

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2005-1)

APPELLEE SUBMISSION
OF THE UNITED STATES OF AMERICA

February 1, 2005

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SERVICE LIST

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Table of Reports Cited in This Submission

Short Title	Full Report Title and Citation
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<i>Chile – Price Bands</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC – Bananas</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – LAN</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R – WT/DS67/AB/R – WT/DS68/AB/R, adopted 22 June 1998
<i>Korea – Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R – WT/DS169/AB/R, adopted 10 January 2001
<i>Korea – Alcohol Taxes</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999
<i>United States – Customs Bonding</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001
<i>United States – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations”</i> , WT/DS108/AB/R, adopted 20 March 2000
<i>US – Corrosion-Resistant Steel AD Sunset Review (Japan)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>United States – Section 211</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002
<i>United States – Steel 201</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R - WT/DS249/AB/R - WT/DS251/AB/R - WT/DS252/AB/R - WT/DS253/AB/R - WT/DS254/AB/R - WT/DS258/AB/R - WT/DS259/AB/R, adopted 10 December 2003

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. This submission responds to the Other Appellant Submission filed by Antigua and Barbuda (“Antigua”) on January 24, 2005 concerning the report of the Panel in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (“Panel Report”).¹

2. Although there were numerous errors of law in the Panel Report, they did not include the particular errors alleged by Antigua. Specifically, the United States submits that:

- The Panel correctly found that it could not consider the alleged “total prohibition” as a measure in and of itself because it was not identified as such in Antigua’s Panel Request;
- The Panel correctly found that even if the “total prohibition” had been identified as a measure in the Panel Request, Antigua was not entitled to rely on it as such;
- The Panel correctly found that the only limitations falling within the scope of Article XVI of the GATS are those listed in Article XVI:2;
- The Panel did not err by finding that Antigua failed to make a *prima facie* case with respect to laws of Colorado, Minnesota, New Jersey, and New York;
- The Panel correctly decided to consider the U.S. defense under Article XIV of the GATS;
- The Panel did not make the defense for the United States under Article XIV;
- The Panel did not err in reaching the conclusions challenged by Antigua under Article XIV(a) of the GATS;
- The Panel did not err in reaching the conclusions challenged by Antigua with respect to Article XIV(c) of the GATS; and
- The Panel did not err in reaching the conclusions challenged by Antigua with respect to the chapeau of Article XIV of the GATS.

¹ WT/DS285/R, circulated November 14, 2004.

II. ARGUMENT

A. **The Panel correctly found that it could not consider the alleged “total prohibition” as a measure in and of itself because it was not identified as such in Antigua’s Panel Request.**

3. Contrary to Antigua’s allegation, the Panel properly rejected Antigua’s attempt to treat an alleged “total prohibition” as a “measure in and of itself” on the basis that Antigua did not identify the “total prohibition” as a “measure in and of itself” in its request for establishment of a panel in this dispute (the “Panel Request”). Antigua’s Panel Request defined the Panel’s terms of reference. The Panel thus lacked jurisdiction to consider measures not specifically identified in the Panel Request.

4. The body of Antigua’s Panel Request stated that “certain measures of central, regional or local governments and authorities of the United States are inconsistent with the United States’ commitments and obligations under the General Agreement on Trade in Services (GATS) with respect to the cross-border supply of gambling and betting services,” and that “[t]he relevant laws are listed in Sections I and II of the Annex attached to this request.”² The Annex to the Panel Request then contained the list of U.S. federal and state laws and other purported measures at issue in this dispute. The Annex did not mention a “total prohibition.”

5. The Panel correctly concluded that Antigua mentioned the “total prohibition” in its Panel Request only as an alleged *effect* of one or more laws listed in the Annex, not as a distinct measure being challenged in and of itself.³ Antigua conveyed this through its (factually incorrect) assertion in the Panel Request that “relevant United States authorities take the view that these laws (separately or in combination) *have the effect* of prohibiting all supply of gambling and betting services from outside the United States to consumers in the United States.”⁴ The words “these laws” referred to “laws ... listed in Sections I and II of the Annex

² The Panel Request also stated that “[t]he 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.”

³ Panel Report, para. 6.169.

⁴ (emphasis added).

attached to this request,” as the Panel correctly found.⁵ In this context, the Panel then correctly found that Antigua’s reference to an alleged “total prohibition of gambling and betting services” in the following paragraph of its Panel Request merely referred to the alleged “*effect*” of one or more laws listed in the Annex to the Panel request.⁶ The Panel correctly found that a term used “to describe the alleged effect of the measures” listed in a panel request is not a specific measure at issue in and of itself.⁷

6. The Panel thus found that the Panel Request in this dispute did not authorize the Panel to consider the alleged effect of one or more of the purported measures listed in the Annex as if that effect were a measure in and of itself. The Panel was therefore correct to conclude in paragraph 6.171 of its report that Antigua “is bound to rely upon the measures identified in its Panel request,” and that since Antigua “did not identify the ‘total prohibition’ as a measure in and of itself” in the Panel Request, Antigua was “not entitled to rely upon it as a ‘measure’ in this dispute.”

7. Antigua’s citations to and discussion of *EC – Bananas*, *EC – LAN*, *United States – FSC*, *United States – OCTG*, and other past disputes are inapposite to the issue on appeal raised by Antigua. None of those disputes involved a complaining party seeking to challenge the mere description of an alleged effect of a group of measures as if that description were an additional, distinct measure in and of itself. Rather, those disputes raised a different and more common issue – namely, whether a general description of a measure or measures was sufficient to identify the specific measures at issue for purposes of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) and thus bring those measures within the jurisdiction of a panel. The Appellate Body in these previous disputes did not find that the complaining party could treat the mere description of the alleged effect of a measure or measures as a measure in and of itself.

8. For example, in *United States – OCTG*, the question was “whether Argentina’s panel request clearly identifies *where in ‘US law’* Argentina finds an ‘irrefutable presumption,’” not

⁵ Panel Report, para. 6.169.

⁶ Panel Report, para. 6.170.

⁷ Panel Report, para. 6.170-6.171.

whether the “irrefutable presumption” was a measure in and of itself.⁸ Indeed, as with the other disputes cited by Antigua, Argentina never argued the latter.⁹ Thus, contrary to Antigua’s arguments, the Appellate Body did not find that Argentina’s panel request entitled it to treat the “irrefutable presumption” as a measure in and of itself, divorced from the underlying provisions of U.S. law that allegedly comprised it.

9. In contrast to past disputes, therefore, the unprecedented proposition that Antigua is advancing in this appeal is that a panel request that describes the supposed effect of one or more specific measures as a “total prohibition” enables a panel to consider a challenge to the alleged “total prohibition” as an additional measure in and of itself, without regard to the specific measures of which that “total prohibition” was allegedly an effect. In this case the Panel properly found that a mere description of the purported effect of one or more specific measures is not an additional measure in and of itself.¹⁰ On that basis, the Panel correctly concluded that a challenge to the “total prohibition” as a measure in and of itself was outside its terms of reference.¹¹

10. In defense of its Panel Request, Antigua incorrectly states that “[t]he United States has not alleged that it was prejudiced by the Panel Request” in regard to the total prohibition. In fact, the United States alleged prejudice as a result of Antigua’s “total prohibition” approach as

⁸ Appellate Body Report, *United States – OCTG*, para. 168 (emphasis added); *see also id.*, para. 166 (explaining that “[t]his presumption ... is presented as deriving from the ‘US law’ applied by the USDOC” and that “Argentina could proceed by establishing the WTO-inconsistency of the ‘irrefutable presumption’ itself, *that is, of the United States legal provision(s) embodying that presumption.*” (emphasis added))

⁹ It is also worth noting that much of the analysis of the *United States – OCTG* Appellate Body report cited by Antigua in para. 15 of its Other Appellant Submission deals not with the identification of a measure, but with whether “a brief summary of the legal basis of the complaint sufficient to present the problem clearly” was provided, which is also inapposite to the issue raised by Antigua in Section II.A of its Other Appellant Submission. *See* Appellate Body Report, *United States – OCTG*, paras. 158-167.

¹⁰ Panel Report, paras. 6.170-6.171.

¹¹ Panel Report, para. 6.171. Contrary to Antigua’s assertion at para. 20 of its Other Appellant Submission, Antigua, in describing its Panel Request in its first submission, did not purport to have identified the “total prohibition” as a measure in and of itself. *See* First Submission of Antigua and Barbuda, paras. 140-143.

soon as Antigua revealed it in Antigua's first submission, observing that "[t]he United States, and indeed the third parties, would suffer prejudice if Antigua were allowed to substitute a general proposition [*i.e.*, the alleged "total prohibition" effect] for specific measures in this dispute."¹²

11. A principal function of the Panel Request is to avoid such prejudice by clearly informing the responding party and the potential third parties of the legal basis for the complaint.¹³ By failing to inform the responding party and the third parties in this dispute of Antigua's intention to treat the "total prohibition" as a measure in and of itself, rather than addressing the substance of the actual and purported measures listed in the Annex to the Panel Request, Antigua's Panel Request failed to perform this important function. This further confirms the correctness of the Panel's finding on this issue.

