ANNEX A

Working Procedures for the Panel in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*

1. The Panel will provide the parties with a timetable for panel proceedings and will work according to the normal working procedures as set out in the DSU and its Appendix 3 plus certain additional procedures, as follows:

2. The Panel shall meet in closed session. The parties to the dispute, and the third parties, shall be present at the meetings only when invited by the Panel to appear before it.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. As provided in Article 18.2 of the DSU, where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the Panel shall ask the party which has brought the complaint to present its case. Subsequently, at the same meeting, the party against which the complaint has been brought shall be asked to present its points of view.

6. The third parties shall be invited in writing to present their views during a session of the first substantive meeting of the Panel set aside for that purpose. The third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the Panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the Panel.

8. The Panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing. Written replies to questions shall be submitted at a date to be decided by the Panel in consultation with the parties.

9. The third pa -0.165/2m lNf59.5 TeTw ( ) Tj -251di

response to such a request prior to the first substantive meeting of the Panel. The complaining party shall submit this response at a time to be determined by the Panel after receipt and in light of the respondent's request. Exceptions to this procedure will be granted upon a showing of good cause.

12. Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals or answers to questions. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate.

13. To facilitate the maintenance of the record of the dispute, and for ease of reference to exhibits submitted by the parties, parties are requested to number their exhibits sequentially throughout the stages of the dispute.

14. The parties and third parties shall provide the Panel with an executive summary of the facts and arguments as presented to the Panel in their written submissions and oral presentations within one week following the delivery to the Panel of the written version of the relevant submission. The executive summaries of the written submissions to be provided by each party should not exceed 10 pages in length and the executive summaries of the oral presentations should not exceed 5 pages in length each. The summary to be provided by each third party shall summarize their written submission and oral presentation, and should not exceed 5 pages in length. The executive summaries shall not in any way serve as a substitute for the submissions of the parties in the Panel's examination of the case. However, the Panel may reproduce the executive summaries provided by the parties and third parties in the arguments section of its report, subject to any modifications deemed appropriate by the Panel. The parties' and third parties' replies to questions, and the parties' comments on each other's replies to questions will be attached to the Panel report as annexes.

15. The parties and third parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include, as representatives of the government concerned, private counsel and advisers. In this regard, it is noted that the complainant has undertaken to ensure as far as possible that a government official be present at all meetings with the Panel. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings. In particular, private lawyers acting on behalf of the complainant are bound by the same obligations and responsibilities as WTO Members. Parties shall provide a list of the participants of their delegation before or at the beginning of the meeting with the Panel.

16. Following issuance of the interim report, the parties shall have no less than 10 days to submit written requests to review precise aspects of the interim report and to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at the time the written request for review is submitted. Following receipt of any written requests for review, in cases where no further meeting with the Panel is requested, the parties shall have the opportunity within a time-period to be specified by the Panel to submit written comments on the other parties' written requests for review. Such comments shall be strictly limited to commenting the other parties' written requests for review.

17. The following procedures regarding service of documents apply:

(a) Each party and third party shall serve its submissions directly on all other parties, including where appropriate the third parties, and confirm that it has done so at the time it provides its submission to the Panel.

(b) The parties and the third parties should provide their written submissions and written answers to questions by 5:30 p.m. on the deadlines established by the Panel,

unless a different time is set by the Panel. In this regard, the parties have agreed that they will exchange written submissions and written answers to questions, including all exhibits, electronically, in word processing format (Word or WordPerfect). Where necessary (for example, due to the nature and/or size of the document in question), exhibits may be submitted in .pdf format or by fax. In cases where the size of the exhibits is so large as to render it impracticable to send the documents in .pdf format or by fax by the stipulated deadlines, hard copies shall be sent by courier for receipt the day after the due date. Hard copies of all submissions and answers will be sent by courier within 24 hours of the deadlines. These procedures apply to the submission of documents to the Panel, to the other party and to third parties.

(c) Parties and third parties shall provide the Secretariat with copies of their oral submissions by noon of the first working day following the last day of the substantive meetings.

(d) The parties and third parties shall provide the Panel with 9 copies of all their submissions, including the written versions of oral statements and answers to questions. All these copies shall be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (office number 3154).

(e) At the time they provide a hard copy of their submissions, the parties and third parties shall also provide the Panel with an electronic copy of all their submissions on a diskette or as an e-mail attachment in a format compatible with the Secretariat's software. E-mail attachments shall be sent to the Dispute Settlement Registry (DSRegistry@wto.org) with a copy to Ms Mireille Cossy (e-mail: mireille.cossy@wto.org).

(f) Each party shall serve executive summaries mentioned in paragraph 14 directly on the other party and confirm that it has done so at the time it provides its submission to the Panel. Each third party shall serve executive summaries mentioned in paragraph 14 directly on the parties and confirm that it has done so at the time it provides its submission to the Panel. Subparagraphs (d) and (e) above shall be applied to the service of executive summaries.

ANNEX B

REQUEST FOR PRELIMINARY RULINGS

A. DECISION OF THE PANEL[*]

1. This communication from the Panel is in response to the United States request for preliminary rulings in respect of Antigua and Barbuda's request for establishment of a panel[1] and issues relevant to that request in Antigua and Barbuda's first written submission.[2] The request was received on Friday night, 17 October 2003.

2. On 20 October 2003, the Panel invited Antigua and Barbuda and the third parties to comment on the US request. Antigua and Barbuda submitted its response on 23 October 2003, the European Communities and Japan on 24 October 2003. Chinese Taipei, Mexico and Canada informed the Panel that they would not submit any comments to the US request for preliminary rulings.

1. Procedural background

3. On 13 March 2003, Antigua and Barbuda requested consultations with the United States regarding measures applied by central, regional and local authorities in the United States that (allegedly) affect the cross-border supply of gambling and betting services. In an Annex to its original request for consultations[3], Antigua and Barbuda identified a number of documents as "measures", indicating that 'these measures and their application may constitute an infringement of the obligations of the United States under GATS".

4. Sections I and II of the Annex to the request for consultations contain a list of federal and state statutory measures. Section III lists other documents, categorised by Antigua and Barbuda in its Annex as "Other United States and State actions or measures." These documents include case law, Attorney Generals' opinions, press releases and pages from Internet websites.

5. With respect to the items identified in the Annex, Antigua and Barbuda claimed in its request for consultations that:

> "It is my Government's understanding that the cumulative impact of the Federal and State measures of the type listed in the Annex to this request is that the supply of gambling and betting services from another WTO Member (such as Antigua and Barbuda) to the United States on a cross-border basis is considered unlawful under United States law."[4]

6. On 10 April 2003, Antigua and Barbuda notified an addendum to its request for consultations.[5] That addendum purported to "clarify some of the references to US legislation in the original Annex".[6] Attached to the addendum was a new version of the Annex that had been attached to the original request for consultations. The addendum also reiterated Antigua and Barbuda's claim that a prohibition on the cross-

cumulative application of the measures listed in the Annex. In particular, the addendum provided that:

> "As explained in our request for consultations of 13 March 2003 it is our understanding that the prohibition on the cross-border supply of gambling and betting services in the United States arises from the cumulative impact of measures of the type listed in the Annex. The corrected Annex clarifies some of the references to United States legislation and replaces references to a few measures which are no longer in force with references to current measures. "[7]

7. On 13 June 2003, Antigua and Barbuda submitted to the DSB its request for establishment of a panel (hereinafter referred to as the "Panel request").[8] As in the case of the request for consultations, the Panel request contained an Annex, the contents and structure of which is virtually identical to the Annex attached to the revised request for consultations.

8. The Panel request reiterates the claim made in Antigua and Barbuda's request for consultations that the laws referred to in Sections I and II of the Annex have the effect of prohibiting all supply of gambling and betting services from outside the United States to consumers in the United States. However, with respect to the items contained in Section III of the Annex, the Panel request states that:

> "Section III of the Annex lists examples of measures by non-legislative authorities of the United States applying these laws to the cross-border supply of gambling and betting services."[9]

9. Finally, the Panel request also states that:

> "The measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations."[10]

10. At the first and second meetings of the DSB at which Antigua and Barbuda's Panel request was considered, the United States alleged a number of inadequacies associated with Antigua and Barbuda's Panel request.[11] In particular, the United States stated that a number of items contained in the Annex to the Panel request were not "measures" that could be properly included within the scope of a panel request; that the Annex included several measures which appeared not to have been included in the revised request for consultations; and that not all of the measures cited in the Annex were related to the supply of cross-border gambling and betting services.[12] The United States raised the issue of these alleged inadequacies again at the Panel's organizational meeting held on 3 September 2003.

11. On 1 October 2003, as provided in the Panel's Working Procedures and timetable, Antigua and Barbuda made its first written submission to the Panel in which it addressed some of the concerns that had previously been raised by the United States regarding its Panel request.

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[7] WT/DS285/1/Add.1, para. 2.
[8] WT/DS285/2.
[9] WT/DS285/2, para.2.
[10] WT/DS285/2, para.2.
[11] First meeting held on 24 June 2003: WT/DSB/M/151; Second meeting held on 21 and 23 July 2003: WT/DSB/M/153.
[12] WT/DSB/M/151, p.11, para.9; WT/DSB/M/153, para. 47

summary of the legal basis of the complaint sufficient to present the problem clearly.[14] In *EC – Bananas III*, the Appellate Body made clear that:

> "It is important that a Panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the Panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."[15]

17. In assessing the United States' request for preliminary rulings, the Panel considers that it is important to bear in mind what Antigua and Barbuda considers to be the measure(s) that it is challenging and in respect of which it requested consultations. In this regard, we note that in its Panel request, in its first written submission, and in its comments on the US request for preliminary rulings, Antigua and Barbuda em

> other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes." (emphasis added) [19]

(b) Assessment of the US request

(i) Some of the measures listed in the Annex to the Panel request were not included in the request for consultations and should not be considered by the Panel

21. As indicated above, the issue here is whether the Panel is entitled to consider provisions of legislation referred to in the Panel request in cases where the request for consultations referred to the same legislation but contained references to different provisions of that legislation.

22. The concerned measures indicated by the United States in this regard are the state laws for Colorado, New York and Rhode Island. In particular:

> (1) With respect to Colorado, the revised request for consultations referred to COLO. REV. STAT. §§ 18-10-101 to 18-10-**08** (1999)" whereas the Panel request referred to " COLO. REV. STAT. §§ 18-10-101 to 18-10-**108** (1999)".

25. We take this to mean that there may be differences between the measures listed in the request for consultations and those listed in the request for establishment of a panel. Indeed, we consider that such differences may well be justified given that facts may emerge during the course of consultations so as to "shape the substance and the scope of the subsequent panel proceedings".[22] However, we do recognize that a balance is needed between, on the one hand, the right of the complainant to alter the request for establishment of a panel in light of information that may become available during consultations and, on the other hand, the need to ensure that a Member does not request the establishment of a panel with regard to a dispute on which no consultations were requested.

26. As to whether or not, in this case, the differences between the Panel request and the revised request for consultations referred to above are such that the Panel is still entitled to consider the measures implicated by the US argument, we note that both the revised request for consultations and the Panel request contain references to the same *legislation* for each of the relevant states. However, the discrepancies that exist as between the two sets of requests relate to the *provisions* referred to. On the face of it, the discrepancies appear typographical in nature. Given that the jurisprudence anticipates alteration of Panel requests in certain circumstances referred to above, it would seem that alterations to Panel requests in cases of typographical errors should be accepted given their apparently less egregious nature.

27. However, we are unable at this stage to make a definitive assessment of whether the differences are purely typographical in nature given that Antigua and Barbuda has not yet completed establishing its *prima facie* case[23] and the legislation in question has not yet been adduced as evidence. In addition, the Panel considers that it will be better placed to make this assessment once it has heard the parties' substantive arguments. Therefore, for the time being, the Panel declines to rule on this aspect of the US request.

(ii) Some of the items listed in the Annex to the Panel request are not "measures" within the meaning of Article 6.2 of the DSU and, therefore, are not within the Panel's terms of reference

28. In its response to the United States' request for a preliminary ruling on this issue, we note that Antigua and Barbuda emphasised that the Panel need not determine whether the items contained in Section III of the Annex to the Panel request constitute separate and individual measures. Indeed, Antigua and Barbuda has stated that the items contained in Section III are based on the legislative provisions listed in Sections I and II.

29. As to the legal status that should be attributed to the items contained in Section III of the Annex to the Panel request, we recall the Appellate Body statement in *US – Carbon Steel*:

> "The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal eDae.g (US) Tj 16.5 0 TDections I and II.

the DSU, it would supplement the meaning of "measures" in Article 6.2 of the DSU,[29]

4. Adjustment of Panel's Timetable

42. In light of the above, we request that the United States file its first written submission by Friday, 7 November 2003 and its executive summary by Friday, 14 November 2003. Third parties' submissions will be due on Friday, 14 November 2003 with executive summaries of these submissions due on 21 November. As a consequence of the changes to the timetable that result from the US request for preliminary rulings, it is necessary to postpone the first substantive meeting with the parties. Due to the panelists' commitments, the first panel meeting with the parties will take place on 10, 11 and 12 December 2003. The rebuttals of the parties will be due on Friday, 9 January 2004 and the second panel meeting will take place on 26 and 27 January 2004. A revised calendar was attached.

[signed: B.K. Zutshi, Chairman of the Panel]

B. ARGUMENTS OF THE PARTIES

1. Arguments of the United States

43. Having reviewed the first submission of Antigua, the **United States**

measure interpreted and applied, and from the scope of the court's authority. The opinions of a US court of competent jurisdiction are binding as to the parties to the dispute only. They may also have value as precedent in future decisions – but opinions of courts inferior to the US Supreme Court have such value only with respect to the same court and lower courts within the scope of the originating court's authority.[48] The United States submits that, while the Panel may consider the two opinions cited by Antigua in order to help determine the meaning of the US laws they interpret (to the extent that those laws are within the scope of this dispute), these opinions are not "measures" under the DSU for purposes of this dispute. In conclusion, the United States requests that the Panel make preliminary rulings finding that the items discussed above are not "measures" within the meaning of Article 6.2 of the DSU, and that therefore these items are not within the Panel's terms of reference.

