 January 2005, from the Delegation of Antigua and Barbuda, is being circulated to Members.

Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, Antigua and Barbuda ("Antigua") hereby notifies the Dispute Settlement Body (the "DSB") of the World Trade Organisation (the "WTO") of its decision to appeal to the Appellate Body as an Other Appellant certain issues of law covered in the Report of the Panel in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/R) (the "Final Report").

1. Antigua seeks review of the Panel's legal conclusion that Antigua was not entitled to rely on what was referred to in the Final Report as the "total prohibition" as a "measure" under Article XXVIII(a) of the General Agreement on Trade in Services (the "GATS") and Article 6.2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[8] The Panel erred when it concluded that Antigua had not identified the "total prohibition" in its Panel request. In making this finding, the Panel misinterpreted Antigua's Panel request and incorrectly interpreted and applied DSU Article 6.2 and GATS Articles I:1, I:3(a), XXIII and XVIII(a).

2. Antigua seeks review of the Panel's legal conclusion that, even if Antigua had identified the "total prohibition" as a "measure" in its Panel request, Antigua was not entitled to rely upon the "total prohibition" as a measure.[9] In coming to this conclusion, the Panel developed and applied a three-part test that is both unsupported by and inconsistent with DSU Article 6.2 and GATS Articles I:1, I:3(a) and XXVIII(a). The Panel also erred by failing to objectively assess and ascribe any significance to the United States' admission that it maintained a "total prohibition" on the cross-border provision of gambling and betting services, contrary to DSU Article 11.

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[8] *See* Final Report, paras. 6.171, 6.169, 6.170 and 6.177. *See also id.*, paras. 6.156 and 6.157.

[9] *See id.*, paras. 6.171, 6.175–6.185. *See also id.*, para. 197.

3. In the event the Appellate Body were find in favour of the United States in the review sought by the United States pursuant to the third numbered paragraph of the United States' Notice of Appeal dated 7 January 2005 and reverse the conclusion of the Panel in paragraph 7.2(b) of the Final Report, Antigua seeks review of the Panel's legal conclusion that GATS Article XVI:1 is limited by GATS Article XVI:2.[10] In making this determination, the Panel adopted a legally incorrect interpretation of GATS Article XVI.

4. Antigua seeks review of the Panel's legal conclusion that measures that prohibit consumers from using the gambling services offered by Antiguan operators through cross-border supply do not violate GATS Articles XVI:2(a) and XVI:2(c).[11] In making this determination, the Panel adopted a legally incorrect interpretation of GATS Articles XVI:2(a) and XVI:2(c).

5. Antigua seeks review of the Panel's decision to consider the claimed defence of the United States under GATS Article XIV, which was affirmatively raised by the United States only at the last session of the second substantive meeting of the Panel with the parties–too late in the proceeding to allow for a fair opportunity by Antigua to rebut the defence and for proper assessment and adjudication of the claim by the Panel.[12] Additionally, the Panel in essence constructed and completed the GATS Article XIV on behalf of the United States, thus relieving the United States of its burden of proof. The consideration by the Panel of the Article XIV defence submitted by the United States at such a late date in the proceeding, as well as the construction and completion of such defence by the Panel on behalf of the United States, is contrary to the requirements of due process, the principle of equality of arms and the terms of DSU Articles 3.10 and 11.

6. In the event the Appellate Body determines that the United States' GATS Article XIV defence was properly before the Panel, Antigua seeks review of the Panel's application and assessment of GATS Article XIV(a) to the defence, which was erroneous in a number of respects,[13] including without limitation (i) failure to properly consider the text of GATS Article XIV; (ii) improper analysis and application of the test developed by the Appellate Body in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R ("*Korea – Beef*"); and (iii) failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

These errors are illustrated, for example, by:

(A) The failure of the Panel to take into consideration footnote 5 of GATS Article XIV(a), which was mentioned in paragraphs 6.467 and 6.468 of the Final Report, but never applied to the facts of the case nor mentioned again in the Final Report.

(B) The Panel giving total deference to the findings of United States authorities in making its assessment of (i) whether the applicable measures are measures designed to protect public morals or to maintain public order and (ii) the "necessary" test set out in *Korea – Beef*, and in each case not examining the actual facts before it in making the assessments. With respect to (i), in its assessment of the point, contained in paragraphs 6.479 through 6.487 of the Final Report, the Panel cites no evidence to support its conclusions other than findings or statements of the United States or its authorities. With respect to (ii), *first*, in its assessment of the "importance of the interests or values that the measures were designed to protect" aspect of the *Korea – Beef* test, contained in paragraphs 6.489 through 6.492 of the Final Report, the Panel cites no evidence to support its conclusions other than findings or statements of the United States or its authorities and *second*, in its

[10] *See id*., paras. 6.298, 6.299 and 6.318.

[11] *See id*., paras. 6.382, 6.383, 6.397, 6.398, 6.401, 6.402, 6.405 and 6.406.

[12] *See id*., paras. 6.444, 6.583 and 6.584.

[13] *See id*., paras. 6.467–6.469, 6.474. 6.479–6.521, 6.533 and 6.535.

apparent differentiation of "remote" gambling services from "non-remote" gambling services, contained in paragraphs 6.498 through 6.521 of the Final Report, substantially all of the evidence cited by the Panel in support of its conclusions are findings or statements of the United States or its authorities[14] and a number of the findings are not supported by any evidence at all.