B. The Panel correctly found that even if the "total prohibition" had been identified as a measure in the Panel Request, Antigua was not entitled to rely on it as such.

12. WTO dispute settlement provides a mechanism to address, in the words of Article 3.3 of the DSU, "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures taken by another Member*."¹⁴ Article 3.7 of the DSU further states that "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of *the measures concerned* if these are found to be inconsistent with the provisions of any of the covered agreements."¹⁵

13. Nothing in GATS Article XXVIII(a) suggests that "measure" means something different in the GATS than in other covered agreements. The words "or any other form" in Article XXVIII(a) follow an indicative list of instruments and actions that have already been recognized

¹² See Request for preliminary rulings by the United States, para. 21.

¹³ Appellate Body Report, *EC – Bananas*, para. 142.

¹⁴ (emphasis added).

¹⁵ (emphasis added). Many other provisions of the DSU similarly refer to a "measure" or "measures."

as measures for purposes of other covered agreements.¹⁶ Moreover, the clarification that a measure in any form may be the subject of GATS obligations can simply not be read to mean that a non-measure (such as a mere description of the purported effect of one or more measures) may be converted into a measure for purposes of the GATS.

14. In examining whether the alleged “total prohibition” could be considered a measure in and of itself, the Panel in this dispute relied on the reasoning of the Appellate Body in *United States – Corrosion-Resistant Steel AD Sunset Review (Japan)*.¹⁷ The Appellate Body in that dispute observed that “[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.”¹⁸ The Appellate Body further observed that panels have in the past examined measures consisting of “particular acts applied only to a specific situation,” as well as “acts setting forth rules or norms that are intended to have general and prospective application.”¹⁹

15. Taken together, the Panel correctly concluded that, in the circumstances of this dispute, the alleged “total prohibition” as set forth by Antigua in its Panel Request was merely a description of “the alleged effect of an imprecisely defined list of legislative provisions and other instruments,” and that such a description “cannot constitute a single and autonomous ‘measure’ that can be challenged in and of itself.”²⁰ The Panel also found that the “total prohibition” was imprecisely defined from the perspective of implementation of any possible adverse ruling, and

¹⁶ It is also worth noting the contrast between Article XXVIII(a) (which makes clear that measures may occur in any possible “form”) and Article XVI:2 (in which only a closed list of “forms” appears). See Section II.C of the U.S. Appellant Submission. As detailed in that section, the Panel erred when it ignored its own correct finding that Article XVI:2 contains an exhaustive list of restricted “forms,” and determined instead that a measure *in any “form”* – so long as it had the *effect* of a measure with a restricted “form” – must be equated with a restricted “form” measure. If the drafters had intended such a result, no doubt they would have – as with Article XXVIII(a) – added the words “and any other form” to Article XVI:2.

¹⁷ Panel Report, paras. 6.173, 6.176.

¹⁸ Appellate Body Report, *United States – Corrosion-Resistant Steel AD Sunset Review (Japan)*, para. 81.

¹⁹ Appellate Body Report, *United States – Corrosion-Resistant Steel AD Sunset Review (Japan)*, para. 82.

²⁰ Panel Report, para. 6.175.

it found that the simple allegation of a “total prohibition” did not meet Antigua’s burden of “identifying measures with some detail and explanation so as to allow the United States to defend itself adequately.”²¹

16. The Panel’s conclusion that the alleged “total prohibition” was not a measure in and of itself was supported by the record in this dispute and the reasoning of the Appellate Body in past disputes. There was no apparent dispute between the parties at the panel phase of this dispute that the alleged “total prohibition” was a description of the purported effect of underlying laws and the application thereof, and the Panel’s findings reflect this.²² As discussed above, the Panel found that this was how Antigua itself framed the issue in its Panel Request.

17. From the perspective of the U.S. legal system, it is the underlying statute or statutes – not a party’s description of them – that has force or effect as a matter of municipal law.²³ As the Panel correctly found, Antigua’s description of the purported effect of one or more possibly relevant U.S. laws does not contain rules or norms of the United States.²⁴ This conclusion is also consistent with the analysis used by the Appellate Body in *United States – OCTG*. In that dispute, the Appellate Body concluded that the U.S. Sunset Policy Bulletin was a measure subject to challenge in WTO dispute settlement because it had “normative value” in the U.S. legal system pertaining to dumping cases.²⁵ By contrast, Antigua’s mischaracterization of the effect of U.S. law as a “total prohibition” has no normative force – indeed, no meaning or consequences whatsoever – in U.S. municipal law.²⁶ The relevant rules or norms of U.S. municipal law reside in what Antigua calls the “vast, uncertain body of American laws”²⁷ that Antigua identified as possibly contributing to the alleged effect of “total prohibition.” A service

²¹ Panel Report, para. 6.184.

²² See Panel Report, para. 6.176 (finding that “Antigua’s use of the term ‘total prohibition’ in this case is by way of *description* of an alleged effect to which it takes objection ...” (original emphasis)).

²³ See Panel Report, para. 6.158 (summarizing U.S. arguments).

²⁴ Panel Report, para. 6.176.

²⁵ Appellate Body Report, *United States – OCTG*, para. 184.

²⁶ See Panel Report, para. 6.158 (summarizing U.S. arguments).

²⁷ Other Appellant Submission of Antigua and Barbuda, para. 23.

supplier can be sanctioned under U.S. municipal law for violating those laws, but not for violating someone's description of them as creating a "total prohibition." The Panel was therefore correct to conclude that "a 'total prohibition' as explained by Antigua ... is a description of an effect rather than an instrument containing rules or norms."²⁸

18. As it did at the Panel phase of this dispute, Antigua seeks on appeal to manufacture an admission by the United States that "the total prohibition exists," and to argue that because there was allegedly no "genuine disagreement" on this point, Antigua was somehow entitled to treat the "total prohibition" as a measure and to be relieved of its burden of proof with respect to particular U.S. laws that allegedly cause this purported effect.²⁹ The record in this dispute reflects that the United States never conceded the existence of a "total prohibition," and it genuinely and strongly disagreed with Antigua's attempt to challenge that conclusory description, rather than particular measures. The U.S. rejection of the alleged "total prohibition" was reiterated in unequivocal terms at the second Panel meeting, where a U.S. official stated that:

Antigua continues to insist that the United States has conceded or agreed to propositions with which the United States in fact disagrees. Let me be absolutely clear. The United States neither concedes nor agrees with any of Antigua's propositions about the alleged "total prohibition." That label neither embodies nor accurately describes U.S. law.³⁰

²⁸ Panel Report, para. 6.176.

²⁹ Other Appellant Submission of Antigua and Barbuda, paras. 5, 33-38, 45-50. Antigua mistakenly asserts in para. 5 of its Other Appellant Submission that there is "full agreement by the parties on the *cause*—a total prohibition on the services sought to be offered by Antigua—and the *effect*—inability of Antigua to lawfully offer those services to consumers in the United States." There is no such agreement. The United States has repeatedly explained that the "cause" as Antigua puts it is U.S. law as it is embodied in the relevant statutes, and the "effect" is not a "total prohibition" on cross-border supply of gambling and betting services. Indeed, the purported "total prohibition" causes nothing as a matter of U.S. municipal law; it is a mere description, and an incorrect one.

³⁰ Closing statement of the United States at the second Panel meeting, para. 2.

19. In response to a question from the Panel, the United States also clarified that Antigua was incorrect to read U.S. remarks at the June 24, 2003, DSB meeting³¹ as a “concession” of, or even as support for, the existence of its alleged “total prohibition” on cross border supply of all gambling services. In response to the Panel’s question about these statements, the United States provided the Panel with a clarification that the United States viewed as having been implicit in the U.S. remarks:

[T]he 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 U.S. law.³²

20. More importantly, the United States pointed out that since the concept of a “total prohibition” is devoid of any legal meaning or consequences under either U.S. law or the GATS, Antigua’s assertions about it contributed nothing to its *prima facie* case.

21. Even if the United States were to make a general statement about the effect of U.S. law, such as the statement that the particular actions of transmission of Internet or telephone bets are prohibited, the Panel was correct to conclude that doing so does not relieve the complaining party of its burden with respect to particular measures.³³ Merely making a statement about the effect of U.S. law does not violate Article XVI of the GATS, therefore the statement cannot be the “measure” at issue in this dispute. Statements of a Member may under appropriate

³¹ At that meeting, the United States stated that it had “made it clear that cross-border gambling and betting services are prohibited under U.S. law” and that such services “are prohibited from domestic and foreign service suppliers alike.”

³² Response of the United States to Panel question 9.