47. With respect to the second issue raised in paragraph 43, the United States argues that Antigua requested establishment of a panel for three measures that were not the subject of consultations: Article I, Section 9 of the New York Constitution; Article VI, Section 22 of the Rhode Island Constitution; and Sections 18-10-101 to 18-10-108 of the Colorado Revised Statutes. These provisions were not cited in Antigua's consultations request,[49] subj 0.284 Tw t-

drugging of racing animals;[55] and a state statute making it illegal to dispose of a refrigerator without first removing the door.[56] In any event, the ability of a party to predict changes in the measures cited in the request for consultations is irrelevant. The request for consultations is not a guessing game. Antigua indisputably failed to request consultations on Article I, Section 9 of the New York Constitution; Article VI, Section 22 of the Rhode Island Constitution; and Sections 18-10-101 to 18-10-108 of the Colorado Revised Statutes. Therefore, the United States requests that the Panel find that the measures cited for the first time in Antigua's panel request are outside the Panel's terms of reference.

49. Finally, the United States argues that Antigua failed to offer a *prima facie* case regarding specific US measures. After listing hundreds of statutory provisions, and other items, as possibly being among the challenged measures in its panel request, Antigua states that, in its view, "[t]he subject of this dispute is the *total prohibition on the cross-border supply of gambling and betting services*." While appearing to accept that this "total prohibition" is comprised of particular "laws or regulations," Antigua has neither quoted, attached, nor argued the meaning of any such law or regulation. Instead, Antigua asserts that "there is no need to conduct a debate on the precise scope of specific United States laws and regulations." It further states that "[t]he precise way in which this import ban is constructed under United States law" – allegedly through one or more of the measures and purported measures listed in its panel request – "should not affect the outcome of this proceeding." So long as Antigua refuses to identify specific measures as the subject of its *prima facie* case, the United States submits that Antigua has established no *prima facie* case with respect to any measure. As explained above, it is well established that a "matter" referred to the DSB consists of one or more "specific" measure(s), together with one or more legal claims relating to such measures.[57] A panel with standard terms of reference may only examine this matter, i.e., claims relating to the "specific" measures included in a panel request.

50. The United States argues that Antigua, as the complaining party, bears the burden of identifying the specific measures as to which it asserts violations of WTO provisions. Even under the minimal requirements applicable to a panel request, a panel has recently found that "[d]ue process requires that the complaining party fully assume the burden of identifying the specific measures under challenge" so that the opposing party does not bear the burden of determining what measures are or are not at issue.[58] If this much is required of the panel request, due process clearly requires no less specificity with respect to identification of specific measures that are the subject of the complaining party's *prima facie* case.[59] The complaining party bears this burden, and cannot shift it to the responding party – as Antigua is explicitly seeking to do here.[60] Antigua must make it clear what specific measures are at issue in this dispute.

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[55] See, e.g., California Penal Code §§ 337f through 337h; Vermont Statutes title 13, § 2153.

[56] Massachusetts General Laws, Chapter 271, § 46 (imposing a fine for failure to remove doors from discarded refrigerators).

[57] DSU Article 6.2. See also Appellate Body Report on *Guatemala – Cement I*, para. 72.

[58] Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 24.

[59] The United States notes that the Appellate Body clarified in *India – Patents (US)* that parties may not be deliberately vague regarding their claims and factual allegations, including what specific measures are at issue. ("All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims." Para. 94).

[60] The United States recalls that Antigua and Barbuda states that the United States is "better positioned than Antigua to coherently construe its own laws". The United States notes that, if necessary, it will address the burden of proof issue further in its first submission. For the moment, the United States simply notes that the Appellate Body has previously clarified that a party making a claim of WTO inconsistency regarding another party's municipal law "bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion." Appellate Body Report on *US – Carbon Steel*, para. 157.

54. The United States proposes that, should Antigua state that it does not intend to make any arguments with respect to any specific measures, there would be no need for the Panel to adjust the timetable to provide for a supplemental submission. In this regard, the United States further requests that Antigua be invited to state, no later than 24 October 2003, whether it will make a supplemental submission, so that the United States can know in advance if its first written submission will still be due on 29 October. In the event Antigua confirms that it will not file this further submission, the United States would request that the Panel make a preliminary ruling to find that all the measures and purported measures listed in the Annex to Antigua's panel request are no longer at issue in this dispute. This ruling would ensure that the United States is not prejudiced and deprived of due process by having the WTO-consistency of specific measures raised at some later stage of the proceedings, when the US and third parties will not have a full opportunity to respond to Antigua's claims with respect to these specific measures.[65]

55. In conclusion, he United States requests that the Panel make preliminary rulings finding that: (i) the items discussed above are not "measures" within the meaning of Article 6.2 of the DSU; and (ii) the measures cited for the first time in Antigua's panel request are outside the Panel's terms of reference. The United States also requests that the Panel invite Antigua to make a further submission presenting any arguments it wishes to advance with respect to specific measures listed in the Annex to its panel request; and that the Panel make a preliminary ruling – if Antigua chooses not to make this further submission – that all the items listed in the Annex are no longer at issue in this dispute.

2. Arguments of Antigua

56. Antigua argues that, overall the approach of the United States represents the starkest possible of contrasts to the principles of WTO dispute settlement as stated by the Appellate Body.[66] The points raised at this stage by the United States are unfair, they are far from prompt and will, if accepted, lead to the most ineffective means of resolving this trade dispute. The US argument that it cannot prepare Uni) the 129cannot samr,el , j 0shUnitebin th2.75not prejudiced and deaggdissg tlyo:se 0.3the mead -1ro66

terms of WTO law is the effect of one or more measures and, in that regard, you have unambiguously told us that the provision of these types of services from Antigua and Barbuda to persons in the US is unlawful in the US."

58.

has raised other procedural issues regarding the "measures" (see below paragraphs 3.78 to 3.80). Until submitting its request for preliminary rulings, the United States has at no point stated that it cannot understand Antigua's claim in the absence of further explanation of that claim as it relates to each individual law. If the United States had done so, Antigua would have addressed this issue in its first submission. With respect to the US assertion that Antigua has not submitted sufficient "proof" to establish a *prima facie* case that each individual law listed in the Annex to its panel request effectively prohibits the provision of cross-border gambling services, Antigua submits that the United States accepts that the total prohibition of cross-border gambling exists. In view of its explanation of *United States v. Cohen* applying the Wire Act,[74] the United States clearly also accepts that at least one specific law in the Annex to Antigua's panel request (i.e. the Wire Act) prohibits provision of cross-border gambling services. A report from the GAO confirms this for other specific United States laws mentioned in the Annex to the panel request.[75] Furthermore the United States has yet to dispute that most of the laws cited in the Annex to the panel request do in fact relate to the prohibition of cross-border gambling and betting services (it only claims that some do not, and only on the basis of a deliberate misreading of the references to these laws).[76] In this respect Antigua submits that to the extent that "proof" is an issue here, Antigua has in any event established a *prima facie* case with regard to the measures listed in its panel request that come within the scope of this dispute (i.e. those that do relate to the cross-border supply of gambling and betting services).[77]

60. Antigua submits that it is doubtful that anyone could compose a definitive list of all United States laws and regulations that could be applied against cross-border gambling. The reason for this is that United States law with regard to this issue is itself unclear and Antigua is certainly not the only party with some difficulty in understanding the US legal system as it relates to the provision of cross-border gambling and betting services. As the United States' own General Accounting Office has stated:

> "Internet gambling is an essentially borderless activity that poses regulatory and enforcement challenges. The legal framework for regulating it in the United States and overseas is complex. US law as it applies to Internet gambling involves both state and federal statutes.allenges. The 48B srS4r7 TD -0.1247 berate misreading of D -0.16a10 Tw (77) Tj

United States laws on this issue.[80] This lack of clarity of US law confronted Antigua with a dilemma

63. With respect to the US argument that certain "items" listed in Section III of the Annex to Antigua's panel request are not "measures" that can be investigated under the DSU, Antigua maintains that, since the measures listed in Section III of the Annex are based on the legislative provisions listed in Sections I and II of the Annex,[84] they are in any event covered in that capacity. In Antigua's view it does not really matter whether the measures listed in Section III "do something concrete, independently of any other instruments" or whether these are taken into account by the Panel "to help determine the meaning of US laws." In fact, actions by criminal enforcement authorities (such as the ones listed in Section III of the Annex) could very well be classified under both categories. What matters is that the United States maintains and enforces a total prohibition on cross-border gambling (and this is clearly the case). In this respect Antigua suggests that the Panel utilise its discretion to exercise judicial economy and to decide this case without ruling whether measures such as the ones listed in Section III of the Annex are "measures" that can be the subject of WTO dispute settlement.

64. In case the Panel nevertheless wants to address this issue, Antigua refers back to the discussion in paragraph 3.77 of this report. Antigua would add only that the four press releases and related documents from Attorneys General are obviously not included in the panel request as press releases but because they describe the measures, i.e. the prosecution actions (on which little or no other official information is publicly available).

65. Antigua rejects the US argument that Antigua's panel request improperly includes measures that were not the subject of consultations and notes it has already responded to this argument in paragraph 3.78 of this report . The United States simply ignores these arguments and the Appellate Body ruling in *Brazil – Aircraft*[85] referred to by Antigua in its first submission. Antigua notes the United States' reference to the Appellate Body Report in

C. ARGUMENTS OF THE THIRD PARTIES

70. The European Communities argues that, in many of these cases, the standard the US proposes (i.e. that a measure within the meaning of Article 6.2 must "constitute an instrument with a functional life of its own" under municipal law – i.e., it must "*do* something concrete, independently of any other instruments."[91]) would not allow a panel to re

measure as it indicated in its request for consultations, the Panel would be barred by Article 6.2 from reviewing the consistency of that measure with the WTO provisions relied upon by the claimant. Furthermore, the purpose of consultations has to be contrasted with that of the panel request, which is to define the scope of the Panel's terms of reference, and to notify the responding party and third parties of the complainant's case.[96] It is in view of that different function that "[d]efects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings".[97] But, again, Antigua and Barbuda's request for panel establishment does include not only the relevant specific measures, but also the specific provisions thereof referred to by the United States.

75. The European Communities also wishes to recall how the role of the parties in dispute settlement procedures was very effectively characterized by the Appellate Body in

82. Japan notes that, as the United States itself admits, a panel's preliminary rulings on the specificity of measures relate to due process rights of defence. In contrast, as the Appellate Body found in *US – Wool Shirts and Blouses*, the party asserting the affirmative of a particular claim or defence establishes a *prima facie* case by adducing evidence sufficient to raise a presumption that what is claimed is true, and "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."[105] Panel's deliberations on this matter are of important substantive nature and form the basis of its findings of consistency/inconsistency of the measures in question with the WTO Agreement. Consequently, the question of whether or not Antigua and Barbuda has established a *prima facie* case is independent of, and must be separated from, the question of whether or not the United States' due process rights are affected by the alleged lack of specificity. Even if the Panel were to findthat theRidentifica 01.25D 0Tc T(j)T3(7are wa(fB)) measuss0r4TD2g3-(19measu5 find T,0)d ef0 (hes prima 02 (o findDS

ANNEX C

PANEL'S QUESTIONS TO THE PARTIES

Note

This Annex contains the questions posed by the Panel and written answers provided by the Parties during the first (Section I) and second (Section II) substantive meetings, as well as the questions posed to the Third Parties during the first substantive meeting and their answers (Section IV).

The Panel expressly invited each Party to reply to questions posed to the other Party, if it so wished, as well as to questions posed to the Third Parties. At the first meeting, Third Parties were also invited to reply to questions posed to the Parties (Section I).

Moreover, with respect to the questions posed at second substantive meeting, each Party was invited to comment on the responses provided by the other Party. These comments are reproduced in Section III of this Annex.

I. PANEL'S QUESTIONS TO THE PARTIES AT THE FIRST SUBSTANTIVE MEETING

A. US SCHEDULE

For both parties:

1. What is the legal status and value of the 1993 Scheduling Guidelines and W/120 in WTO dispute settlement proceedings and to what extent are they relevant for the interpretation of GATS Schedules where no explicit reference to the CPC is contained in those Schedules?

Antigua

Pursuant to Article 31 of the Vienna Convention, the 1993 Scheduling Guidelines circulated by the Secretariat during the Uruguay Round negotiations[106] and the W/120 represent important tools to the interpretation of Members' schedules under the GATS. Whether or not a GATS schedule contains explicit references to the CPC has no impact on the interpretative value of the 1993 Scheduling Guidelines and W/120 as determined pursuant to Article 31 of the Vienna Convention.

The 1993 Scheduling Guidelines are part of the *context* of the GATS and GATS schedules because they are an "instrument" made in connection with the conclusion of the treaty as per Article 31(2) of the Vienna Convention. Admittedly the 1993 Scheduling Guidelines were technically not "made" by "one or more parties" but by the then GATT Secretariat. However, the 1993 Scheduling Guidelines explicitly mention that they were "circulated by the Secretariat in response to requests by participants." At the time of the Uruguay Round negotiations they were also accepted by all parties as a basis for the drafting of services schedules. This was explicitly confirmed when the Council for Trade in Services unanimously adopted new scheduling guidelines in 2001 (the "2001 Scheduling Guidelines"[107]), footnote 1 of which states that: "[I]t should be understood that schedules in force prior to the date of this document have been drafted according to MTN.GNS/W/164 and

[106] MTN.GNS/W/164 (3 September 1993).
[107] S/L/92 (28 March 2001).