(C) The Panel, in its assessment of the "necessary" test set out in *Korea – Beef*, reaching its conclusions regarding the "importance of the interests or values" and the differentiation of "remote" gambling services based solely upon apparent "concerns" of the United States without requiring evidence–and without making any finding–that the "concerns" were justified under the circumstances of this case. The United States submitted *no* evidence associated with Antiguan[15] cross-border supply of gambling and betting services of, *inter alia* (i) money laundering; (ii) fraud; (iii) health concerns; (iv) underage gambling; or (v) organised crime (collectively, the "Five Concerns").

(D) The failure of the Panel to make an objective assessment of the extent to which the measures at issue actually contributed to the ends ostensibly pursued by the measures. In paragraph 6.494 of the Final Report, the Panel dismissed this prong of the *Korea – Beef* test by concluding that because the United States measures prohibited the cross-border supply of gambling services, the measures "must contribute, at least to some extent, to addressing those concerns." However, the Panel failed to make any factual inquiry at all as to whether the measures actually contribute to addressing the Five Concerns.

(E) The Panel ignoring or misapplying factual evidence presented by Antigua. Antigua submitted substantial third-party evidence regarding the existence of the Five Concerns in the United States domestic gambling market, regulatory schemes and other contexts in which goods or services are provided on a cross-border or Internet-delivered basis.[16] Very little of this evidence was taken into consideration by the Panel. The Panel erred by failing to consider this evidence (i) in the context of determining exactly how material the "concerns" of the United States are regarding problems associated with the Five Concerns; (ii) to assess the United States' tolerance of problems associated with the Five Concerns in its regulated domestic industry; (iii) to determine whether any basis exists for the differentiation of "remote" gambling services from "non-remote" gambling services in respect of the Five Concerns; (v) whether reasonable alternatives to prohibition were available to the United States; or (vi) in contrast to the complete lack of similar evidence adduced by the United States in the context of the provision of cross-border gambling services.

7. In the event the Appellate Body determines that the United States' GATS Article XIV defence was properly before the Panel, and further in the event the Appellate Body upholds the "three-part" measure identification test developed by the Panel in paragraphs 6.215 through 6.249 of the Final Report, Antigua seeks review of the Panel's finding that the United States had sufficiently identified the United States' "RICO" statute[17] for consideration under GATS Article XIV(c).[18] The Panel's finding is not supported by analysis under the "three-part" test, is not supported by any evidence and is contrary to DSU Article 11.

[14]The only other evidence considered by the Panel in this discussion is an out-of-context reference to some language in a report prepared for Antigua by certain experts (Final Report, para. 6.513) and extracts from [illegible] the Panelates'

8. In the event the Appellate Body determines that the United States' GATS Article XIV defence was properly before the Panel, Antigua seeks review of the Panel's application and assessment of GATS Article XIV(c) to the defence, which was legally erroneous in a number of respects,[19] including without limitation (i) in assessing the RICO statute, the Panel failed to properly apply GATS Article XIV(c) as the Panel had already determined that the state statutes upon which the RICO statute itself relies were not properly before the Panel;[20] (ii) in assessing the RICO statute, the Panel failed to properly apply GATS Article XIV(c) as the Panel had already determined that with respect to the one "concern" addressed by the RICO statute, organised crime, the United States had not been able to demonstrate it was a specific concern related to "remote" gambling;[21] (iii) in application of the "necessary" test under *Korea – Beef*, the Panel failed to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

(A) In the discussion regarding video lottery terminals in paragraphs 6.590 through 6.594 of the Final Report, the Panel (i) made a conclusion regarding "identification and age verification" in connection with purchases at video lottery terminals that is not supported by any evidence; (ii) ignored significant Antiguan evidence to the contrary; and (iii) shifted the burden of proof to Antigua to "refute" the unproven claim of the United States as to "identification and age verification."

(B) In the discussion regarding Nevada bookmakers in paragraphs 6.601 through 6.603 of the Final Report, the Panel (i) made a conclusion regarding the provision of gambling and betting services through the Internet in Nevada that is not supported by any evidence; (ii) ignored Antiguan evidence to the contrary; and (iii) shifted the burden of proof to Antigua to refute the unproven claim of the United States that Nevada bookmakers do not provide services via the Internet.

(C) The discussion regarding the letters from a state lottery association is without any context at all.

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ANNEX II(a)

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ANNEX III

GENERAL AGREEMENT

ON TRADE IN SERVICES

GATS/SC/90
15 April 1994
(94-1088)

THE UNITED STATES OF AMERICA

Schedule of Specific Commitments

(This is authentic in English only)

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THE UNITED STATES OF AMERICA - SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

...

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
II. SECTOR-SPECIFIC COMMITMENTS ...			
10. RECREATIONAL, CULTURAL, & SPORTING SERVICES			
A. ENTERTAINMENT SERVICES (INCLUDING THEATRE, LIVE BANDS AND CIRCUS SERVICES)	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None	
B. NEWS AGENCY SERVICES	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None	
C. LIBRARIES, ARCHIVES, MUSEUMS AND OTHER CULTURAL SERVICES	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None	
D. OTHER RECREATIONAL SERVICES (except sporting)	1) None 2) None 3) The number of concessions available for commercial operations in federal, state and local facilities is limited 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None	