³³ See Panel Report, paras. 6.165 (finding that a purported admission of the United States did not answer the question of what specific provisions of U.S. laws prohibit remote supply of gambling and betting services) and 6.180 (finding that “in light of ... the *prima facie* requirements of Antigua’s burden of proof, we believe that it is crucial, and not ‘wasteful and unnecessary,’ to be precise and consistent in the identification of the measures at issue”). This issue of the purported U.S. admission is discussed at para. 36 of the U.S. Appellant Submission. In addition, the United States notes that Antigua’s passing reference to DSU Article 11 in para. 46 of its Other Appellant Submission does not meet the high standard applicable to Article 11 claims. See Appellate Body Report, *United States – Steel 201*, para. 498.

circumstances be considered as *evidence* of the meaning of a specific measure. But it remained Antigua's burden as the complaining party in this dispute to identify the specific provisions of U.S. law that allegedly impose a limitation that is inconsistent with Article XVI, and to make a *prima facie* case of that inconsistency through evidence and argumentation. As the Panel correctly found, Antigua did not do so, leaving the Panel to conclude that "an imprecisely defined 'puzzle' of laws forms the basis of the 'total prohibition' that has been identified by Antigua as the challenged measure."³⁴

22. To find otherwise would have the bizarre consequence of opening up a whole new field of WTO disputes challenging the statements of a Member's officials about measures of that Member, divorced from the actual measures themselves. One can imagine, for example, future disputes in which parties would seek to characterize statements by a Member's officials as admissions of the "total subsidization" of an enterprise, and argue that such "total subsidization" as a measure in and of itself is inconsistent with provisions of the *Agreement on Subsidies and Countervailing Measures* without ever challenging any particular measures that allegedly confer a subsidy. This is not a practicable or desirable way of resolving trade disputes.

23. For the foregoing reasons, there is also no need for the Appellate Body to "complete the analysis" of the "total prohibition" as a measure in and of itself as Antigua requests.³⁵

³⁴ Panel Report, para. 6.182. Antigua explains that it refused to assemble this "puzzle" for the Panel because to do so would cause Antigua to fall into a "trap" laid by the United States. Other Appellant Submission of Antigua and Barbuda, para. 45. Antigua appears to view this "trap" as part of a larger U.S. design to "obfuscate, hinder and delay" this dispute by "absurdly" suggesting that Antigua must make a *prima facie* case regarding particular measures rather than purporting to challenge its own description of U.S. law. *Id.*, para. 5. As confirmation of the "trap," Antigua cites the U.S. observation that assembling its "puzzle" was "an impossible task."

As the United States explained to the Panel in para. 40 of the second U.S. opening statement, assembling the "puzzle" was an "impossible task" because the pieces do not fit together to form Antigua's desired picture of a "total prohibition," which is due to the fact that "total prohibition" is not an accurate description of U.S. law. Thus, notwithstanding the exaggerated tone of Antigua's remarks, the only "trap" laid for Antigua in this dispute was Antigua's own misstatement of the effect of U.S. law, which Antigua was evidently unable to support with evidence and argumentation concerning particular measures.

³⁵ Other Appellant Submission of Antigua and Barbuda, para. 51.

C. The Panel correctly found that the only limitations falling within the scope of Article XVI of the GATS are those listed in Article XVI:2.

24. Antigua conditionally argues that the Panel erred by finding that “when a Member has the inscription ‘None’ in the market access column of its schedule, it must maintain ‘full market access’ within the meaning of the GATS, i.e. it must not maintain any of the six limitations and measures listed in the second paragraph of Article XVI.”³⁶ Antigua urges instead that any measure that “limit[s] the ability of Antiguan services and service suppliers to gain access to the market” violates Article XVI:1 of the GATS.³⁷

25. The text of Article XVI does not support Antigua’s argument. If, as Antigua suggests, Article XVI:1 independently prohibited any limitation on the ability to supply a service in the market of a Member, there would be no point whatsoever in providing a closed list of specific limitations in Article XVI:2 of the GATS, as all limitations would already be covered by Article XVI:1.³⁸ In other words, Antigua’s proposed interpretation would deprive Article XVI:2 of all useful effect, in violation of customary rules of interpretation of international law.³⁹

26. Antigua’s arguments on this point are inconsistent in several other respects with customary rules of interpretation of international law, as reflected in Article 31 of the *Vienna Convention on the Law of Treaties* (“Vienna Convention”). First, Antigua asserts a “main” object and purpose for the GATS that offers no support for its reading of Article XVI, and makes the further mistake of suggesting that this object and purpose should override the text relied on by the Panel, rather than reading the terms of the text in their context and “in the light of” the object and purpose of the GATS as required by Article 31 of the Vienna Convention.⁴⁰ Second,

³⁶ Other Appellant Submission of Antigua and Barbuda, paras. 52-55 (Antigua’s argument); Panel Report, para. 6.279 (Panel finding quoted in text).

³⁷ Other Appellant Submission of Antigua and Barbuda, para. 54.

³⁸ The United States has explained at length in its Appellant Submission that a Member that makes a market access commitment has not committed to provide unlimited ability to supply the relevant services in all cases. It has only committed that market access will not be impeded by the precise limitations set out in Article XVI:2. *See* Appellant Submission of the United States, paras. 112, 126-134.

³⁹ *See* Appellate Body Report, *United States – Section 211*, para. 238.

⁴⁰ *See* Other Appellant Submission of Antigua and Barbuda, para. 60.

Antigua misreads the reference to “good faith” in Article 31 of the Vienna Convention as an “element” of treaty interpretation to be applied in some unspecified way alongside the terms of the text and their context.⁴¹ In fact, “good faith” is a requirement as to the manner of conducting the interpretation, not a substantive element to be considered in reaching the interpretation.⁴² Third, Antigua incorrectly cites the 1993 Scheduling Guidelines as “context” for Article XVI of the GATS when in fact they are mere preparatory work and can only be used as a supplementary means of interpretation under Article 32 of the Vienna Convention.⁴³

27. As the Panel correctly found, the closed list in Article XVI:2 is an exhaustive definition of the limitations that may not be maintained by a Member that has made a full market access commitment. The first sentence of Article XVI:2 makes this clear:

In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as: [XIV:2(a) through XIV:2(f)]

28. The text of Article XVI:2 thus establishes the relationship between Article XVI:1 and Article XVI:2. Article XVI:1 states the general obligation of Members to “accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.” The portion of the U.S. Schedule as to which the Panel made findings has the word “None” inscribed under the heading “Limitations on market access.” Article XVI:2 defines, by means of a closed list, the “Limitations on market access” referenced in the U.S. Schedule. The Panel thus correctly found

⁴¹ Other Appellant Submission of Antigua and Barbuda, paras. 58-59.

⁴² See Vienna Convention, Article 31 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

⁴³ The United States has already explained why the 1993 Scheduling Guidelines cited by Antigua in para. 59 of its Other Appellant Submission are not context for interpretation of a schedule to the GATS. See Appellant Submission of the United States, paras. 63-72. For the same reasons, they are not context for Article XVI of the GATS.

that inscription of the word “None” means none of the six limitations and measures listed in the second paragraph of Article XVI.⁴⁴

D. The Panel did not err by finding that Antigua failed to make a *prima facie* case with respect to laws of Colorado, Minnesota, New Jersey, and New York.

29. Antigua alleges that the Panel erred by “placing too much emphasis on the text of subparagraphs 2(a) and 2(c) of GATS Article XVI” in its finding that Antigua did not make a *prima facie* case that laws of Colorado, Minnesota, New Jersey, and New York violated the GATS.⁴⁵ As the United States argued in its Appellant Submission, the Panel should never have considered these laws because Antigua never offered any evidence or argument regarding how they allegedly violated Article XVI of the GATS.⁴⁶ In that sense, the Panel’s conclusion with respect to these particular laws was correct – Antigua did not make a *prima facie* case with respect to these particular laws – but the Panel’s reasoning was too narrow. In fact, Antigua did not make a *prima facie* case with respect to any particular statute that allegedly comprised the purported “total prohibition.”

30. The Appellate Body should not accept Antigua’s invitation to now de-emphasize the text of the GATS and find that limitations on consumers that are not explicitly covered by the text of Article XVI:2 are nonetheless somehow prohibited by that provision. As the United States argued in its Appellant Submission, the limitations covered by Article XVI:2 are precisely those mentioned in its text.⁴⁷

31. In expressing concern that “the Panel’s interpretation would allow a developed WTO Member with a full market access commitment on the cross-border supply of computer services

⁴⁴ Panel Report, para. 6.279.

⁴⁵ Other Appellant Submission of Antigua and Barbuda, paras. 56-60.

⁴⁶ Appellant Submission of the United States, paras. 6-38, 101 and n. 160.

⁴⁷ Appellant Submission of the United States, paras. 97-134. As the United States has explained, the Panel initially made a correct finding in this regard, but turned away from that finding to reach incorrect conclusions. *Id.*, paras. 99-100.

to prohibit its companies from outsourcing computer services to other countries,”⁴⁸ Antigua confuses the obligations of Article XVI with Article XVII. It is the national treatment provision of Article XVII, which is not at issue in this appeal, that requires no less favorable treatment of foreign like services and service suppliers in the GATS. Antigua thus makes the same error reflected in paragraph 6.332 of the Panel Report – it neglects the obvious fact that measures that fall outside the precise terms of Article XVI remain subject to other provisions of the agreement, including, where applicable, its provisions on national treatment (Article XVII) and domestic regulation (Article VI). Simply put, Article XVI of the GATS does not encompass, and does not need to encompass, every possible limitation on the ability to supply a service into a Member’s market; rather, it encompasses the precise limitations set out in Article XVI:2.