MTN.GNS/W/164/Add.1). Against this background Antigua submits that the 1993 Scheduling Guidelines cannot be disqualified as "context" simply because their formal author is the GATT Secretariat and not a Member of the World Trade Organisation (the "WTO").[108] The purpose of treaty interpretation under Articles 31 and 32 of the Vienna Convention is to identify the common intention of the parties.[109] Articles 31 and 32 of the Vienna Convention should be applied with that objective in mind and not literally.[110] What is important in determining whether an instrument, such as the 1993 Scheduling Guidelines, expresses the *common* intention of the parties is whether it is accepted by *all* the parties, not whether its formal author is *one* of the parties. Antigua further submits that the 2001 Scheduling Guidelines comprise a *subsequent agreement* between the parties (as per Article 31(3) of the Vienna Convention) regarding the interpretation of existing schedules in the light of the 1993 Scheduling Guidelines. As mentioned above, footnote 1 of the 2001 Scheduling Guidelines (unanimously approved by the Council for Trade in Services) provides that: "It should be understood that schedules in force prior to the date of this document have been drafted according to MTN.GNS/W/164 and MTN.GNS/W/164/Add.1."

Antigua believes that W/120 qualifies as part of the context of the GATS and GATS schedules for two primary reasons: (i) W/120 is incorporated by reference in the Dispute Settlement Understanding ("the DSU") of the WTO (Article 31(2) of the Vienna Convention); and (ii) W/120 is an instrument made in connection with the conclusion of the treaty and accepted by all parties (Article 31(2)(b) of the Vienna Convention). Furthermore there exists a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention and subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention confirming the interpretative value of W/120.

According to Article II:2 of the Marrakech Agreement Establishing the World Trade Organization (the "WTO Agreement"), the GATS, the DSU and the other multilateral and plurilateral agreements are integral parts of the WTO Agreement. Article 31(2) of the Vienna Convention defines context as (amongst others) the text of the treaty, including its preambles and annexes. Thus the DSU qualifies as context for the interpretation of the GATS (and vice-versa) because they are both part of the same treaty—the WTO Agreement. Article 22(3)(f)(ii) of the DSU explicitly refers to W/120 to define "sector" of trade for purposes of suspension of concessions. In doing so it incorporates W/120 by reference in the DSU. As a part of the DSU, W/120 is context of the GATS and the US Schedule, which itself is an integral part of the GATS under Article XX:3 of the GATS.

W/120 further qualifies as "context" because, like the 1993 Scheduling Guidelines, it is an instrument made in connection with the conclusion of the GATS under Article 31(2)(b) of the Vienna Convention. The Montreal Ministerial of December 1988 explicitly requested the GATT Secretariat to compile a "reference list of sectors."[111] W/120 was the result of this exercise and it follows from the 1993 Scheduling Guidelines and the reference to W/120 in the DSU that all Members accepted W/120 as a starting point, a "reference list" for the drafting of their GATS schedules.[112] The common intention of the parties (expressed in the 1993 Scheduling Guidelines) allowed a party to depart from

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[108] Antigua is of the view that neither can the 1993 Scheduling Guidelines be disqualified because they state that they "should not be considered as an authoritative legal interpretation of the GATS" (See I. Sinclair, *The* Vienna Convention *on the Law of Treaties*, (Manchester University Press, 1984), pp. 129-130.

[109] Appellate Body Report on *EC – Computer Equipment*, para. 84.

[110] See, e.g., I. Sinclair, Vienna Convention, at pp. 117-118: "In their commentary the Commission refer to the rich variety of principles and maxims of interpretation applied by international tribunals. They point out that these are, for the most part, principles of logic and good sense which are valuable only as guides to assist in appreciating the meaning which parties may have intended to attach to the expressions employed in a document; and that recourse to many of these principles is discretionary rather than obligatory, interpretation being to some extent an art rather than an exact science."

[111] MTN.TNC/7(MIN), Part II.

[112] With regard to the issue that W/120 was "made" by the GATT Secretariat and not by a party, Antigua submits that the argumentation developed on this issue with regard to the 1993 Scheduling Guidelines equally applies to W/120.

that "reference list," provided it did so explicitly. Paragraph 5 of the US Draft Final Schedule confirms that the United States explicitly subscribed to this "common intention."

The 2001 Scheduling Guidelines comprise a subsequent agreement confirming the interpretative value of the 1993 Scheduling Guidelines. The 1993 Scheduling Guidelines explicitly establish W/120 as the "default" reference list for Uruguay Round Schedules. Thus, by confirming the interpretative value of the 1993 Scheduling Guidelines the 2001 Scheduling Guidelines have also confirmed the interpretative value of W/120.

A "subsequent practice," within the meaning of Article 31(3)(b) of the Vienna Convention, exists establishing the agreement of the WTO Members regarding the interpretative value of W/120. Since the entry into force of the GATS, Members have consistently referred to W/120 as the classification used for GATS purposes and as the main point of reference for any discussion on the classification of services. This includes the United States' own communication to the WTO on Classification of Energy Services[113] and the USITC Document.

As explained above, the reasons why the 1993 Scheduling Guidelines and W/120 qualify as important interpretative factors within the meaning of Article 31 of the Vienna Convention for *all* GATS schedules, are not related to references to the CPC. Thus the absence or presence of explicit references to the CPC in a specific schedule can have no impact on the legal status and interpretative value of the 1993 Scheduling Guidelines or W/120.

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United States

Classifica783n

Agreement more generally. To the extent appropriate, recourse may also be had to supplementary means of interpretation.

The United States clearly used and followed the structure of the W/120 to schedule its specific commitments. However, its Schedule does not include explicit references to the CPC numbers that, in the W/120, are associated with a particular services sector or sub-sector. This does not mean, as the United States suggests, that the CPC numbers associated with a particular services sector or sub-sector in the W/120 are irrelevant, inapplicable or to be ignored when interpreting the United States' specific commitments. Rather, they form part of the ***context***, or, alternatively, constitute a ***supplementary means of interpretation***, which, in accordance with Articles 31 and 32 of the Vienna Convention, is relevant to interpreting and ascertaining the meaning of the specific commitments of the United States.

When the US Schedule is interpreted in accordance with Articles 31 and 32 of the Vienna Convention, and all the elements that are relevant to ascertaining the common intention of the Members with respect to the United States' specific commitments are taken into consideration, there is only one reasonable conclusion: where the US Schedule mirrors the W/120, without clearly and explicitly departing from it and the corresponding CPC numbers, it must be inferred that the United States' specific commitments were meant and are to be interpreted in the light of the W/120 and the CPC numbers associated with it.

When the United States scheduled its specific commitments, it was free to clearly reject the W/120 and the corresponding CPC numbers. It did not. On the contrary, it expressly indicated to its trade partners that except where specifically noted in its Schedule, the scope of the United States' specific commitments corresponds to the sectoral coverage in the W/120.[117] Since the W/120 defines sectoral coverage by referring to relevant CPC numbers, this means that, except where specifically noted in the US Schedule, the scope of the United States' specific commitments corresponds to the scope of relevant CPC numbers (setting out the scope of particular services sectors or sub-sectors) referred to in the W/120. This was and is the common understanding of the Members with respect to the specific commitments undertaken by the United States under the GATS, and it must be respected.

As regards more specifically the W/120, Canada recalls its conclusion that the W/120 and the corresponding CPC numbers form part of the ***context*** that, pursuant to Article 31 of the Vienna Convention, must be taken into account by the Panel when interpreting the specific commitments of the United States under the GATS. In Canada's view, the W/120 (and by implication the CPC numbers referred to in it) at least qualifies as an "instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" under Article 31(2) of the Vienna Convention.[118] Indeed: (i) the W/120 is an instrument; (ii) the W/120 was prepared by the GATT Secretariat at the request and for the benefit of Uruguay Round participants. It was reviewed and commented upon by these countries.[119] Uruguay Round participants used the W/120 as the general benchmark for the scheduling of specific commitments, thereby incorporating into their Schedules the W/120's nomenclature, except where specifically noted. These same countries also agreed to the use of the W/120 in the DSU.[120] The W/120 was in effect made by Uruguay Round participants acting through the then GATT Secretariat – quite possibly the only practical and effective way to work in a concerted manner on such a complex matter. In these circumstances, the W/120 can be considered to have been "made by the parties"

[117] Communication from the United States of America, *Draft Final Schedule of the United States of America Concerning Initial Commitments*, MTN.GNS/W/112/Rev.3, 7 December 1993, para. 5.
[118] See Section IV.A of this Report.
[119] Ibid.
[120] DSU, Article 22(3)(f)(ii).

within the meaning of Article 31(2)(b) of the Vienna Convention[121]; (iii) the W/120 was finalized in July 1991 and used by Uruguay Round participants until the end of the market access negotiations. It was also specifically referred to in the DSU. It was thus made in connection with the conclusion of the GATS; and (iv) the notable fact that the W/120 is specifically referred to in the DSU,[122] which is one of the Multilateral Trade Agreements binding on all Members,[123] necessarily establishes that it was accepted by all Uruguay Round participants as an instrument related to the GATS and the WTO Agreement. This, in itself, invalidates the United States' assertion that the W/120 is only part of the negotiating history of the GATS and therefore cannot constitute anything more than a supplementary means of interpretation under Article 32 of the Vienna Convention.[124]

In the event that the W/120 and the corresponding CPC numbers are found not to qualify as "context" within the meaning of Article 31(2) of the Vienna Convention, Canada submits, alternatively, that they do qualify, and should be referred to by the Panel, as *supplementary means of interpretation* of the US Schedule under Article 32 of the Vienna Convention.[125]

In the end, what is certain is that the W/120 and the corresponding CPC numbers are relevant and ought to be considered by the Panel when interpreting the specific commitments in the US Schedule in accordance with the applicable rules of interpretation set out in Articles 31 and 32 of the Vienna Convention. When the US Schedule is interpreted in accordance with these rules of interpretation, and all the elements that are relevant to ascertaining the meaning of the United States' specific commitments are taken into consideration, the only reasonable conclusion is that where the US Schedule mirrors the W/120, without clearly and explicitly departing from it and the corresponding CPC numbers, it must be inferred that the United States' specific commitments are to be interpreted consistently with the W/120 and the CPC numbers associated with it.[126]

As regards the 1993 Scheduling Guidelines *per se*, they constitute a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention. Canada recalls that it does not challenge the fact that these Guidelines do not constitute an authoritative legal interpretation of the GATS.[127] Indeed, they specifically state that they are not such an authoritative legal interpretation of the GATS. In any case, the authority to adopt interpretations of the WTO agreements, including the GATS, is reserved exclusively to the Ministerial Conference and the General Council.[128] This is beside the point, however. The fact that the 1993 Scheduling Guidelines do not consist of formal legal interpretations of the GATS does not mean that they cannot be used to shed light on the general understanding of the Uruguay Round participants as regards the scheduling of specific commitments. While there is no question that the 1993 Scheduling Guidelines are not an authoritative legal interpretation of the GATS, there is also no question that, in accordance with their stated purpose, they assisted all Members in the preparation of their Schedules and the listing of their specific

[121] Canada in no way suggests that any document from, or involving the participation of, the Secretariat may qualify as an "instrument" or "agreement" under Article 31(2) of the Vienna Convention. Canada argues that the W/120 qualifies as relevant "context" for the interpretation of the US Schedule based on the specific and unique characteristics and circumstances pertaining to that document.

[122] DSU, Article 22(3)(f)(ii).

[123] WTO Agreement, Article II:2.

[124] See Section III.B.2. of this Report. This may also support the argument that the W/120 qualifies as an "agreement" within the meaning of Article 31(2)(a) of the Vienna Convention.

[125] Canada wrote that the United States does not contest that the W/120 may qualify as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention (see United States' first written submission, para. 63). In its argumentation, however, the United States simply ignores the relevance and application of the W/120 as such a supplementary means of interpretation of its Schedule, and does not address its effect on the interpretation of its specific commitments in the present case.

[126] See Section IV.A of this Report.

[127] Ibid.

[128] WTO Agreement, Article IX:2.

commitments. As such, they may be used as an element that confirms other evidence of what the United States has done in its Schedule.

In the present case, the 1993 Scheduling Guidelines constitute one element among others that refutes, rather than supports, the United States' argument that the W/120 and the corresponding CPC numbers are irrelevant and should be ignored. They are concordant with other factors demonstrating that, in its Schedule, the United States espoused the W/120, and by implication the corresponding CPC numbers, except where specifically noted. These factors are: (i) the US Schedule generally mirrors the W/120;

Mexico

The 1993 Scheduling Guidelines and the W/120 constitute part of the preparatory work of the GATS and the WTO Agreement. At the very least, both thus qualify as "supplementary means of interpretation" pursuant to Article 32 of the Vienna Convention. As such, both documents can always be used to confirm the meaning of the United States' specific commitments resulting from the application of the general rule of interpretation in Article 31 of the Vienna Convention, or to determine the meaning when the interpretation according to Article 31 leaves that meaning ambiguous or obscure. Accordingly, both documents are highly relevant to the interpretation of the GATS Schedule of Specific Commitments of the United States on the basis of the Vienna Convention in this dispute. The fact that no explicit reference to the CPC is contained in the US Schedule has no bearing on this issue. The relevant question is rather whether the 1993 Scheduling Guidelines and document W/120 support the conclusion that sub-sector 10.D of the US Schedule includes a commitment on gambling and betting services.