E. The Panel correctly decided to consider the U.S. defense under Article XIV of the GATS.

32. Antigua asserts that the United States was somehow late in raising its Article XIV defense at the Panel phase of this dispute, and that this alleged tardiness “greatly prejudiced” Antigua and should have led the Panel to take the extraordinary step of refusing to consider the responding party’s affirmative defense under Article XIV.⁴⁹ In light of the way in which Antigua argued its case in this dispute, it is difficult to understand the basis for Antigua’s allegation of tardiness or its accusation that the United States was engaged in a “simple litigation tactic,” much less the purported legal basis for a panel refusing to consider an affirmative defense raised in the defending party’s second submission and subsequently.

33. Article XIV is a defense that may be invoked in response to a complaining party’s argument that particular measures are inconsistent with a GATS obligation. To mount such a defense in this dispute, the United States needed to at least know what specific measures Antigua was actually alleging to be inconsistent with GATS obligations. Yet throughout the Panel phase of this dispute, whether as a “litigation tactic” or for other reasons, Antigua never argued that any particular U.S. statutes are inconsistent with Article XVI of the GATS, and would not say

⁴⁸ Other Appellant Submission of Antigua and Barbuda, para. 60.

⁴⁹ Other Appellant Submission of Antigua and Barbuda, paras. 72-77.

precisely which measures it was challenging. Indeed, Antigua did not even provide the Panel with the text of the measures listed in its Panel request until the first Panel meeting. It was also at that first meeting that Antigua deigned to discuss – albeit briefly and in passing – the three U.S. federal statutes as to which the Panel created arguments for Antigua and made adverse findings.⁵⁰ This brief discussion was not sufficient to establish a *prima facie* case of GATS inconsistency for the reasons explained in the U.S. Appellant Submission.⁵¹ Nonetheless, in light of the Panel’s interest in this passing discussion by Antigua,⁵² and in spite of the fact that Antigua still had not alleged (and never did allege) that any particular U.S. statutes are inconsistent with Article XVI of the GATS,⁵³ the United States took its next available opportunity – in the U.S. second submission – to provide extensive argumentation that these three federal statutes and any relevant state laws would be covered by the Article XIV exception.⁵⁴

34. The logic of Antigua’s position on appeal seems to be that the United States was required to initiate its defense even earlier, with no clear idea of which of the many possibly relevant measures it should defend. A responding party in WTO dispute settlement cannot be required to read the mind of the complaining party and anticipate arguments not actually made, nor can it be required to make the case for the complaining party in order to defend itself.⁵⁵ In this case, as the Panel found, Antigua never precisely articulated a case that any particular measure violated the GATS.⁵⁶ In the absence of this, the United States could not mount its defense. By raising an

⁵⁰ This first, brief discussion of the three statutes encompassed a total of one paragraph in Antigua’s opening statement at the first Panel meeting (para. 21), and indeed was presented simply as an example of the “huge amount of American legislation on gambling and betting.” See Opening statement of Antigua and Barbuda at the first Panel meeting, paras. 21-22.

⁵¹ See, e.g., Appellant Submission of the United States, para. 28.

⁵² See in particular Panel Question 32.

⁵³ See e.g., Antigua’s response to Panel Question 32 (responding to a Panel question about particular measures by reasserting Antigua’s “total prohibition” approach).

⁵⁴ Second written submission of the United States, paras. 72-123.

⁵⁵ Cf. Appellate Body Report, *Chile – Price Bands*, para. 164 (“WTO Members must not be left to wonder what specific claims have been made against them in dispute settlement.”).

⁵⁶ Panel Report, para. 6.207.

Article XIV defense in its second submission notwithstanding the deficiencies in Antigua's *prima facie* case, the United States, as a safeguard, went beyond what was required of it. This is why the United States repeatedly clarified, as Antigua notes, that it was not necessary for the Panel to reach the issue of the applicability of Article XIV in this dispute. The United States maintains the view that is not necessary to reach this issue on appeal.⁵⁷

35. Antigua's argument that it was somehow prejudiced by the alleged tardiness of the United States in raising its Article XIV defense is without merit. The United States provided detailed evidence and argumentation on Article XIV in its second submission.⁵⁸ Between the filing of the U.S. second submission and the second Panel meeting, Antigua had ample time in which to prepare its response.⁵⁹ The record reflects that Antigua in fact used this opportunity to respond.⁶⁰ If Antigua felt that it required a further opportunity to respond to the U.S. arguments under Article XIV, it was free to request such an opportunity – something the United States did twice in anticipation of possible arguments by Antigua (which in fact were never made until the Panel made them in its interim report) concerning specific U.S. measures.⁶¹ The record reflects that Antigua made no such request and alleged no prejudice to its interests. When the United States made further Article XIV arguments in responding to the Panel's questions in connection

⁵⁷ Antigua takes issue with U.S. statements to the Panel that the Panel need not consider Article XIV. Other Appellant Submission of Antigua and Barbuda, paras. 74-77. There was nothing unusual or out of order about these statements. It is common for a party to clarify to a Panel or the Appellate Body that the party believes it is not necessary to reach a particular issue should a finding on another issue (*e.g.*, whether a party has borne its initial burden of proof) make a subsequent finding unnecessary. When the Panel sought confirmation that the United States was invoking Article XIV as a defense, however, the United States clearly provided it. *See* Response of the United States to Panel question 44.

⁵⁸ Second written submission of the United States, paras. 72-123.

⁵⁹ The United States filed its second written submission on January 9, 2004. The second substantive meeting of the Panel took place on January 26-27, 2004.

⁶⁰ Opening statement of Antigua and Barbuda at the second Panel meeting, paras. 68-83.

⁶¹ *See* Request for Preliminary Rulings by the United States, para. 23; Response of the United States to Panel question 32. *See also* Appellate Body Report, *Australia – Salmon*, para. 278 (finding that a panel did not err when the responding party requested additional time to respond to new matters raised at the second panel meeting and the Panel granted that additional time).

with the second Panel meeting, the Panel provided Antigua with an opportunity to comment on those arguments, giving Antigua the last word on Article XIV issues in the panel phase of this dispute.⁶² At that point Antigua again expressed no concern that its ability to respond had been curtailed, and again did not request an opportunity to make any further response.

36. In fact, nothing in Article 12 of the DSU or the Working Procedures in Appendix 3 of the DSU requires that affirmative defenses be raised in a particular submission. Nor did the Panel's Working Procedures in this dispute, established pursuant to Article 12.1 of the DSU, set any such requirements – and the Panel found no violation of its Working Procedures in this dispute.

37. On the contrary, the Appellate Body has previously observed that the complaining party is not precluded from raising new arguments in its second submission or later.⁶³ Clearly the responding party is no less able to raise new arguments later than its first oral statement.

38. Moreover, any concern about the timing of the U.S. argumentation on Article XIV of the GATS could have been dealt with under Article 12.2 of the DSU, which provides that “[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.”⁶⁴ As explained above, Antigua never requested that the Panel use this flexibility to address any prejudice that Antigua may silently have perceived.

F. The Panel did not make the defense for the United States under Article XIV.

⁶² See E-mails from the Secretary of the Panel to the parties dated February 2 and 5, 2004; Comments by Antigua and Barbuda on responses of the United States to the Panel's questions in connection with the second substantive meeting.

⁶³ Appellate Body Report, *EC – Bananas*, para. 145 (“There is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel.”); see also Appellate Body Report, *Chile – Price Bands*, paras. 154-162 (reaffirming that the question whether a complaining party has articulated a claim under a provision within the panel's terms of reference cannot be determined from the first written submission alone; rather, one must examine the complaining party's answers to panel questions and its rebuttal submission in order to determine whether the complaining party articulated a claim).

⁶⁴ See also Appellate Body Report, *Australia – Salmon*, para. 272 (discussing DSU Article 12.2 in the context of rejecting an argument concerning late-submitted evidence.).

39. The arguments in Antigua's Other Appellant Submission regarding Article XIV of the GATS reveal one significant point of agreement between the parties to this dispute: Both parties agree that "panels are not entitled to make the case for a complaining party."⁶⁵ This is the fundamental, and now undisputed, legal premise of the U.S. arguments in paragraphs 6 through 38 of its Appellant Submission. Coupled with Antigua's prior concession that "*the Panel apparently determined for itself* whether the evidence in front of it was sufficient to consider the various federal and state laws on a case-by-case basis,"⁶⁶ the agreement of the parties on the relevant legal principle strongly supports the U.S. arguments in Section A of its Appellant Submission, and provides further confirmation that the Appellate Body need not reach the issue of Article XIV in this dispute because of the Panel's errors with respect to the burden of proof under Article XVI of the GATS.

40. In arguing that the Panel made the case for the United States with respect to aspects of Article XIV (Article XIV(a), XIV(b), and the chapeau of Article XIV), Antigua overlooks the distinction between the Panel's actions in making the case for Antigua that specific measures violated Article XVI of the GATS, and the Panel's consideration of U.S. arguments under Article XIV. A panel does not make the case for the party bearing the burden of proof if the party bearing the burden of proof identifies the specific measures that are relevant to its claim, provides evidence of the meaning and operation of those measures, explains the legal requirements necessary to sustain the claim, and draws upon its evidence to make an argument that those specific measures satisfy the legal requirements necessary to sustain the claim. The United States has shown in its Appellant Submission that Antigua failed to do this to such an extent that it neglected to even make the assertion – much less provide an argument – that any specific U.S. statute or other measure identified in Antigua's Panel Request violated Article XVI of the GATS. Instead, the Panel correctly found that Antigua left this task to the Panel.⁶⁷ In contrast, the United States in articulating its defense under Article XIV of the GATS met all of

⁶⁵ Other Appellant Submission of Antigua and Barbuda, para. 79.

⁶⁶ Comments of Antigua and Barbuda on U.S. request for review of the interim report, para. 11 (emphasis added).

⁶⁷ Panel Report, paras. 6.204, 6.207.

these requirements and sustained its burden of proof, and did not leave it to the Panel to make an argument that specific measures met the requirements of Article XIV.

41. Antigua asserts that the United States offered a “brief” or “cursory” discussion of Article XIV that, for all its alleged brevity, “cover[ed] 53 separately numbered paragraphs.”⁶⁸ It is first of all ironic that Antigua would make this assertion, since the United States has already shown in Annex I of its Appellant Submission that Antigua’s discussions of particular U.S. statutes as to which the Panel made adverse findings were either far shorter or completely nonexistent. That Antigua would assert that a much more extensive discussion by the United States was too “brief” or “cursory” provides further confirmation of the arguments in Section A of the U.S. Appellant Submission.

42. In fact, contrary to Antigua’s arguments, the United States detailed in its Article XIV arguments how the relevant statutes came to be enacted and the operation and purpose of each statute. The United States then made arguments concerning the relevant legal standards under Article XIV of the GATS, and – crucially – the United States made a sustained legal argument that the relevant specific measures were consistent with the legal requirements for a defense under Article XIV of the GATS, and marshaled evidence from its submissions to support that argument. Unlike Antigua, the United States did not premise its claims on the alleged effect of all possibly relevant measures without regard to the operation of particular measures. Thus the Panel was not left to make a case on behalf of the United States under Article XIV.

43. Antigua asserts that the Panel’s actions were a “violation of due process and the principle of equality of arms,” but cites no textual basis in the covered agreements for these principles, and fails to elaborate on their alleged relevance.⁶⁹ Antigua also makes a passing reference to DSU

⁶⁸ Other Appellant Submission of Antigua and Barbuda, para. 64.

⁶⁹ Other Appellant Submission of Antigua and Barbuda, para. 78. The United States has not been able to locate any reference to the “principle of equality of arms” in any covered agreement, nor does it appear to be a principle of interpretation of international law.

Article 11,⁷⁰ without explanation, that does not meet the high standard of Article 11 argumentation applied in past Appellate Body reports.⁷¹

44. Antigua asserts that U.S. arguments under Article XIV(a) were limited to the issues of organized crime and underage gambling, and did not include concerns relating to money laundering and fraud.⁷² This is incorrect. The United States in fact argued that “gambling by remote supply is particularly vulnerable to *various forms of criminal activity*, especially organized crime.”⁷³ In the footnote to that statement, the United States specifically cross-referenced not only its earlier discussion of organized crime, but also its earlier discussion of money laundering, fraud, and other consumer crimes.⁷⁴ The United States went on to provide additional evidence of remote supply of gambling as a “vehicle for organized crime *and other forms of lawlessness*,”⁷⁵ and further argued that the relevant laws were “indispensable tools in the fight against organized crime *and other forms of criminality*.”⁷⁶ At the second Panel meeting, the United States explicitly “invite[d] the Panel to reflect on the Article XIV implications of some of our earlier discussion – including the discussion of ... *money laundering* and other

⁷⁰ Other Appellant Submission of Antigua and Barbuda, para. 78.

⁷¹ See Appellate Body Report, *United States – Steel 201*, para. 498 (“A challenge under Article 11 of the DSU must not be vague or ambiguous. On the contrary, such a challenge must be clearly articulated and substantiated with specific arguments. An Article 11 claim is not to be made lightly, or merely as a subsidiary argument or claim in support of a claim of a panel’s failure to construe or apply correctly a particular provision of a covered agreement. A claim under Article 11 of the DSU must stand by itself and be substantiated, as such, and not as subsidiary to another alleged violation.”)

⁷² Other Appellant Submission of Antigua and Barbuda, paras. 81-84. Antigua does not allege that the Panel made the case for the United States under Article XIV(a) with respect to organized crime and underage gambling.

⁷³ Second submission of the United States. para. 111 (emphasis added).

⁷⁴ Second submission of the United States. n. 139 (referencing discussion at paras. 46-51 of the same submission).

⁷⁵ Second submission of the United States. para. 113 (emphasis added). The United States pointed out that Antigua’s own evidence supported this view. See *id.*, para. 113 and n. 141.

⁷⁶ Second submission of the United States. para. 115 (emphasis added).

dangers.”⁷⁷ The Panel did exactly that, and properly considered money laundering and fraud as well as organized crime.

45. In addition, the United States explicitly pointed out to the Panel in the course of presenting its Article XIV argumentation that the term “organized crime” refers to a phenomenon that encompasses fraud and money laundering activity, as well as a wide range of other unlawful activity. The United States pointed out, for example, that the statutory findings of Congress in the Organized Crime Control Act of 1970 refer to organized crime as “a highly sophisticated, diversified, and widespread activity” involving “unlawful conduct and the illegal use of force, *fraud*, and corruption.”⁷⁸ The United States also pointed out that the appendix to U.S. Attorney General Order 1386-89 states that the characteristics of organized crime groups include having “economic gain as their primary goal, not only from patently illegal enterprises such as drugs, gambling and loansharking, but also from such activities as *laundering illegal money* through ... legitimate business.”⁷⁹ This further confirms that the Panel acted properly in considering money laundering and fraud concerns under Article XIV(a).

46. Antigua is also incorrect in asserting that U.S. arguments under Article XIV(a) did not encompass health risks associated with 24-hour, isolated access to gambling. The United States expressly argued under Article XIV(a) that “remote supply greatly expands gambling opportunities into settings – such as homes and schools – where it has not traditionally been present and is not subject to the controls present in other settings.”⁸⁰ The United States later elaborated on the health implications of this expanded availability in the context of a discussion at the second Panel meeting of Article XVII of the GATS, arguing that:

⁷⁷ Opening statement of the United States at the second Panel meeting, para. 75 (emphasis added). The earlier discussion in the same oral statement further detailed U.S. concerns in the areas of “organized crime, money laundering, and other forms of crime.” *See id.*, paras. 48-60.

⁷⁸ Response of the United States to Panel question 45.

⁷⁹ Response of the United States to Panel question 45 (citing Order Directing Realignment of Organized Crime Program Resources, Attorney General Order 1386-89, appendix (December 26, 1989)). Excerpt at Exhibit U.S.-42.

⁸⁰ Second submission of the United States, para. 114.

Remote gambling also presents special health and youth protection risks in part because it is available to anyone, anywhere – including compulsive gamblers and children – who can gamble 24 hours a day with a mere “click of the mouse.” Isolation and anonymity compound the danger. In the words of a gambling addict interviewed on the videotape we have provided, “nobody has to see you do it” and “nobody has to know.”⁸¹

The United States tied this danger back to Article XIV in the same oral statement by “invit[ing] the Panel to reflect on the Article XIV implications of some of our earlier discussion” of various dangers associated with remote supply of gambling. This is what the Panel did in respect of U.S. health concerns.⁸²

47. Antigua also asserts that the Panel erred by considering an Article XIV(b) issue.⁸³ Yet, as Antigua acknowledges, the Panel did not even discuss Article XIV(b), much less make findings under that provision, so the United States fails to see the point of Antigua’s assertion. The Panel found that action to address the health risks of gambling in this dispute fell within the of scope of protection of public morals and/or public order under Article XIV(a), and Antigua has not appealed the substance of the Panel’s finding that it was possible to consider health concerns under Article XIV(a).⁸⁴

48. Finally, Antigua asserts that the Panel should not have addressed the chapeau of Article XIV.⁸⁵ Antigua’s concern with the Panel’s findings appears to be that those findings “contained” discussion that was not “contained” in identical form in the U.S. submissions.

⁸¹ Opening statement of the United States at the second Panel meeting, para. 50 (citing *The Big Gamble*, Exhibit U.S.-39).

⁸² *See* Panel Report, para. 6.510-6.514 (the reference to “United States’ second oral statement, para. 30” in note 954 of the Panel Report appears to be a typographical error and should refer to para. 50 of that statement; similarly, the attribution of a quotation in note 960 of the Panel Report to “para. 30 of [the U.S.] first oral statement” is incorrect in that the quotation actually appears in para. 50 of the U.S. opening statement at the second Panel meeting).

⁸³ Other Appellant Submission of Antigua and Barbuda, para. 85.