Chinese Taipei

The 1993 Scheduling Guidelines and the W/120 do not have independent legal status within the WTO in the sense that they do not have any formal binding legal authority on Members. In fact, the introduction to the Guidelines clearly states that the explanatory answers contained in it "should not be considered as an authoritative legal interpretation of the GATS.[131] Nevertheless, the hasA20387 Tc6utitaut-o/120 constitute part of taoi.25 TD /F0 6.79F0 11.2naal interpretation of tle

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> **"1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.**
>
> **2. An organ includes any person or entity which has the status in accordance with the internal law of the State."**

Antigua

[a]& [c]: The USITC is an agency of the United States federal government, created by Act of Congress[134] and given a number of powers and responsibilities under a number of federal statutes,[135] including the power to make rules and regulations.[136] The USITC Document consists of "explanatory materials" produced by the USITC in connection with the US Schedule. The USTR is also an agency of the United States federal government, created by Act of Congress[137] and given a variety of powers and responsibilities under a number of federal statutes,[138] including the power to make rules and regulations,[139] the power to "utilize, with their consent, the services, personnel, and facilities of other Federal agencies,"[140] the power and responsibility for the conduct of all international trade negotiations, including "any matter considered under the auspices of the World Trade Organization"

contested that the USITC Document serves as an interpretative aid to the US Schedule and, as an official pronouncement of an agency of the United States government with the power to exercise authority in connection with the United States' relationships with the WTO, the statement has significant value in this proceeding.[147]

Under general principles of international law the USITC Document, made on behalf of the United States by an organ of government expressly delegated powers to act in the area, is binding upon the United States. The USITC has, at the request of the USTR, assumed responsibility for "maintaining" the US Schedule.[148] In the USITC Document, a public document clearly intended to explain the US Schedule to the world at large, the USITC has indicated that sub-sector 10.D of the US Schedule corresponds to CPC category 964. The United States has not disputed the USITC's interpretation until the emergence of this dispute. It is a fundamental rule of international law that a state party to a treaty has a right to designate the organ or organs of its government that are responsible for the carrying out of its responsibilities under that treaty.[149] Some treaties provide for this expressly.[150] Other treaties rely implicitly on this rule.[151] The USTR designated the USITC to (emphasis added): "[I]nitiate an ongoing program to compile and maintain the *official* US Schedule of (Services Commitments.D150 TD -0.1885):official

Permanent Court of International Justice has applied this rule widely.[156] This rule has also been applied by the International Court of Justice, even prior to the Vienna Convention, in its Advisory Opinion on the *International Status of South-West Africa*,[157] where the Court stated that: "[I]nterpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument." This conclusion is consistent with Article 31.3(b) of the Vienna Convention which provides that, in interpreting a treaty, account shall be taken of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

This approach should be particularly relevant to the interpretation of a text, such as the schedules established under the GATS, that originates from only one of the contracting parties.[158] Furthermore, special credence should be given to subsequent practice of state organs that, like the USITC in this instance, have been given a specific role in relation to the treaty obligation at issue.[159] In the USITC Document the USITC explained how the US Schedule corresponds to the CPC. No other agency, organ or official of the United States has taken a different view prior to the advent of this proceeding and no WTO Member has objected to the USITC interpretation. This absence of protest indicates that the WTO Members, and Antigua in particular, have acquiesced in the USITC's interpretation.[160]

Further support for the binding character of the USITC interpretation of the US Schedule can be found in the international law prin"

the "official" US Schedule indicates the intention of the United States that it should be bound by the USITC's statement. Trade in gambling and betting services has in fact taken place from Antigua to the United States consistent with the USITC interpretation. A binding estoppel has therefore arisen under international law to prevent the United States from unilaterally abandoning the public interpretation made by the USITC to the detriment of other WTO Members that may have relied on the interpretation.

It is further submitted that the USITC Document constitutes a unilateral declaration by the United States to the effect that sub-sector 10.D of the US Schedule corresponds to CPC category 964 that is binding on, and engages the responsibility of, the United States. As such, it creates enforceable rights for other WTO Members. In the *Nuclear Tests* cases,[162] the International Court of Justice concluded that statements made by the French government, intended to be relied upon by other states as an expression of future French conduct, constituted an undertaking possessing legal effect. As such, they were binding on, and engaged the responsibility of, France.[163] Similarly, in the present case, the statement of the USITC constitutes a binding unilateral declaration in which other WTO Members are entitled to place confidence.

Antigua concludes that, considering the role of the USITC as the agency of the United States government given the responsibility for the compilation and maintenance of the US Schedule, the consistency of its interpretation,[164] the lack of any inconsistent interpretations or statements from any other agency of the United States government and the absence of any protest from other WTO Members, the USITC Document represents an authoritative interpretation by the United States of the US Schedule in accordance with applicable rules of customary international law and Article 31 of the Vienna Convention. That interpretation is binding on, and engages the responsibility of, the United States. The USITC Document also comprises a binding unilateral declaration upon which other WTO Members are entitled to rely. The United States is estopped, in its relations with WTO Members, from now adopting an interpretation of the US Schedule inconsistent with that of the USITC.

[b]: Antigua assumes the Panel's question refers to the SAA accompanying the Uruguay Round Agreements Act ("URAA").[165] According to the URAA, the SAA constitutes "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application."[166] According to the SAA itself:

> … this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements,

[162] I.C.J. Reports 1974 at pp. 253, 267; paras. 43 and 46 (*Australia v. France*) and pp. 457, 472-473; paras. 46 and 49 (*New Zealand v. France*).

[163] On the subject of binding unilateral declarations at international law, see further: *Case Concerning*

rule of customary international law[175] that a sovereign state is responsible for the conduct of all of its organs, acting in that capacity, as part of the principle of the unity of the state at international law. The reference to a state organ in Article 4 is extremely wide, extending beyond organs of central

and Oral statement, this document merely confirms what already results from the 1993 Scheduling Guidelines and the W/120, as well as from the cover note to the US draft final schedule.

The European Communities is aware of the objection raised by the United States as to the value of "unilateral practice" of one party to a treaty.[195] The relevance of unilateral practice has to be evaluated in the light of the obligation to be implemented. In particular, implementation of a Schedule of specific commitments is incumbent upon the WTO Member concerned. Therefore, the practice of that Member is particularly relevant to interpret that part of the WTO Agreement. The "implementing practice" of other Members in respect of such Schedule appears to be limited to either acceptance of or objections to the way in which the Member concerned applies its Schedule. To the best of the EC knowledge no WTO Member has objected to the concordance provided by the USITC in its document. Also, in its Report in *EC – Computer Equipment* the Appellate Body referred to practice of one Member, the European Communities, in order to review the EC Schedule.[196] The documents issued by US authorities after the Uruguay Round, and the lack of objections, by other WTO Members, to the position that GATS commitments, and specifically US commitments for sub-sector 10.D, are based on the CPC but for express departures, constitute a "discernible pattern" of a concordant sequence of acts implying an agreement of the various WTO Members on this interpretative issue.[197]

[b]: The relevance for interpretation of treaty obligations in accordance with the Vienna Convention of each instrument must be evaluated on its own merits, irrespective of the status and value of other possible documents and instruments.

The SAA is one document in which the United States indicated what it believes to be the interpretation of the Uruguay Round texts and the obligations of the United States. As noted by the Panel in *US – Section 301 Trade Act*, the SAA provides, in its own terms,[198] "[…] this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law." Based on this, in the words of the Panel, "[T]he SAA thus contains the view of the Administration, submitted by the President to Congress and receiving its imprimatur, concerning both interpretation and application and containing commitments, to be followed also by future Administrations, on which domestic as well as international actors can rely."[199] Of course, the fact that the SAA is a document in which the US Administration position was set out does not exclude that other documents also express positions attributable to the United States. The US authorities are subject to the international customary rules on attributability of acts to a State just as authorities of all other Members are.

The European Communities also notes that the SAA contains no general interpretation of the US Specific commitments. Nor was the US obliged to do so, since paragraph 16 of the 1993 Scheduling Guidelines clarifies that in the absence of express departures, reference should be made to the CPC codes. Instead, the SAA refers to a specific instance in which the United States decided to depart from the CPC system:

> [s]ome commitments made in the financial services sector, including those made by the United States, have been scheduled according to the Understanding on Commitments in Financial Services, which formed part of the Uruguay Round

[195] See Section III.B.2. of this Report.

[196] Appellate Body Report on *EC – Computer Equipment*, para. 93.

[197] Appellate Body Report on *Chile – Price Band System*, paras. 213-214, quoting Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 11.

> package. The Understanding describes certain commitments that differ from, and in some cases are more detailed than, those found in the GATS.[200]

This specific indication in the SAA confirms that when so needed, the United States was able to indicate a departure from the general CPC system. No other such departure is indicated in the Statement of Administrative Action. Given that the SAA contains no general explanation of the scope of the US Schedules, the US authorities must presumably have considered it useful to provide such explanation elsewhere, also for the benefit of business operators. This was done, *inter alia*, in the USITC Document. Providing such clarifications is indeed one of the missions of the USITC[201] and the information contained in the USITC Document is presumably correct – witness the fact that the same concordance table was reproduced in the 1998 version of Exhibit AB-65. Otherwise, one might infer that the USITC has not fulfilled the task it was entrusted with by the USTR (see reply to question 2(d) below). Of course, the USITC Document itself does not "create" or "determine" the scope of the US obligations under the US Schedule (nor does, for that matter, the SAA). A WTO Member does not have a right to determine unilaterally and subsequently the content of its international obligations. Rather, the USITC Document confirms what can already be gleaned from the 1993 Scheduling Guidelines and what was stated by the United States when it submitted its Draft Final Schedule, also containing an offer for sub-sector 10.D.

[c]: Yes. It should be noted that the "statement" to which the Panel presumably refers – that is, the concordance between the US Schedule, the W/120 and the CPC is not a incidental or spontaneous one. It is one rendered by the USITC at the request of the USTR, in turn acting under legal authority delegated to it by the US President under Section 332 of the Tariff Act of 1930.[202] The position expressed by the USITC in Exhibit AB-65 is also not an isolated one. As already noted above in reply to question 2(a), the USITC has, for several purposes, taken the general position that GATS commitments were negotiated on the basis of the CPC. As to the legal value of the USITC Document, such document confirms the position consistently taken by the United States as to the way in which its Schedule is structured and the scope of the US specific commitments. It does not create a legal obligation to interpret the US Schedule consistently with the 1993 Scheduling Guidelines and the W/120 (and thus the CPC). That obligation already flows from the value of the 1993 Scheduling Guidelines and W/120 as interpretative tools within the meaning of the Vienna Convention. It also results from the express indication, in the explanatory note to the drafts and final version of the US Schedule, that "Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's revised Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)."[203] This matter is further addressed below in reply to question 2(d).

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[200] Statement of Administrative Action, H.R. 5110, H.R. Doc. 316, Vol. 1, 103d Congress, 2nd Session, p. 976 (1994).

[201] See, e.g., the USITC strategic plan (available at the Internet address: http://www.usitc.gov/webabout.htm), p. 21, whereby it is stated:

> Stable mission. The Commission maintains an extensive repository of trade data and trade-related expertise and provides information services relating to U.S. international trade and competitiveness.

[202] 19 U.S.C. 1332(g) (the provisions governing the organization and functioning of the USITC are available at the Internet address: http://www4.law.cornell.edu/uscode/19/ch4stIIpII.html).

[203] *Communication from the United States of America, Draft Final Schedule of the United States of America to the members of the Group of Negotiations on Services*, MTN.GNS/W/112/Rev.3, 7 December 1993; *Communication from the United States of America, Revised Conditional Offer of the United States of America concerning initial commitments*, MTN.GNS/W/112/Rev.2, 1 October 1993; *Communication from the United States, Schedule of the United States Concerning Initial Commitments on Trade in Services*, MTN.GNS/W/112/Rev.4, 15 December 1993.

[d]: State responsibility is not the only context in which the issue of attributability of an act to a State (or other subject of public international law) arises. For example, the same issue arises – as an implied threshold question – in treaty-making. Thus, it is submitted that Article 4 of the *Draft Articles on the Responsibility for States of Internationally Wrongful Acts*[204] is relevant in that it codifies the customary law principle of attribution, concerning attributability of actions to a State generally – not just with a view to establishing international responsibility. In fact, the act of the USITC is not a wrongful act. Chapter II of Part I of the International Law Commission Articles on the Responsibility of States defines the circumstances in which a certain conduct is attributable to the State, the latter being an essential requirement for the establishment of international responsibility of a State. In particular Article 4, on the basis of the principle of the unity of the State, lays down the rule that the conduct of an organ of a State is attributable to that State. As the International Law Commission points out in its commentary on the Articles on State Responsibility the rule that "the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognised in international judicial decisions."[205] Furthermore, the International Court of Justice has recently confirmed the above rule as well as its customary character. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* the Court held that "According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility … ".[206]

As the International Law Commission explains, the term "state organ" is to be understood in the most general sense.[207] It extends to organs from any branch of the State, exercising legislative, executive, judicial *or any other functions*. It should be noted that it has been held that these functions might involve the giving of administrative guidance to the private sector.[208] Article 5 of the International Law Commission Articles on the Responsibility of States goes further to attribute to the State the conduct of a person or entity which is not a State organ in the sense of Article 4, but which is nevertheless authorised by the law of that State to exercise governmental authority. As the ILC explains in its commentary to Article 5, the generic term 'entity' tabled ...

having access to any documents pertaining in its investigations, summoning witnesses, and requesting any person to provide it with the required information.[213] The letter by which the USTR requested the USITC to undertake responsibility for maintaining the US Schedule of specific commitments[214] is absolutely clear in this respect:

> [u]nder the GATS, the US Government is obligated to develop and maintain a US Schedule of US Servi 0.e-0.3,Fj 88.56 0 TD -0.172138Tc 0.32.992Tw (o dments) T. I belilope Gate C

[c]: In the context of this dispute, the issue is whether the statement by the USITC can be used to interpret the US Schedule of Specific Commitments within the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention. See Mexico's response to question 2(a) above.

[d]: See the response to the previous question.