⁸⁴ Antigua has appealed a different health issue under Article XIV(a) – whether it was proper for the Panel to consider health risks in light of the evidence and argumentation provided by the United States on that issue. Antigua’s argument on that issue is without merit for the reasons addressed above.

⁸⁵ Other Appellant Submission of Antigua and Barbuda, para. 86.

However, a Panel does not err simply because it declines to adopt verbatim every aspect of the reasoning suggested a party.⁸⁶ A panel does err, however, if it relieves the complaining party of its burden of initially making the *prima facie* case and assumes that burden on its behalf. In contrast to the arguments that the Panel created for Antigua under Article XVI of the GATS, however there was no need for the Panel to assume the initial burden of the United States under the Article XIV chapeau. The United States specifically asserted that the measures that it was defending were consistent with the Article XIV chapeau, and sustained its initial burden on its own behalf by providing argumentation and evidence supporting that defense.⁸⁷

G. The Panel did not err in reaching the conclusions challenged by Antigua under Article XIV(a) of the GATS.

49. Antigua alleges three errors by the Panel under Article XIV(a) of the GATS, consisting of (1) failure to devote sufficient attention to footnote 5 of Article XIV(a),⁸⁸ (2) misapplication of the “weighing and balancing” approach used by the Appellate Body in *Korea – Beef* to determine whether a measure is “necessary”;⁸⁹ and (3) violation of Article 11 of the DSU by allegedly showing “total deference to the statements and findings of [U.S.] authorities”⁹⁰. These allegations of error are without merit.

1. The Panel fully applied footnote five of Article XIV(a).

50. Antigua places surprising new emphasis on footnote five to Article XIV(a) in its appeal. Footnote five to Article XIV(a) states that “[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of

⁸⁶ See Appellate Body Report, *United States – Customs Bonding*, para. 123 (finding that a Panel “was not obliged to limit its legal reasoning in reaching a finding to arguments presented” by a party).

⁸⁷ See Appellant Submission of the United States, para. 187; Second submission of the United States, paras. 117-122.

⁸⁸ Other Appellant Submission of Antigua and Barbuda, paras. 88, 89-90.

⁸⁹ Other Appellant Submission of Antigua and Barbuda, paras. 88, 91-105.

⁹⁰ Other Appellant Submission of Antigua and Barbuda, paras. 88, 106-119 (the quoted statement appears in para. 106).

society.” Antigua’s argumentation regarding footnote five before the Panel consisted of the one-sentence statement that “[t]he footnote to Article XIV(a) clarifies that this exception needs to be interpreted narrowly.”⁹¹ The United States, by contrast, provided specific evidence of grave threats to public morals and public order, and argued that this evidence met the standard of Article XIV(a), including footnote five.⁹²

51. Antigua’s argument is without merit. The Panel expressly took footnote five into account in concluding that the words “public order” in Article XIV(a) referred to “fundamental interests of a society.”⁹³ Moreover, Antigua ignores the fact that the Panel subsequently made findings regarding the gravity of the U.S. interest at stake and the seriousness of the threat to that interest under Article XIV(a) that more than satisfied the requirement in footnote five of “a genuine and sufficiently serious threat” to fundamental interests. In the course of its analysis of the “importance of interests or values protected” by U.S. measures, the Panel expressly found that the relevant laws “are intended to protect society against the threat of money laundering, organized crime, fraud and risks to children (i.e. underage gambling) and to health (i.e. pathological gambling).”⁹⁴ The Panel then found that these threats were similar to “a life-threatening health risk,” and that the U.S. interests in protecting against such grave threats were “very important societal interests that can be characterized as ‘vital and important in the highest degree.’”⁹⁵

52. By limiting the scope of the words “public order” in Article XIV(a) to “fundamental interests of a society,” and by finding that the “interests and values” protected by the relevant U.S. statutes were “very important” and “vital and important in the highest degree,” the Panel

⁹¹ Opening statement of Antigua and Barbuda at the second Panel meeting, para. 74.

⁹² See Second Submission of the United States, paras. 110-116.

⁹³ Panel Report, paras. 6.467-6.468.

⁹⁴ Panel Report, para. 6.489. The Panel went on to quote a statement by Congress that “organized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens.” *Id.*, para. 6.491.

⁹⁵ Panel Report, para. 6.492.

fully applied all requirements of footnote five of Article XIV(a), and did so to a far greater extent than Antigua ever requested in its submissions to the Panel.

2. The Panel did not err in the ways alleged by Antigua in its “weighing and balancing” of certain *Korea – Beef* factors.

53. Antigua alleges that the Panel erred in its application of Article XIV(a) by neglecting to make “a factual finding that the United States concerns with respect to ‘remote’ gambling relate to *actually existing risks*.” Antigua describes this additional inquiry as “assessing the actual *risk posed*” by the activity.⁹⁶

54. Yet even in making this argument, Antigua expresses uncertainty about whether such an additional inquiry was actually part of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) Article XX analysis used in *Korea – Beef* and *EC – Asbestos*.⁹⁷ That uncertainty is well founded. In fact, the additional assessment of “actual risk posed” that Antigua proposes has not been required as an element of the analysis applied by the Appellate Body under specific prongs of Article XX of the GATT 1994 in these prior disputes. In the case of *Korea – Beef*, Antigua’s citations reveal no support for such an inquiry.⁹⁸ In *EC – Asbestos*, the Appellate Body described how the Panel had looked to evidence of the existence of a health risk as a basis for finding “that the measure falls within the category of measures embraced by Article XX(b) of

⁹⁶ Other Appellant Submission of Antigua and Barbuda, para. 94.

⁹⁷ See Other Appellant Submission of Antigua and Barbuda, para. 94 and n. 129 (stating that “[a]rguably, the factual determination in that case was made prior to the application of the three-part ‘necessary’ test in the context of whether the measure was designed to ‘secure compliance with’ other, GATT consistent laws); *id.* at para. 95 (stating that “it appears more likely that the factual determination was made prior to application of the ‘necessity’ test”).

⁹⁸ Antigua’s citation to paras. 157-158 of the Appellate Body Report in *Korea – Beef* provides no support for the existence of such an additional inquiry in that dispute. In the cited paragraphs, the Appellate Body stated that Article XX(d) of the GATS required that a measure “must be one designed to ‘secure compliance’ ...” and “must be ‘necessary’ to secure such compliance.” Appellate Body Report, *Korea – Beef*, para. 157. It then reviewed the findings of the Panel in that dispute that the measures at issue were designed to “secure compliance.” *Id.* at para. 158. The Appellate Body in *Korea – Beef* did consider the “importance of the interest of values that the challenged measure is intended to protect,” but it did not find that the importance of an interest or value depended on an assessment of “actual risk posed.”

the GATT 1994.”⁹⁹ The Appellate Body did not, however, conclude that anything in the text of Article XX(b) required panels to approach the issue in that particular way.

55. Furthermore, even if there were such a requirement, Antigua simply disregards the Panel’s extensive findings that the concerns identified by the United States actually did exist in the field of remote supply of gambling.¹⁰⁰ These findings demonstrate that, contrary to Antigua’s arguments, the Panel did in fact find that the concerns identified by the United States were “actually present” in the context of this dispute.

56. Antigua appears to argue that the Panel was required to make a narrower finding that the specific risks in question existed with respect to the supply of gambling services *from Antigua*, rather than in relation to all remote supply of gambling.¹⁰¹ There is, however, no support for such a requirement – particularly not in a case where the concerns alleged by the United States and found by the Panel (*e.g.*, the inherent susceptibility of remotely supplied gambling to various risks) were not related to the national origin of the service or supplier. Indeed, there have been many past disputes in the field of trade in goods in which Panels found that a particular concern existed with respect to the good in question, regardless of origin. For example, in *EC – Asbestos*, the Appellate Body affirmed a Panel’s finding that chrysotile-cement products posed a risk to human life or health without requiring the Panel to find that chrysotile-cement products

⁹⁹ Appellate Body Report, *EC – Asbestos*, para. 157. Antigua cites para. 124 of the Appellate Body Report in *EC – Asbestos*, which appears to be a totally inapposite discussion of “the different tariff classifications of the chrysotile asbestos, PVA, cellulose and glass fibres.”

¹⁰⁰ Panel Report, paras. 6.498-6.518, 6.521. *See especially id.* at paras. 6.501 (finding that an international Financial Action Task Force report “tends to confirm the existence of the concerns identified by the United States in the context of the remote supply of gambling and betting services that relate to the audit trail of remote transactions”); 6.507 (stating that “[w]e have seen evidence that tends to support the United States’ concern that low barriers to entry in the context of the remote supply of gambling and betting services heightens the risk of fraud”); 6.511 (finding that “[t]he evidence tends to support the existence of the United States’ concerns regarding the isolated environment of consumers of remotely supplied gambling and betting services.”); and 6.516 (stating that “[t]he evidence tends to support the United States’ assertion that age verification is a specific concern with respect to the remote supply of gambling and betting services”).

¹⁰¹ Other Appellant Submission of Antigua and Barbuda, para.

from Canada posed a risk to human life or health.¹⁰² The Panel in this dispute similarly found that certain concerns existed relating to remote supply of gambling services, regardless of origin. Antigua clearly failed to persuade the Panel in its rebuttal that its remotely supplied gambling services were somehow free of the risks associated with remotely supplied gambling services in general. In that context, it was neither necessary nor logical for the Panel to particularize its findings to the service when supplied from Antigua.

57. Antigua next alleges that the Panel erred in assessing the extent to which U.S. measures contributed to the realization of the ends pursued.¹⁰³ Essentially, Antigua argues that the Panel was wrong to conclude that prohibiting an activity is a means of addressing public order or public morals concerns associated with that activity because (1) there is no “established nexus” between prohibiting an activity and addressing a concern about it, and (2) the Panel did not assess the “extent” of the contribution that prohibiting an activity makes to addressing concerns about that activity. Under Antigua’s reasoning, it would be error for a panel to conclude that prohibiting aviation would significantly contribute to reducing airplane crashes. Such an argument lacks merit. The “nexus” Antigua is searching for lies in the common sense logic that making a particular activity unlawful results in law-abiding people ceasing to engage in it and lawbreakers being subject to sanctions for engaging in it, thus the incidence of the activity that causes the concern is consequently lower than it otherwise would be. The “extent” of this contribution in any society in which the rule of law prevails would seem self-evidently significant. Indeed, Antigua itself submits in the following paragraph that this approach is “the most restrictive possible.” The Panel’s finding on this point is therefore sound.¹⁰⁴

¹⁰² See, e.g., Appellate Body Report, *EC – Asbestos*, para. 162 (finding that it was within the bounds of a panel’s discretion to find that chrysotile-cement products pose a risk to human life or health).

¹⁰³ Other Appellant Submission of Antigua and Barbuda, para. 97.

¹⁰⁴ The Panel’s finding is also not a violation of Article 11, as Antigua summarily asserts in paragraph 111 of its Other Appellant Submission. The Panel had ample evidence, as well as its own common sense, on which to rely for the conclusion that prohibiting an activity contributed to addressing concerns about that activity. Moreover, Antigua’s summary assertion does not meet the high standard applicable to Article 11 claims. See Appellate Body Report, *United States – Steel 201*, para. 498.

58. Antigua's third point under the heading of *Korea – Beef* relates to the assessment of reasonably available alternatives.¹⁰⁵ The United States has already discussed this issue extensively in its Appellant Submission.¹⁰⁶ The core of Antigua's argument appears to be that the Panel neglected to consider potential alternatives other than measures already used by the United States to address similar concerns. This is obviously not the case, since the Panel found erroneously that the United States should have consulted with Antigua in order to explore the possibility of finding other unspecified alternatives. Thus the Panel did not fail to consider other alternatives, as Antigua now alleges. Antigua simply failed to persuade the Panel that any alternatives actually existed, as opposed to merely being potentially discoverable through consultations.¹⁰⁷ In the absence of any reasonably available alternatives, the Panel erred by imposing a non-existent procedural requirement on the United States to seek alternatives that might or might not exist through consultations with Antigua.¹⁰⁸

3. The Panel did not violate DSU Article 11, in the ways alleged by Antigua, in its Article XIV(a) analysis.

59. Antigua's claims of violations of DSU Article 11 by the Panel are without merit. Under Article 11, Antigua challenges (a) the Panel's finding that the relevant U.S. measures are designed to protect public morals and public order; (b) the Panel's finding that the interests served by the U.S. measures are "very important" and "vital and important in the highest

¹⁰⁵ Other Appellant Submission of Antigua and Barbuda, paras. 98.105.

¹⁰⁶ Appellant Submission of the United States, paras. 136-165.

¹⁰⁷ In response to the U.S. *prima facie* case that it had sought alternatives and found none, Antigua made the suggestion of "discussion and negotiations" based on the speculative possibility that "there may well be existing technologies and methods of cooperation that could obviate any concerns that the United States may have in respect of the provision of cross-border gambling and betting services." See Comment by Antigua and Barbuda on response of the United States to Panel question 43.

¹⁰⁸ In para. 105 of its Other Appellant Submission Antigua summarily asserts that the Panel erred in declining to consider regulation of non-remote gambling as a compatible alternative. Antigua appears to base this assertion on Article 11 of the DSU, but it falls far short of the level of argumentation and analysis required to sustain such a claim. See Appellate Body Report, *United States – Steel 201*, para. 498.

degree”; (c) the Panel’s finding that the relevant measures contributed to the end pursued; and (d) the Panel’s assessment of the so-called “five concerns” of money laundering, fraud, health, underage gambling, and organized crime.

60. Antigua’s arguments on each of these points are reminiscent of the Article 11 arguments rejected by the Appellate Body in *EC – Asbestos* in the context of the issue of existence of a human health concern under Article XX of GATT 1994. In that dispute the Appellate Body explained that:

The Panel enjoyed a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence. The Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements – that is the essence of the task of appreciating the evidence.

61. The Appellate Body further stated that “we will interfere with the Panel’s appreciation of the evidence only when we are ‘satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.’” The Appellate Body in *EC – Asbestos* concluded that “nothing suggests that the Panel exceeded the bounds of its lawful discretion.” The Appellate Body should reach the same conclusion in regard to Antigua’s Article 11 claims in this dispute.

62. Antigua’s most frequent and insistent assertion in its Article 11 arguments is that the Panel somehow erred by placing significant weight on testimony, statements, and reports from U.S. official sources. However, the fact that Antigua is unhappy with the weight given by the Panel to particular evidence is not an Article 11 violation.¹⁰⁹ Moreover, Antigua repeatedly asserts that such evidence, even when consisting of testimony given under oath before the Congress of the United States, is not “actual evidence.”¹¹⁰ It is perplexing that Antigua would take this view, since throughout this dispute Antigua itself has frequently cited material from

¹⁰⁹ See Appellate Body Report, *Korea – Alcohol Taxes*, para. 164 (“It is not an error, let alone an egregious error, for the Panel to fail to accord the weight to the evidence that one of the parties believes should be accorded to it.”).

¹¹⁰ Other Appellant Submission of Antigua and Barbuda, paras. 112, 115, 116, 117, 118, 133, and 136.

U.S. official sources.¹¹¹ Indeed, many of the materials cited by the Panel, and which Antigua now dismisses as not “actual evidence,” were exhibits originally offered as evidence by Antigua.¹¹² The United States fails to understand how such material could have been “evidence” when it was offered by Antigua, but ceased to be “actual evidence” when relied upon by the United States and by the Panel. As far as the United States is aware, “evidence” is any probative material offered to prove the existence or nonexistence of a fact, regardless of which side relies on it.¹¹³ Testimony, official reports, and other writings are forms of evidence, they are no less “actual” than any other evidence, and the Panel is entitled to consider them as such.

63. It is possible that what Antigua is really arguing is that, in its view, the Panel should not have regarded the testimony of U.S. officials before Congress as *persuasive* evidence of the design of U.S. laws, the importance of U.S. interests or values, or the concerns sought to be addressed by U.S. laws. If so, Antigua is again merely asserting its disagreement with the Panel’s weighing of the evidence – an area where panels have significant discretion. And again, Antigua’s arguments are similar to arguments rejected by the Appellate Body in *EC – Asbestos*.

64. The Panel’s conclusions on these issues are extensively supported by analysis and citations to the record. The fact that many of the cited sources are U.S. official sources is hardly surprising in light of the fact that the issues before the Panel were intimately connected with U.S. law and the matter of protecting public order and public morals in the United States. It is

¹¹¹ For example, Antigua relied on U.S. Department of Defense report on gambling on military bases mentioned in paragraph 107 of Antigua’s Other Appellant Submission. Panel Report, para. 6.480.

¹¹² Such evidence includes a report of the U.S. General Accounting Office, Panel Report, para. 6.500; a briefing and testimony by a U.S. Deputy Assistant Attorney General, *id.* paras. 6.502, 6.505, 6.511, and 6.516; and the final report of the U.S. National Gambling Impact Study Commission, *id.* paras. 6.508, 6.512, and 6.517.

¹¹³ See Black’s Law Dictionary (West 1990), p. 55 (defining “evidence” in part as “Any species of proof legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.... Testimony, writings, or material objects offered in proof of an alleged fact or proposition. That probative material, legally received, by which the tribunal may be lawfully persuaded of the truth or falsity of a fact in issue.... Testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact....”)

entirely appropriate for a panel to accord weight to evidence of the views of domestic authorities in such matters. Nonetheless, far from showing “total deference to the statements and findings of [U.S.] authorities,”¹¹⁴ the Panel did not hesitate to examine evidence from other sources,¹¹⁵ to consider evidence provided by Antigua,¹¹⁶ and to make a finding against the United States in one instance¹¹⁷. Under all these circumstances, the fact that it did not weigh every aspect of the evidence in Antigua’s favor is not a violation of Article 11.¹¹⁸

65. Antigua also asserts that the Panel erred in its assessment of the evidence by giving weight to statements made at the time of enactment of the relevant statutes about the importance of the interests or values protected by U.S. laws.¹¹⁹ Again, this is an issue of relative weight of the evidence as to which the Panel enjoyed significant discretion. Moreover, Antigua’s suggestion that these concerns from the time of enactment may somehow have become obsolete is disproved by the Panel’s discussion of recent 2003 testimony before the U.S. Congress that confirmed the continuing and in some respects even greater relevance of U.S. public order and public morals concerns in the age of Internet gambling.¹²⁰

66. Finally, Antigua’s objection that “none of the evidence relates to factual matters involving the cross-border gambling and betting services provided by Antigua”¹²¹ is without

¹¹⁴ Other Appellant Submission of Antigua and Barbuda, para. 106.