3. Antigua and Barbuda as well as the European Communities (Exhibit AB-74 and paragraph 15 of the European Communities' oral statement to the first meeting of the

did the United States contradict its position that the scope of its commitments is based on the 1991 Sectoral Classification W/120 and the CPC.[228]

[b]: The legal status and value of the cover note is the same as that of its attachment. It is a preparatory document where the United States explained the scope of its final offer and thus of the obligations it was offering to undertake. As such, it is part of the supplementary means of interpretation of the US Schedules of specific commitments. It is the document which the other [then] GATT contracting parties had available in order to evaluate the US services final offer. If the United States had meant, after the issuance of doc

other Members' Schedules in order to interpret its own Schedule. As the European Communities has shown, these entries referred to by the United States do not clearly support the United States' position. In any case, what a very few Members out of a hundred and forty-six[229] may have done in their Schedules with respect to specific services is not relevant for purposes of determining what the United States has done in its own Schedule. Canada has made clear that a Member may, in certain cases, have departed from the W/120 and the corresponding CPC numbers associated with it. No Member was obliged to schedule specific commitments in accordance with the W/120 and the corresponding CPC numbers. The fact that a few Members may have scheduled specific commitments on gambling and betting services differently than the United States simply reflects that fact. The task of a panel is to look at what the United States has done in its Schedule, not at what a few other Members may have done.

For the United States:

5. Which classification system, if any, did the United States follow in establishing its GATS schedule of specific commitments? If the United States has followed a specific classification system, could the United States provide the Panel with a table of concordance between that system and W/120 for the entire schedule? In the absence of an explicit reference to the CPC in the US Schedule, what is the definitional framework within which the US commitment in the first column of its Schedule should be interpreted?

United States

Subject to some changes (*e.g.*, "except sporting"), the United States generally followed the W/120 *structure* in its schedule of specific commitments. However, the United States did not refer to the CPC or any other particular nomenclature to describe the terms of the US Schedule, preferring instead that those terms be interpreted according to their ordinary meaning, in their context and in light of the object and purpose of the GATS. Those rules, reflected in Articles 31 and 32 of the Vienna Convention, provide the definitional framework within which the description of the US commitment in the first column of its Schedule should be interpreted. Because the United States did not agree to any special meanings for the terms in its schedule, such as by agreeing to any particular nomenclature, there is no additional document that could be used as the basis for a concordance.

6. What is the relevance of the US industry classification system for interpreting the US GATS schedule? How are gambling and betting services classified in that system?

United States

The North American Industry Classification System (NAICS 2002) is intended for classifying types of establishments for statistical purposes. It is the result of trilateral negotiations among three WTO Members (Canada, Mexico, and the United States). Accordingly it is not negotiating history for the US GATS Schedule, but does provide evidence that there are internationally accepted, alternative ways to classify services other than the CPC. The NAICS supports the US view that gambling is not part of "other recreational services (except sporting)." NAICS 2002 includes the two-digit heading 71, "Arts, Entertainment, and Recreation." Within that heading, three-digit heading 713, "Amusement, Gambling, and Recreation Industries," includes four-digit heading 7132 "Gambling Industries." Significantly, "Gambling Industries" is a stand-alone heading, and is not part of the separate four-digit heading 7139, covering "Other Amusement and Recreation Industries" (7139). "Internet game sites" falls under separate NAICS 2002 heading 516110, "Internet Publishing and

[229] As of 4 April 2003.

Broadcasting." Definitions of these categories may be found on the US Census Bureau website "2002 NAICS Codes and Titles" by clicking on the hyperlinks for individual codes.[230]

Antigua

At the time of the Uruguay Round negotiations the United States used the Standard Industrial Classification system (the "SIC"), introduced in 1987. Although this classification has since been reorganised (in 1997), to the current North American Industry Classification System (the "NAICS"), only the SIC system could possibly be relevant for any examination of United States commitments agreed in the Uruguay Round as the NAICS postdates the Uruguay Round Agreements. The SIC contained a broad category, "79 – Amusement and Recreation Services."

8. The United States argues, *inter alia*, that (i) "except sporting" [illegible] gambling and betting from its commitment under 10.D [illegible] a commitment on gambling and betting, it would ha[illegible] would the United States feel the need to excl[illegible] (including, in its view, gambling and betting) from sub-sector 10.D [illegible] that gambling and betting are included under 10.E? How can this be [illegible] the principle that entries in a classification system are mutually exclusi[illegible]

United States

The two assertions to which the Pane[illegible] to two alternative arguments advanced by Antigua (which bears the burden of pro[illegible]e of a US commitment). In response to Antigua's assertion that sub-sector 10.D o[illegible]ule is defined by the CPC and includes gambling services, the United States has [illegible]1) the US Schedule is not and cannot be defined by the CPC; and (2) even if 1[illegible] gambling services (*quod non*), the words "except sporting" exclude gambling, w[illegible]e ordinary meaning of "sporting."[232] In response to Antigua's assertion that gam[illegible]e ordinary meaning of "entertainment" and also within the ordinary meaning of "re[illegible]nited States has pointed out that (1) Antigua fails to prove this; and (2) even if it [illegible]*on*), the logical consequence would be that gambling really fits neither of these ca[illegible] belongs in "10.E Other" [illegible] is even more persuasive if the Panel finds [illegible]s for "ente[illegible] services" are mutually exclusive.

Regarding why the United S[illegible]serful to exclude "sporting" (includ[illegible] gambling) if it belongs in 10.E in any e[illegible]tates considers that the exclusion provides a[illegible] added assurance against misinterpretat[illegible]mmitments, while at the same time clarifying the status of other (non-gambling) form[illegible]

B. THE MEASURE(S) AT ISSUE

For both parties:

9. What is the legal status and [illegible]ents made by the US representative at meetings of the DSB[233] to the ef[illegible]ply of cross-border gambling and betting services is prohibited under US [illegible]

Antigua

In the context of this dispute the Unit[illegible]ice before the DSB unequivocally stated that "cross-border gambling and betting servic[illegible]d under US law,"[234] confirming earlier statements made to Antigua during consultations[illegible]de the same statement on a number of

[232] With respect to the meaning of "sporting," t[illegible]ttaches for the Panel's examinatio[illegible] copies of the following definitions: *New Shorter Oxford Eng[illegible]* 3000 (1993) ("Now *esp[ecia][illegible]* pertaining to or interested in betting or gambling"); *Merriam-W[illegible]Dictionary*, p. 1134 ([illegible] 2001) ("of or relating to dissipation *and esp[ecially] gambling*"); *W[illegible]* p. 2206 (1986) ("of, relating to, or preoccupied with dissipation and [illegible]

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other occasions not directly related to this proceeding.[235] Although at the first Panel session in this matter the United States appeared initially to have withdrawn that statement, during the final Panel meeting of the session the United States once more made clear its position that the cross-border provision of gambling and betting services from Antigua to the United States was illegal under United States law.[236]

The discussion contained in *US – Section 301 Trade Act* is very helpful in assessing the effect of the United States statements before the DSB as well as before the Panel in this proceeding. In *US – Section 301 Trade Act* the United States had "explicitly, officially, repeatedly and unconditionally confirmed [a United States] commitment (…)"[237] both at a meeting of the panel and in response to questions from the panel. While observing that "[a]ttributing international legal significance to unilateral statements made by a State should not be done lightly and should be subject to strict conditions,"[238] the panel found that the statements made before it "were a reflection of official US

11 December 2003, the United States head of delegation, while ostensibly narrowing the scope of earlier United States declarations on the subject, still clearly stated that the placing and taking of bets—"gambling and betting"—on a cross-border basis was illegal under United States law. Under the reasoning adopted by the panel in *US – Section 301 Trade Act*, the Panel is entitled to rely on these statements by the United States.[241] Given these clear declarations by the United States of "its legal position (…) as regards its domestic law"[242] at the heart of this dispute, it is untenable for the United States to assert that Antigua has argued the "total prohibition" based upon a "mere assertion" or that, indeed, Antigua has not made its *prima facie* case regarding the measures of the United States at issue in this proceeding.

The panel in *US – Section 301 Trade Act* referred to the judgment of the ICJ in the *Nuclear Test* case (Australia v. France).[243] In that case the ICJ found that France had imposed on itself an obligation of international law by making repeated public statements that it would cease the conduct of atmospheric nuclear tests. The panel in *US – Section 301 Trade Act* pointed out that the legal effect of the United States statement at issue un *US – Section 301 Trade Act* did not go as far as creating a new legal obligation but it nonetheless applied the same and perhaps even more stringent conditions that the ones unused by the ICJ in the *Nuclear Test* case.[244] In the *Nuclear Test* case the ICJ based its finding primarily on statements by the French President and the French Defence Minister at two press conferences.[245] The statements by the United States at issue in this case were not made at press conferences but, as in *US – Section 301 Trade Act*, were made in the context of a specific dispute settlement procedure. Furthermore the statements at issue in this case do not create a new legal obligation for the United States but only describe the effect of extant United States' domestic legislation. This results in a statement of fact upon which not only the Panel, but also Antigua and the third parties, are entitled to rely. With reference to the panel report in *US – Section 301 Trade Act*,e7ut als

> "[A]n agreement, admission, or *other concession* made in a judicial proceeding by the parties or their attorneys. The essence of a stipulation is an agreement between the parties or between counsel with respect to business before a court (…). A stipulation is a time-saving device used to admit necessary, but foundational or peripheral evidence which both parties to the litigation concede the truth of and which is not a point of contention between the parties. A stipulation is a confessory pleading negating the need to offer evidence to prove the fact, and the party is not permitted to later attempt to disprove the fact.[246]

The circumstances surrounding the United States' statement strongly suggests that it would be considered a stipulation under United States law. During consultations, Antigua proposed its position that the lengthy measures cited in its Annex, either singularly or in combination, were best described as a total prohibition of remote cross-border betting and gambling services by the United States. Antigua's proposal reflected its belief that the "total prohibition" concept was not in dispute and, further, would serve to expedite the review of this matter by allowing the Panel and parties to avoid expending the time and resources necessary to describe and define the numerous federal and state laws which constitute the total prohibition. In response to a letter from Antigua[247] raising the merits of proceeding under this theory, the United States responded in writing by confirming its position that the cross-border gambling services offered by Antiguan operators were prohibited by United States law.[248] The United States then proceeded to repeat the "total prohibition" concept in statements to the

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Under United States law, the United States' statements to the DSB that United States law prohibits the services in question would represent compelling evidence of the existence of matter asserted — that United States law prohibits Antiguan operators from providing remote cross-border betting and gambling services to consumers in the United States. This significant piece of evidence by itself would be sufficient to support a finding in a United States court that the United States totally prohibits cross-border gambling and betting services. Although Antigua does not believe the United States denies the existence of its total prohibition, if the United States sought to do so a United States court would consider the formal statements of the United States before the DSB an "admission by a party opponent." Relevant admissions of a party, whether consisting of oral or written assertions or nonverbal conduct,[254] are admissible in evidence in United States courts when offered by an opponent.[255] Admissions in the form of an opinion are competent evidence, even if the opinion is a conclusion of law.[256] As such, the statements made by the United States before the DSB would be allowed into evidence by

Because the United States made the statements regarding the total prohibition in the course of this proceeding, were this matter pending in a United States court, the United States would be "judicially estopped" from contending now that there is no total prohibition. The doctrine of "judicial estoppel" arises under United States jurisprudence when a party attempts to assert, in a judicial or quasi-judicial proceeding, a position contrary to a position taken by that party in a prior judicial or quasi-judicial proceeding.[259] United States courts have recognized that it is wrong to allow a person to abuse the judicial process by advocating one position, then later advocating a different position at a time when the changed position becomes beneficial.[260] If the doctrine is applied, the court in the subsequent proceeding will "estop," or prevent, the party from asserting a factual or legal position contrary to that asserted in the earlier action.[261] The United States government is, like any other litigant, subject to judicial estoppel whenever that doctrine is properly invoked.[262]

United States

At the June 24, 2003, DSB meeting, the United States stated that it had "made it clear that cross-border gambling and betting services are prohibited under US law" and that such services "are prohibited from domestic and foreign service suppliers alike." The United States stands by these statements. Two clarifications may be helpful. First, the United States did not say at the time that this prohibition was "total," and has repeatedly clarified that it is not. At the time of the DSB meeting, such a clarification was unnecessary because we were speaking in the context of claims that we then understood to relate to transmission of bets by Internet or telephone from Antiguan suppliers – actions which are indeed prohibited under US law. Second, our remark about the applicability of this prohibition to domestic service suppliers should have made it clear that the prohibition we were referring to was not a restriction on cross-border supply *per se*; rather, we were referring to laws of general application that apply equally to cross-border supply and supply of the like services (i.e., remote supply) within the United States.

Both of these points were implicit in our remarks at the DSB meeting. Antigua is incorrect to read these remarks as a "concession" of, or even as support for, the existence of its alleged "total prohibition" on cross bor

Antigua

Antigua is challenging all three aspects which are intrinsically linked and are all elements of the total ban that Antigua seeks to challenge in this case. *Legislative and regulatory provisions* are given a practical effect by their *application* to specific cases. If, for example, the United States maintained its prohibition but did not enforce it, then the impairment of Antigua's GATS benefits would be much less substantial and Antigua would probably not have started this proceeding. The United States *practice* vis-à-vis the foreign cross-border supply of gambling and betting services is also based on or at least purported to be based on legislative and regulatory provisions.[263] In Antigua's view it would not be logical or effective to challenge some of these elements and not others.

providing market access for cross-border gambling and betting services from Antigua in accordance with its GATS obligations. How this is formally structured under United States law does not matter.

United States

Setting aside issues concerning Antigua's failure to make a *prima facie* case, as to which the United States has already commented, the Panel's question points to a distinct issue concerning the scope of Antigua's Panel request. The United States considers that the only claims within the scope of Antigua's Panel request (and, therefore, the Panel's terms of reference) would be "as such" claims against specific legislative and regulatory provisions and/or the collective effect of two or more such provisions. The Panel request does not articulate any claim against particular applications of these measures, and Antigua's clarification, as accepted by the Panel, would appear to confirm that no such

Antigua

The case referred to is the *United States v. Jay Cohen* case.[270] The *Cohen* case involves the prosecution under the Wire Act[271] of an American citizen who had moved to and established a company in Antigua to offer gambling and betting services into, among other places, the United States on a cross- 3521se

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[271] Th[illegible]

services include the proceeding brought by the New York Attorney General under state criminal statutes, the Wire Act and the Travel Act in the *World Interactive Gaming Corp.* case[276] and the unsuccessful prosecution in the case of *United States v. Truesdale*[277] of an Internet gambling service provider based in the Dominican Republic under the "Illegal Gambling Business Act."[278] In addition, state authorities continue to take action to prohibit or impede the offering of cross-border betting and gambling services. Like the United States' recent letter advising national advertisers not to allow advertising for offshore Internet gambling services,[279] states have followed suit and taken similar action. An example of such state action was recently reported in Alabama.[280]

In Alabama, state law provides that a person commits the state crime of "promoting gambling" if he knowingly advances or profits from unlawful gambling activity otherwise than as a player.[281] In November 2003, the Alabama state attorney general's office instructed WJOX-AM in Birmingham, Alabama, a sports-talk radio station, to cease broadcasting commercials for Internet gambling operations or risk criminal prosecution. The warning was issued in a letter by Richard Allen, chief deputy to Alabama Attorney General Bill Pryor. In the letter, Allen informed the radio station that the Alabama Attorney General's office had reviewed advertisements broadcast by the radio station for Internet and telephone gambling operations. "If the ads are discontinued immediately, this office contemplates no further action. This is, however, the second time we have communicated with you about these kinds of activities," Allen wrote. Promoting gambling is a misdemeanour that carries a maximum penalty of a year in jail and a fine of $2,000. Allen warned that each airing of a commercial would be considered a separate crime. As a result of the Attorney General's letter, radio hosts on WJOX-AM have informed listeners they can no longer call in and discuss gambling or betting lines - a frequent topic during college football season.[282]

Unite

Antigua

Article XVI is not a non-discrimination or national treatment clause. Whether or not a measure that violates Article XVI (in this case a prohibition on cross-border supply) also applies within a Member has no relevance for the application of Article XVI Paragraph 6 of the 1993 Scheduling Guidelines lists four examples of limitations on market access caught by Article XVI:2(a): (i) license for a new restaurant based on an economic needs test; (ii) annually established quotas for foreign medical practitioners; Government or privately owned monopoly for labour exchange; and nationality requirements for suppliers of services (equivalent to zero quota). These clearly include examples of measures applying to foreign and domestic services and services suppliers alike. These measures are nevertheless caught by Article XVI:2(a). The last example, the nationality requirement, further confirms that, contrary to what is argued by the United States, a total ban that is not expressed in numerical terms is caught by Article XVI:2(a) as being equivalent to a zero quota (despite the fact that, nominally, a nationality requirement also applies to service suppliers of the Member concerned). Likewise, a total prohibition on remote supply results in a total denial — equivalent to a zero quota — of market access in cross-border mode, as cross-border supply is not possible if remote supply is unlawful.

In the response to question 1 above Antigua explained that the 1993 Scheduling Guidelines are highly relevant for the interpretation of the US Schedule because the 1993 Scheduling Guidelines are part of the context of all GATS schedules. The 1993 Scheduling Guidelines are also highly relevant for the interpretation of the GATS itself and Article XVI in particular.

Article XVI can only be applied through specific commitments in schedules. Consequently the approach taken by the Members when drafting Article XVI commitments in their Uruguay Round schedules is a good indi4oteu Tc wned monopnterpnon of the UStselfc4tv (These itself and Article-12.75i3l

of other WTO Members would, in fact, be denied any market access under mode 1 (cross-border). Thus, service suppliers of other WTO Members could accord treatment less favourable than that provided for under the terms, limitations and conditions agreed and specified in the Schedule of a Member that has made "full market access commitments".

D. ARTICLE XVII

For both parties:

16. If there is "total prohibition" in the United States on the cross-border supply of gambling and betting services, as claimed by Antigua and Barbuda, can there be a violation of Article XVII at all?

Antigua

In Antigua's view the most appropriate interpretation of the relationship between Articles XVI and XVII is that a determination that a total prohibition on cross-border supply violates Article XVI obviates the need to assess whether the prohibition also violates Article XVII. Antigua acknowledges, however, that the text of Articles XVI, XVII and XX:2 of the GATS also allows the conclusion that Articles XVI and XVII can apply simultaneously to a total prohibition on cross-border supply. In this respect Antigua submits that the resolution of the debate on the precise relationship between Articles XVI and XVII has no practical significance for the outcome of this case. To Antigua it does not really matter whether the United States' total prohibition violates Article XVI without reaching Article XVII or whether it violates both Articles.

The question of the overlap between Articles XVI and XVII appears to be one of the most controversial legal questions surrounding the application of the GATS. However, the overlap question only creates a practical problem if a Member has made different commitments for market access and national treatment with regard to the same sector.[288] That is not the case for the sub-sectors of the US Schedule at issue or possibly at issue in this case: sub-sector 10.D and sub-sector 10.A. Consequently, in the specific context of this dispute, the question of overlap is merely a technical one – irrespective of whether the United States' total prohibition violates Article XVI only or both Articles XVI and XVII, the United States is under an obligation to remedy the breach of its GATS obligations by the total ban. This is not an instance in which different aspects of the United States measures are caught by Article XVI or XVII respectively. It is simply a matter of "double usage" of Article XVI and XVII. There are undoubtedly circumstances where Article XVI may apply to a situation and Article XVII not, and vice versa. The fact that in this dispute the United States measures violate both provisions does not undermine the usefulness of either provision. Antigua believes, however, that when looked at in isolation, the wording of Article XVII is sufficiently broad to capture almost all market access restrictions caught by Article XVI, in particular because it covers *de facto* as well as *de jure* discrimination.[289]

The broader problem of the overlap between Article XVI and XVII has been described as one of "Text versus Context."[290] The text of Article XVII allows for it to be applied to almost all market

[288] See Informal Note by the Secretariat, "Technical Review of GATS Provisions," JOB(01)/17, dated 16 February 2001; see also Informal Note by the Secretariat, "Proposals for a Technical Review of GATS Provisions – Article XX:2", JOB(02)/153, dated 24 October 2002.

[289] A Member may, for instance, maintain a quantitative limitation of five suppliers in a certain sub-sector that is equally applicable to foreign and domestic suppliers. In many circumstances this will result in a *de facto* discrimination in favour of the, for instance, three suppliers already operating in that market.

[290] A. Mattoo, "National Treatment in the GATS," 31 *Journal of World Trade* 1997, 107-135, at p. 113. Mr. Mattoo is one of the most dis5 11Tw 184ocumstan.5 cm Tcs12.75 3M TD /F -0.1to8h8 84 0 TD 0.2631 Tc 1.0494 Tw

access restrictions covered by Article XVI. On the other hand the structure of the GATS (*i.e.* the fact that Article XVI exists and is given an equally prominent place as Article XVII in the GATS and in GATS schedules) indicates that there must be meaningful distinction between the two. Although Antigua has not been able to review the negotiating history of these provisions, Antigua has come across what appears to be contradictory commentary on the negotiating history. Some suggest that negotiators worked on the basis of a dividing line between Article XVI and XVII;[291] others suggest that negotiators were well aware of the overlap.[292] In Antigua's view the most appropriate interpretation of the relationship between Articles XVI and XVII is one of "practical hierarchy" in which: (i) Article XVI concerns "the key to the door," i.e. regulation that affects an operator's ability to access a market; and Article XVII concerns regulation that distorts competition in favour of domestic suppliers once an operator has gone "through the door" and is operating on the market.

Under that approach the scope of Article XVII is negatively defined by the scope of Article XVI—if a measure is covered by Article XVI it is not covered by Article XVII. This interpretation does not lead to an unacceptable result in a situation involving a Member that has no commitments in the market access column and a full commitment in the national treatment column, a situation which is perceived to be the most important practical problem posed by the overlap of Articles XVI and XVII.[293] In such a situation, Antigua's proposed interpretation would imply that to the extent that a Member does not maintain measures contrary to Article XVI (meaning that it allows market access even though it goes beyond the commitments in its schedule), it must grant national treatment. Of course, the value of that national treatment commitment will be limited because traders will know that WTO law allows the Member to restrict market access and ban them from the market. However, as long as they are allowed access to the market, they would have to be given national treatment.

Antigua submits that this "practical hierarchy" interpretation is supported by: (i) the structure of the GATS; (ii) the equally prominent place that Article XVI and XVII have in GATS schedules; (iii) the rule that an interpretation must give meaning and effect to all terms of a treaty; and the parallelism between GATT and GATS which was one of the working premises of the negotiators. The situation is complicated, however, by Article XX:2 of the GATS. This appears to confirm that measures can be caught both by Articles XVI and XVII. Simultaneously, however, it excludes the possibility that Article XVII can be used to undermine the effectiveness of restrictions on the application of Article XVI (as in the example described above of the Member that made no commitments for market access and a full commitment for national treatment).[294] In Antigua's view this confirms that, even if the text of Articles XVI and XVII allows overlapping application or "double usage," it was the common intention of the parties that this would not be the case and that the provisions would be applied separately. On the other hand Article XX:2 could be interpreted as supporting the text-based interpretation that Articles XVI and XVII can be applied to the same measure. In Antigua's view this is not the most appropriate interpretation but it is not an inappropriate

[291] Ibid., at pp. 115-116.

[292] Informal Note by the Secretariat, "Proposals for a technical review of GATS provisions – Article XX:2," JOB(02)/89, dated 16 [illegible]

interpretation and the Panel may adopt it. Whatever the Panel decides, Antigua holds the strong view that the decision on this issue will have no material effect on the practical outcome of this dispute.

United States

In this dispute, where the restrictions at issue apply to both cross-border suppliers and domestic suppliers of the "like" service, the United States does not see how there could be a violation of Article XVII. That said, the United States notes that the analysis of an alleged "

example, theoretically, if the United States permitted domestic gambling by remote supply subject to particular regulatory requirements, there might be "like services and service suppliers" issues regarding the extent to which services supplied from Antigua meet the same requirements. However, that is not the case. The more relevant likeness factor in this dispute is therefore not differences in regulation *per se*, but differences in the characteristics of services and suppliers that influence the manner in which they are regulated. Specifically, the greater susceptibility of gambling by remote supply to various threats (organized crime, money laundering, health risks, child and youth gambling, etc.) makes it unlike other, non-remote forms of gambling.

18. With respect to paragraph 63 of Antigua and Barbuda's first oral statement, which states in relevant part that the "'likeness of service providers has little functional relevance in this case":

(a) Is there always a need to assess likeness for both "services" and "service suppliers" under Article XVII of the GATS?

(b) Is there a difference in the relevance of the "likeness" of service suppliers for modes 1 and 2 as compared to for modes 3 and 4? In other words, should the likeness of *service suppliers* as well as the likeness of *services* be considered in the case of modes 1 and 2?

Antigua

[a]: In Antigua's view this is not the case. In paragraph 95 of its first submission the United States suggests that Article XVII can only apply if like services are supplied by like service suppliers. Thus the reference to "service suppliers" in Article XVII:1 would function as a limitation on the scope of Article XVII:1: less favourable treatment of like services would only be caught by Article XVII to the extent that the services are supplied by like service suppliers. However, the text of Article XVII:1 does not support that conclusion at all. The text of Article XVII provides that:

> each Member shall accord to services and service suppliers of any other Member, (…), treatment no less favourable than that it accords to its own like services and service suppliers.

Thus Article XVII mandates treatment "no less favourable" for "like services" *and* "like service suppliers," without limiting that obligation to situations in which both the services and the services suppliers are "like." The text does *not* refer to "like services supplied by like service suppliers." Indeed, it would be difficult to see why the drafters of the GATS would have wanted to limit the scope of Article XVII in such a way. Presumably, in adding the "like service supplier" concept the drafters wanted to extend rather than limit the scope of Article XVII. This is because, in the area of trade in services, much more than in the area of trade in goods, the conditions of competition in the market place can be affected by measures applicable to the service suppliers rather than to the services themselves. This is particularly the case when services are supplied in mode 3 or 4. For instance a Member could impose discriminatory taxes on a foreign service supplier "commercially present" on its territory. In Antigua's view the purpose of the extension of the national treatment obligation to service suppliers in Article XVII is to capture such measures. It is not intended to somehow limit the scope of Article XVII.

[b]: In modes 3 and 4, arguably the *identity* of the service supplier might be more relevant, given that both modes involve the actual, physical presence of businesses or natural persons located in the territory of the Member. In such circumstances it is perhaps more likely that denial of national treatment may occur on the basis of the identity of the service supplier without regard to the actual services being provided. Further, the actual presence of businesses or natural persons may invoke the many concerns that may arise in that context, such as immigration, use of public resources and

services and a host of other issues raised by actual physical presence. But whether or not identity can or should be synonymous with "likeness" is questionable.

United States

[a]: Yes. Article XVII requires likeness of both services and service suppliers. As the panel in *Canada – Autos* observed, "in the absence of 'like' domestic service suppliers, a measure by a Member cannot be found to be inconsistent with the national treatment obligation in Article XVII of the GATS."[298]

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Youbet.com and Capital OTB have been accepted for over 30 years in the United States without any known federal prosecution of major service providers. The United States National Thoroughbred Racing Association has been reported as stating that state-licensed and regulated entities in over 30 states have been conducting interstate pari-mutuel wagering for more than 20 years with the full knowledge of the United States Department of Justice.[311]

While some of the state-sanctioned pari-mutuel wagering services, such as Youbet.com and Capital OTB currently accept both Internet and telephone wagers, there are other state-sanctioned services which accept only telephone wagers. Autotote Enterprises, Inc., for instance, is a licensed pari-mutuel operator in Connecticut which provides 12 off-track venues for patrons to watch and bet on horse racing.[312] The company maintains a telephone account wagering system called "On the Wire," which is accessible to residents of 27 states.[313] The longstanding and uninterrupted policy of acceptance by the United States of remote wagering by off-track and telephone accounts was codified into law in December 2000, when the United States Congr and tespeciedlledy exny d the Indefitedn of ma"terstate p

addition, during 2003 Virginia amended its pari-mutuel wagering laws to grant the Virginia Racing Commission the authority to regulate account wagering, by "which an individual may establish an account with an entity, approved by the Commission, to place pari-mutuel wagers in person or electronically."[318]

Under the Indian Gaming Regulatory Act (the "IGRA"), gamblers at Native American gaming establishments are permitted to gamble against each other by using remote electronic player stations.[319] In two separate rulings issued in 2000, *United States v. 162 MegaMania Gambling Devices*[320] and *United States v. 103 Electronic Gambling Devices*,[321] federal appellate courts affirmed the sanctioned use of electronic player stations that allowed players at various Indian locations to play bingo-type gambling games against each other. Both of these cases involved the legality of a bingo-style gambling game called MegaMania, which is played on a machine called an "electronic player station."[322] These player stations are located on Native American lands in Oklahoma, California and elsewhere.[323] A person playing MegaMania begins the game by electronically selecting up to four cards with randomly generated numbers. The player must pay US$0.25 per card to begin the game. A game will commence once at least 12 players nationwide purchase at least 48 cards. A random selection machine located on Native American land in Oklahoma selects three numbered balls, and a human operator transmits the numbers on the balls by computer to Multimedia's headquarters, where they are sent through a computer network to each player station. The player then touches the corresponding space or spaces on the player's card appearing on the MegaMania station screen. To continue playing the game, a player must pay an additional US$0.25 per card in exchange for the numbers on the next three balls. These numbers are transmitted in roughly ten second intervals. Consequently, the player must continue to pay US$0.25 to US$1.00 every ten seconds to stay in the game. A player wins by being the first player among all those who are playing throughout the country to obtain a set of numbers which match a certain arrangement on his electronic card. On average, Multimedia and the participating Native American tribes retain 15 percent of the amount taken in by the machines and the winning players receive 85 per cent.[324]

In both the *162MegaMania Gambling Devices* and *103 Electronic Gambling Devices* cases, the federal courts held that the cross border electronic MegaMania gambling game was lawful under the IGRA. The analysis applied in these cases suggests that IGRA allows the use of technology, including the Internet, to expand player participation in a common game if the game and all the players are participating from terminals located on Native American land.[325]

United States lotteries are played across state lines in the cases of the Powerball and Mega Millions lottery games. Powerball is a multi-state, mega-jackpot lotto game that is played in 24 states, the District of Columbia and the United States Virgin Islands. The game is administered by the Multi-State Lottery Association (the "MUSL"), a multi government-benefit association owned and operated by its member lotteries.[326] For each drawing, five white balls are picked out of a drum containing 53 balls and one red ball out of another drum containing 42 red balls.[327] Mega Millions is a multi-state lottery game played in 11 states, including Georgia, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Texas, Virginia and Washington.[328] Mega Millions drawings are held

Tuesday and Friday nights. The drawings are conducted by the Georgia Lottery in Atlanta, Georgia.[329] In both of these multi-state gambling games, players in participating states purchase lottery tickets from retail terminals which are linked to

either on a cross-border basis or on a purely domestic basis. US restrictions on remote supply apply equally regardless of national origin.

For the United States:

21. Exhibit AB-42[332] indicates that Youbet.com provides its subscribers the ability to wager "in most states" on horse races. US legal residents above 21 years old can become a member and place bets online or on the telephone once they have opened an account. Youbet.com states that it "is in full compliance with all applicable state and federal laws". Could the United States comment on this case, especially in view of its statement (in paragraph 33 of its first written submission) that the *Interstate Horseracing Act* "does not provide legal authority for any form of Internet gambling"?

United States

While Youbet.com states that they are in "full compliance with all applicable state and federal law," the US Department of Justice (the nation's chief law enforcement agency) does not agree with this statement. The Interstate Horseracing Act of 1978 is a civil statute in which the federal government has no enforcement role. In December 2000, the definition of the term "interstate off-track wager" in the IHA was amended. Congress, however, did not amend preexisting criminal statutes. When President William J. Clinton signed the bill containing the amendment to the IHA after the bill was passed by Congress, the Presidential Statement on Signing stated as follows:

> Finally, section 629 of the Act amends the Interstate Horseracing Act of 1978 to include within the definition of the term "interstate off-track wager," pari-mutuel wagers on horse races that are placed or transmitted from individuals in one State via the telephone or other electronic media and accepted by an off-track betting system in the same or another State. The Department of Justice, however, does not view this provision as codifying the legality of common pool wagering and interstate account wagering even where such wagering is legal in the various States involved for horseracing, nor does the Department view the provision as repealing or amending existing criminal statutes that may be applicable to such activity, in particular sections 1084, 1952, and 1955, of Title 18, United States Code.[333]

After hearings on Internet gambling in 2003, the Department of Justice reiterated its view that current federal law prohibits all types of Internet gambling, including gambling on horse races, dog racing, or lotteries. The Department of Justice maintains this view because the 2000 amendment to the IHA did not repeal the preexisting federal laws making such activity illegal. Under the principles of statutory interpretation applicable in United States courts, "[i]t is a cardinal principle of construction that repeals by implication are not favoured ... . The intention of the legislature to repeal must be clear and manifest."[334]

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22. How does the United States treat Internet services provided by Youbet.com, TVG, Capital OTB and Xpressbet.com, referred to by Antigua and Barbuda in paragraph 118 of its first written submission?

United States

Antigua discussed account wagering on horse races via the Internet and telephone.[335] The United States does not agree that the 2000 amendment to the IHA permits the interstate transmission of bets or wagers on horse races because pre-existing criminal statutes prohibit such activity.[336] It should be noted, however, that these Internet services provide additional services beyond just accepting wagers on horse races. They provide access to information about the horses, the odds on the horse races, simulcasting of horse races, etc. While US law does not permit interstate transmission by a wire communication facility of bets or wagers on horse races, the interstate transmission by a wire communication facility of information assisting in the placing of bets or wagers on horse races would not be prohibited, pursuant to 18 U.S.C. §1084(b), as long as the information is being transmitted from a place where betting on that event is legal to a place where betting on the same event is legal.

23. Could the United States comment on a statement made in the Gaming Industry Report by Bear Stearns (Exhibit AB-36[337]) that a number of operators in Nevada have established Internet gambling websites?

United States

The Bear Stearns report discussed proposals for Internet gambling in the State of Nevada. The report indicated that Nevada's plans for Internet gambling are on hold, and that Nevada has been informed by the Department of Justice that US federal law does not permit Internet transmission of a bet or wager. Nevada officials have assured federal officials that no operation licensed in Nevada has been approved or authorized to use any wagering system that operates over the Internet. In the discussion on Internet gambling businesses located in Alderney and the Isle of Man, the report stated on page 18 that Venetian Casino Resort Athens LLC, a subsidiary of Las Vegas Sands, Inc., had applied for an e-gaming license from Alderney. On page 19, the report stated that MGM Mirage had been awarded a license from the Isle of Man. The United States understands that MGM Mirage formerly operated an Internet gambling website from the Isle of Man, but has ceased operation. Further, when this website was operating, our information indicated it did not accept wagers from individuals located in the United States. The United States does not have specific information on whether or when the Venetian Casino Resort began operating its Internet gambling website. While the United States is not in a position to provide an analysis of the operation of any specific website from the Isle of Man or Alderney, we can categorically state that as long as such websites do not accept bets or wagers from individuals located in the United States and do not provide information assisting in the placing of bets or wagers to individuals located in the United States where such wagering is illegal, then the operation of such websites from Alderney or the Isle of Man by "operators from Nevada" does not violate US federal gambling laws.

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[335] The United States submits that Antigua incorrectly states that "[i]n order to accommodate this new form of account wagering, in 2000, the United States expanded the IHA [Interstate Horseracing Act of 1978] to permit betting on horse races over the Internet. Today, United States residents can lawfully gamble on horse races by telephone or online with several United States-based companies." See Section III.B.5. of this Report.

[336] See US response to Panel's question 21.

[337] Michael Tew and Jason Ader, Bear Stearns & Co. Inc., Equity Research, *Gaming Industry: E-Gaming: A Giant Beyond Our Borders*, submitted by Antigua as exhibit.

24. What is the status of the New Jersey bill referred to in the Gaming Industry Report by Bear Stearns (Exhibit AB-36) that would allow existing land-based casino facilities in New Jersey to operate Internet gaming sites from their own casino floors?

United States

On page 35 of Exhibit AB-36, a bill introduced in 2001 in the State of New Jersey legislature is discussed. That bill was not passed by the State of New Jersey legislature. Another bill, AB 568, is discussed on page 36. That bill was introduced in the 2002-2003 session but it was not passed during that session. We have no information on whether that bill or any similar legislation has been or will be reintroduced in the New Jersey legislature.

25. With respect to Exhibit AB-18W

E. ARTICLE VI

For Antigua and Barbuda:

27. Could Antigua and Barbuda specify what "authorization procedures" it is referring to in its claim of violation of Articles VI:1 and VI:3 of the GATS Agreement?

Antigua

The answer to this question is the same as question 11. It is not possible for Antiguan service suppliers to obtain authorisation to provide gambling and betting services into the United States. This violates Article VI:1 of the GATS because the "authorisation procedures" by their very terms exclude Antiguan suppliers and thus cannot be considered "administered in a reasonable, objective and impartial manner." This violates Article VI:3 because the inability to apply for authorisation makes it impossible for the United States to comply with the requirements of Article VI:3.

28. In respect of its claim of violation of Article VI:1, could Antigua and Barbuda indicate what "measures of general application" are not being "administered in a reasonable, objective and impartial manner" and why?

Antigua

The general approach to gambling law in the United States is that all gambling and betting is prohibited unless a specific authorisation has been given. Thus, the United States first maintains its "measures of general application"—the state and federal measures that act to prohibit the provision of gambling and betting services in the United States. Overlaying the general prohibitions are the state and federal measures that authorise certain persons to provide certain gambling and betting services under a wide and disparate variety of situations.[339] By not providing a method by which Antiguan suppliers can obtain authorisation to offer their services into the United States, the United States is in violation of Article VI:1.

F. ARTICLE XI

For Antigua and Barbuda:

29. In paragraph 108 of its first oral statement, Antigua and Barbuda refers to "legal provisions" that formed the basis of the New York Attorney General's action against Paypal.

(a) Which legal provisions is Antigua and Barbuda referring to?

(b) Is Antigua and Barbuda challenging these legal provisions and/or the application of these provisions?

Antigua

[a]: Paragraphs 14-18 of the "Assurance of Discontinuance" entered into in August 2002 between the Attorney General of the State of New York and PayPal, Inc,[340] refer to the two legal provisions and two cases (each of which was included in the Annex to Antigua's Panel request). In his discussion

[339] See Section III.B.7. of this Report.

[340] Attorney General of the State of New York, Internet Bureau, *In the Matter of Paypal, Inc.*, Assurance of Discontinuance (16 August 2002).

of the two cases the New York Attorney General further refers to two other legal provisions that are also

II. PANEL'S QUESTIONS AT THE SECOND SUBSTANTIVE MEETING

B. US SCHEDULE

For the United States:

30. In its reply to Panel question No. 3 to third parties, the European Communities refers to the last revision of the Revised Final Schedule of the United States Concerning Initial Commitments, circulated as MTN.GNS/W/112/Rev4 on 15 December 1993. The European Communities notes that this revision contained a cover-note that read as follows:

> **Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991).**
>
> **The European Communities notes that the only further activity to be undertaken following circulation of this document by the United States was a process of "'technical verification of schedules' which did not modify at all the scope of the results of negotiations" (as provided for in GATT/AIR/3544 , which, in turn, refers to a decision of the GNS dated 11 December 1993 providing the same).**
>
> **(a) Could the United States comment on the European Communities' reply?**
>
> **(b) How does** the **United States define the term "scope" in this cover-note?**

United States

[a]: The document MTN.GNS/W/112/Rev.4 cited by the European Communities includes a sentence, substantially identical to that which appeared in MTN.GNS/W/112/Rev.3, stating that "[e]xcept where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's revised Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)." The EC has incorrectly described the cover note to draft versions of the US Schedule as indicating a US position "that the scope of [US] commitments is based on the 1991 Sectoral Classification (W/120) and the CPC."[345] The addition of the words "and the CPC" at the end of that sentence misrepresents the content of the cover note. The United States did not refer to the CPC in that note. Also, the United States has previously explained that the ordering of a schedule according to W/120 and the use of the CPC were distinct issues. Using W/120 did not bind a Member to the CPC, and this is confirmed by the fact that Members wishing to refer to the CPC inscribed CPC numbers in their schedules.

Regarding the discussions taking place in late 1993 and early 1994, those discussions provided ample opportunity for other participants in the GATS negotiations to request that the United States place CPC references in its schedule. A statement by the chairman of the Group of Negotiations on Services at an informal meeting on October 29, 1993 confirms this. The Chairman stated that:

> I also intend to organise consultations, possibly on a fairly large scale and probably on 16 November, on drafting of schedules of commitments. I should stress that it would not be the purpose of this exercise to consider the economic content or value of offers, but rather, in the interest of all participants, to identify possible improvements

[345] European Communities' reply to Panel

> in the presentation of offers, based on actual examples. The organisation of this discussion would be greatly assisted if participants informed the secretariat in advance of any common errors in scheduling which in their view affect the clarity or the legal security of commitments. This would enable the secretariat to prepare a working document for the discussion.[346]

The Chairman's instructions strongly imply that any participant that desired the insertion of CPC references in the US schedule was free to raise the issue at that time.

The GATT Secretariat subsequently asked that parties to the GATS negotiations submit their questions on others' schedules of commitments and MFN exemptions by 27 January 1994. Meetings were scheduled in early February 1994 at which interested parties were invited to discuss the draft schedules of individual participants as part of a "rectification" process, with final schedules requested by early March, 1994. While this period was mainly intended to address technical matters, a number of substantive issues remained outstanding as well.[347] Thus the United States would not agree with the assertion that the "scope of the results of the negotiations" was fully settled by December 1993.

[b]: The note relates the "scope" of US commitments to the "sectoral coverage" in W/120, from which one may infer that "scope of commitments" and "sectoral coverage" were being used as roughly synonymous terms. Contrary to the EC's assertions, participants in the negotiations could not reasonably have read this note as an endorsement of the CPC classification. The United States was already on record as not wishing to be bound by any particular nomenclature. Moreover, as the United States noted in response to part (a) of this question, W/120 and the CPC we

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include the mailing of lottery tickets between states, the interstate transportation of wagering paraphernalia, and wagering on sporting events.

36.

D. ARTICLE XVI

For the United States:

37. Assuming, arguendo, that the United States has made a commitment in its GATS Schedule in relation to gambling and betting services, what is the purpose of evaluating consistency with paragraph 2 of Article XVI in addition to making that evaluation with respect to paragraph 1 given that the United States has inscribed a "none" in its Schedule in relation to market access commitments?

United States

The word "none" appears under the heading of "limitations on market access." In order to determine whether a Member has violated the commitment reflected by inscription of the word "none," one must therefore determine what it means to have a "limitation on market access." Article XVI:2 provides the closed list of carefully-described quantitative restrictions and other limitations that are considered "limitations on market access" under the GATS. Thus one is logically bound to look to Article XVI:2 to determine whether a Member has maintained or adopted a measure inconsistent with Article XVI.

38. What is the United States' reaction to Antigua's arguments in paragraph 31 of Antigua's second oral statement regarding the significance of the word "whether" in Article XVI:2(a)?

United States

Antigua relies on the word "whether" to assert that Article XVI:2(a) is, internally speaking, an open list rather than a closed one. The word "whether" does not automatically imply an open list. In fact, the WTO agreements are replete with contrary examples where the drafters understood this, and therefore added some catch-all term such as "any other form." The particular example using that phrase is Article XX

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that: "[T]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination (…)."[357]

The United States' argument that the broad purposes expressed in Article XVI:1 are then negated by a formalistic reading of Article XVI:2 is

With its first submission, Antigua also provided the Panel with anecdotal evidence of competition between Internet-based and domestic gambling services in the United States.[370] There is considerable further anecdotal evidence of competition between Internet and other gambling.[371]

With regard to the general proposition that "Internet-based" commerce competes with "land-based" commerce Antigua refers to the initiative of the United States' Federal Trade Commission ("the FTC") to promote competition over the Internet.[372] The FTC has found, however, "that many state regulations favor local suppliers over outC

view of the express language of Article XIV ("nothing in the agreement shall prevent..."), the United States views the primary role of Article XIV in this dispute as further confirming the absence of any inconsistency.

45. In the case of an affirmative answer to the previous question, could the United States clearly and specifically identify the provisions of laws and regulations with which it says the challenged measures secure compliance under Article XIV(c)?

United States

The United States would like to first note that a Member's laws and regulations are presumed to be consistent with WTO rules unless proven to be otherwise. A defending party's burden of proof regarding measures enforced under Article XIV(c) therefore differs from the burden imposed on a party seeking to prove that laws or regulations are inconsistent with the GATS. The defending party under Article XIV(c) need only show that such laws exist and have not been found inconsistent with the GATS. Such laws do exist in this case, and although Antigua challenges some of these laws (alleged state restrictions on gambling), Antigua has not shown that any (much less all) are inconsistent with the GATS.

states that: "[T]he definition of "organized crime" … refers to those self-perpetuating, structured and disciplined associations of individuals or groups, combined together for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while protecting their activities through a pattern of graft and corruption." According to this definition, organized crime groups possess certain characteristics which include but are not limited to the following: (i) Their illegal activities are conspiratorial; (ii)

III. COMMENTS BY THE PARTIES ON THE RESPONSES PROVIDED IN SECTION II

A. COMMENTS BY ANTIGUA AND BARBUDA ON THE UNITED STATES' RESPONSES TO PANEL'S QUESTIONS AT THE SECOND SUBSTANTIVE MEETING

Question 36 (for the United States)

With respect to the reference to the "very few exceptions limited to licensed sportsbook operations in Nevada" in the second paragraph of Exhibit AB-73[390], could the United States identify these exceptions, even on an illustrative basis?

In its response to this question, the United States answered that Nevada was the only state in which "sports book" services are legal in the United States. This is not accurate. As Antigua has pointed out previously, there are four states in the United States that are exempt from the application of the 1992 federal legislation that restricted certain forms of sports-related betting in the United States.[391] Although effected somewhat cryptically, the exemptions are found in Section 3704 of the statute.[392] Oregon maintains state-sponsored betting on certain sporting events on the basis of this exemption and Delaware has considered adopting extensive sports betting.

A proper analysis of the market for sports betting in the United States should take into account the non-sanctioned, or "illegal," sports betting industry, which comprises a huge segment of the United States gambling market and is, despite protests of the United States to the contrary, as stated by the United States NGISC, "*not likely to be prosecuted*."[393]

Question 42 (for the United States)

In its submissions, the United States has introduced a distinction between, on the one hand, remote supply of gambling and betting services and, on the other, the non-remote supply of such services. Could the United States clarify how it defines "remote" and "non-remote" supply of such services, making reference to the specific application of this distinction in the United States. For instance, if a lottery ticket for a New York State lottery is purchased through a licensed vendor in Florida, does this amount to remote supply, given the definition of this term referred to by the United States in paragraph 7 of its first written submission?

In its response to this question, the United States for the first time presents a clear, concise definition of what it has called "remote supply" — what it considers to be the "unlike" gambling and betting service that it may prohibit from being supplied on a cross-border basis without being in violation of its commitments under the GATS.[394] The response deserves to be set out in its entirety (emphasis added):

> By remote supply, the United States means situations in which the gambling service supplier (whether foreign or domestic) and the service consumer are not physically together. In other words, the consumer of a remotely supplied service does not have to go to any type of outlet, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier has no point of presence but offers the service directly to the consumer through some means of distance communication. *Non-remote supply*

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[390] See above footnote 353.

[391] 28 U.S.C. §§ 3701-3704.

[392] Anthony N. Cabot and Robert D. Faiss, "Sports Gambling in the Cyberspace Era," 5 *Chapman Law Review* 1, Spring 2002, p.7, footnote 31.

[393] NGISC Final Report, pp. 2-4, See generally the discussion and sources in Section III.B.2.of this Report.

[394] And which, apparently, it also believes is subject to exclusion under Article XIV of the GATS.

Antigua also disagrees with the United States' argument that a defending party who seeks to invoke Article XIV(c) must not establish a *prima facie* case that the law for whose compliance the inconsistency with GATS is necessary, is itself consistent with GATS (particularly so if that law essentially has the same effect as the law that has already been found to be GATS-inconsistent). Article XIV is an affirmative defence and it is therefore up to the United States to make a *prima facie* case that the conditions of Article XIV(c) are fulfilled, including the presence of laws that are "not inconsistent" with GATS.

With respect to organized crime laws and regulations, the United States does not meet the high "measure identification" standard that it says exists in WTO dispute settlement. It cites a number of specific laws by way of example

assertion. Antigua's response provides none. Instead, Antigua offers a series of baseless assertions that assume, rather than prove, such competition.

In the first paragraph of its response to question 40, Antigua asserts that there is "considerable overlap in the use of gambling services by regular gamblers." In fact, Antigua has not provided any evidence approaching "considerable overlap" between the users of Internet-based remote gambling services and users of non-remote gambling services.

Antigua cites a summary of a River City Group "study," but fails to provide the study itself.[401] Moreover, the summary cited by Antigua actually contradicts Antigua's "overlap" argument. Specifically, it states that only 28 per cent of all gamblers gamble online for real money. Another

this view by suggesting that Internet gambling is a complement to, rather than a substitute for, land-based gambling.[414]

Much stronger "anecdotal" evidence comes from industry leaders from both the Internet and land-based gambling industries who contradict Antigua's assertions that these two different services are in competition with one another. For example, American Gaming Association President Frank Fahrenkopf has testified before the US Congress that Internet gambling is not a competitive threat to US commercial casinos.[415]

Prominent companies in the Internet gambling industry appear to share this view. For example, Boss Media, one of a handful of major suppliers of Internet gambling technology, states on its website that "Boss Media considers that Internet casinos do not compete with land-based casinos."[416] Similarly, a 2002 industry report funded by Microgaming, another major supplier of Internet gambling technology, concluded that Internet gambling and land-based gambling are actually complementary products, rather than competitors.[417]

In its response to question 40, Antigua refers to "the general proposition that 'Internet-based' commerce competes with 'land-based' commerce" and cites a press release concerning a United States Federal Trade Commission staff report on sales of wine over the Internet. The United States fails to see how this discussion of an unrelated industry is relevant in any way to Antigua's specific burden of proof regarding gambling services. As the United States pointed out, the issue in this dispute is not whether remotely supplied services are

analysis. In the case of gambling, Antigua has failed to support its assertions of likeness with economic evidence or with any other credible evidence.

Question 33 (For Antigua)

Could Antigua provide a list of the gambling and betting services they seek to supply

regulations which respectively do not constitute measures covered by Article XVI:2(a) to (f) and therefore are not reserved in a Members' schedule. It considers that the consistency of such situation with Article XVI needs to be addressed on a case-by-case basis, while the situation could simultaneously might as well raise a question of Article VI:5 consistency.

Mexico

Mexico's view is that where there is a blanket prohibition on the provision of a service through mode 1 (cross-border supply), the number of service suppliers that can supply a service through that mode is zero. Thus, a blanket prohibition on the provision of a service through mode 1 amounts to a quantitative restriction within the meaning of Article XVI:2(a).

C. ARTICLE XVII

2. To what extent is the competitive relationship between, on the one hand, services and service suppliers in the territory from which the service is being supplied and, on the other hand, services and service suppliers in the territory into which the service is being supplied relevant in assessing "likeness"?

European Communities

At the outset, the European Communities wishes to point out that to establish a violation of Article XVII of the GATS there is no need to consider the relationship between both services and service suppliers (see reply to question 9 below). As clarified by the Appellate Body in *Korea – Alcoholic Beverages*,[422] "like" products are always a subset of "directly competitive" products. Therefore, to some extent the competitive relationship (actual or potential) will always be relevant in a "likeness" analysis. The extent will depend on the particular case. In that context, the European Communities also notes that if the competitive relationship is distorted (or absent) owing to a measure applied in the territory into which the service is being supplied, the relevant benchmark is the *potential* competitive relationship that would exist if the services supplied were not subject to that measure. The European Communities would also refer the Panel to its Third party submission and Oral statement where this matter is further addressed.

Mexico

In Mexico's view, it is the nature and characteristics of the services at issue that are directly relevant to the question of whether those services are "like". With respect to service suppliers, where the services supplied are "like", the suppliers of those services are also "like".[423] Mexico further notes that paragraph 3 of Article XVII provides that formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member (i.e., of the Member implementing the measure at issue) as compared to like services or service suppliers of any other Member. Thus, the competitive relationship between services in the territory from which the service is being supplied and services in the territory into which the service is being supplied is highly relevant to the question of whether services and service suppliers of another Member are treated in a manner "no less favourable" than services and service suppliers of the WTO Member implementing the contested measure.

[422] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 118.
[423] Panel Report on *EC – Bananas III (US)*, para. 7.322.

Mexico

At the very least, the regulatory circumstances would be relevant to the "less favourable treatment" analysis. See Mexico's response to question 6 above.

4. With respect to paragraph 9 of Japan's written submission, does the mere fact that services are supplied through different modes of supply (as defined in the GATS Agreement) mean that the regulatory circumstances are different and that, therefore, different treatment as between those modes of supply is justified? Do the third parties agree with Japan's appraisal in paragraph 11 of its written submission of the possible consequences for coverage under the GATS Agreement if "likeness" across modes is permitted under Article XVII?

European Communities

The European Communities does not share the view, expressed in paragraph 9 of Japan's Third party submission, that differences in regulatory circumstances may affect *per se* the "likeness" of a domestic and a foreign service. Inasmuch as "differences in regulatory circumstances" means "differences in applicable regimes", this point is already addressed in paragraph 96 of the EC Third party submission. Inasmuch as it means "differences in factual circumstances whi3D -0.0376 5 Tw (') Tj 2.25D

Mexico

With respect to the first issue, pursuant to paragraph 3 of Article XVII, formally different treatment between modes of supply is possible under the GATS. Such a difference in treatment will only violate Article XVII to the extent that it modifies the conditions of competition in favour of services or service suppliers of the Member (i.e. of the Member implementing the measure at issue) as compared to like services or service suppliers of any other Member. With respect to the second issue, see Mexico's response to question 3 above.

Antigua

Do the third parties agree with Japan's appraisal in paragraph 11 of its written submission of the possible consequence

basis. It is not in a position to state either that the service sector central to this particular case categorically requires consideration of regulatory circumstances. It is of the view that differences in regulatory circumstances should not be categorically excluded as a factor to be taken into consideration in identifying likeness of services, but it is at the liberty of a Party to this and future panel to argue on that aspect, as necessitated.