¹¹⁵ See, e.g., paras. 6.501 (considering statements by the international Financial Action Task Force on Money Laundering), 6.509 (considering a document prepared by Antigua entitled “Fraud within the United States gambling industry”); 6.513-6.514 (considering statements by Antigua’s experts); and 6.518 and n. 966 (considering a document prepared by Antigua entitled “Youth Gambling,” a news article, and testimony by a Visa executive before the U.S. Commission on Online Protection).

¹¹⁶ See, e.g., paras. 6.480, 6.505, 6.509, 6.513-6.514 and accompanying footnotes, and 6.518 and n. 966.

¹¹⁷ Panel Report, para. 6.520 (the United States disagrees with this adverse finding).

¹¹⁸ See Appellate Body Report, *Korea – Alcohol Taxes*, para. 164.

¹¹⁹ Other Appellant Submission of Antigua and Barbuda, paras. 109-110.

¹²⁰ Panel Report, para. 6.484. By contrast, the *Greater New Orleans* opinion quoted by Antigua in paragraph 110 of its Other Appellant Submission does not specifically address Internet gambling.

¹²¹ Other Appellant Submission of Antigua and Barbuda, para. 112.

merit for the reasons discussed in the preceding section. Antiguan suppliers obviously provide gambling services by remote supply,¹²² and all of the relevant Panel findings related to remotely supplied gambling and betting services.¹²³

H. The Panel did not err in reaching the conclusions challenged by Antigua with respect to Article XIV(c) of the GATS.

67. Antigua challenges the Panel's Article XIV(c) analysis on the grounds that (1) the Panel erred by even considering the RICO statute because "the state statutes on which the RICO statute relies were not properly before the Panel";¹²⁴ (2) the Panel erred by considering an organized crime statute because organized crime is allegedly not a specific concern related to remote gambling; and (3) the Panel violated DSU Article 11 in its consideration of the facts. These allegations of error are without merit.

1. The Panel did not err by considering the RICO statute.

68. The initial question before the Panel under Article XIV(c) of the GATS was whether the Wire Act, the Travel Act, and the Illegal Gambling Business statute "secure compliance" with the RICO statute by contributing to its enforcement. As discussed by the Panel, the RICO statute prohibits activities involving "racketeering."¹²⁵ Organized crime is a subset of racketeering.¹²⁶

¹²² See, e.g., First submission of Antigua and Barbuda, para. 39 (describing remote services provided by Antigua-based suppliers).

¹²³ In paragraph 119 of its Other Appellant Submission, Antigua states that "the Panel appeared to be requiring the provision of evidence of *actual* organised crime participation in 'remote' gambling and betting – which is the standard that Antigua believes should have been applied to the entire analysis of the Five Concerns." In fact, Antigua's statement is precisely the opposite of the Panel's actual reasoning. The Panel observed that "the United States has pointed us to instances of organized crime involvement and prosecution in connection with the remote supply of gambling and betting services," but, in a conclusion that the United States views as incorrect, the Panel found that this evidence was not sufficient to demonstrate that there were particular organized crime risks associated with remote supply of gambling as distinct from non-remote supply. Panel Report, para. 6.520.

¹²⁴ Other Appellant Submission of Antigua and Barbuda, para. 130.

¹²⁵ For example, the Panel quoted provisions of the RICO statute that make it a crime to use income from racketeering in an enterprise that affects interstate or foreign commerce. Panel

Because Congress understood that “organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling,”¹²⁷ the RICO statute defines “racketeering” as including acts or threats involving gambling that are chargeable under state law, as the Panel found.¹²⁸ The definition also includes other acts that are typical of organized crime involvement in gambling, such as acts indictable under the federal money laundering statute, the federal extortionate debt collection statute, or under the Wire Act, the Travel Act, and the Illegal Gambling Business statute.¹²⁹

69. The Panel correctly found that, by restricting organized crime gambling activities that can contribute to racketeering, the Wire Act, the Travel Act, and the Illegal Gambling Business statute each assist in enforcing the broader prohibition on racketeering-related activities in the RICO statute, and thus “secure compliance” with the RICO statute.¹³⁰ The Panel further found that the enforcement contribution made by these statutes was “significant” because they help to ensure that organized crime will not escape local prosecution by operating across state or national borders,¹³¹ and also because they allow federal resources to be used to combat organized crime.¹³²

70. Antigua essentially argues that the RICO statute has no independent meaning apart from the state laws listed in Antigua’s Panel request that the Panel declined to consider under Article

Report, para. 6.533. Similarly, RICO makes it a crime to conduct an enterprise through a pattern of racketeering activity. *See* Exhibit U.S.-35 (cited in Panel Report, n. 1011) at 18 U.S.C. § 1962(c).

¹²⁶ U.S. response to Panel question 45.

¹²⁷ Panel Report, para. 6.491 (quoting the Congressional statement of findings prefatory to the Organized Crime Control Act of 1970, which includes the RICO statute).

¹²⁸ Panel Report, para. 6.553.

¹²⁹ Panel Report, para. 6.533, Second submission of the United States, para. 104.

¹³⁰ Panel Report, paras. 6.554-6.556.

¹³¹ Panel Report, para. 6.560 (this finding was made with respect to the Wire Act and the Travel Act).

¹³² Panel Report, para. 6.560 (this finding was made with respect to the Travel Act and the Illegal Gambling Business statute).

XIV(c).¹³³ Because the RICO statute, in Antigua's view, "relies" on those laws, Antigua argues that it was error for the Panel to consider the RICO statute. This is incorrect in at least two respects.

71. First, the RICO statute has independent meaning and protects independent interests and values apart from any other law. It has independent meaning because a violation of RICO requires additional conduct beyond action chargeable or indictable under another law. The example discussed by the Panel is using income from racketeering (*e.g.*, illegal gambling income) to operate an interstate or international enterprise.¹³⁴ It was this independent meaning of RICO as a prohibition on sources of racketeering income for organized crime that the Panel singled out in its findings.¹³⁵ In addition, the Panel relied on the independent interests and values protected by the RICO statute, which are national in scope, "vital and important in the highest degree," and not dependent on any particular state or other law.¹³⁶

72. Second, the scope of gambling activity reached by the RICO statute extends far beyond just the state gambling laws listed in Antigua's Panel Request, to include many other predicate acts or threats.¹³⁷ The laws relevant to other RICO predicate acts or threats (such as using threats

¹³³ The Panel declined to consider the U.S. Article XIV(c) argument with respect to state laws listed in Antigua's Panel Request because it found that the United States could not claim a presumption of WTO-consistency with respect to laws that Antigua had challenged in its Panel Request. The United States does not agree with this finding. Members are entitled to a presumption of WTO-consistency for any measure that has not been found inconsistent with a covered agreement.

¹³⁴ Panel Report, para. 6.553.

¹³⁵ See Panel Report, para. 6.553.

¹³⁶ See Panel Report, para. 6.558.

¹³⁷ As the Panel observed, the definition of "racketeering" includes, among other things, "any act or threat involving ... gambling ... which is chargeable under State law" – not just acts or threats that violate the particular laws listed in Antigua's Panel Request. Panel Report, para. 6.553. For example, if a person commits illegal acts or threats of murder, extortion, or money laundering that involve gambling, and uses income gained from those activities in an enterprise affecting interstate or foreign commerce, that person may be prosecuted for a RICO violation – even if that person has not violated any of the state laws in Antigua's Panel request. In such a case, application of RICO would be predicated on commission of acts chargeable under U.S. state laws on murder and extortion, and/or acts indictable under relevant federal laws, such as the money laundering and extortionate debt collection.

of violence to collect gambling debts) are not challenged by Antigua in this dispute and are entitled to a presumption of WTO consistency.¹³⁸ Because the scope of RICO in relation to gambling is so much broader than just the state gambling laws listed in Antigua's Panel request and includes a wide array of laws that must be presumed to be WTO-consistent, the Panel's Article XIV(c) findings with regard to the RICO statute were in no way undermined by the possibility of basing a RICO prosecution on certain of the state laws listed in Antigua's Panel Request.

73. The Panel thus did not err in finding that the Wire Act, the Travel Act, and the Illegal Gambling Business statute perform an enforcement role that secures compliance with the RICO statute. As discussed by the Panel, the United States views the Wire Act, the Travel Act, and the Illegal Gambling Business statute as components of a broader enforcement strategy to deprive organized crime of its ability to operate, including its access to gambling revenue.¹³⁹ Consistent with the Panel's findings, the RICO statute, with its prohibitions on uses of racketeering income and other racketeering-related activity, is central to that strategy. Also consistent with the Panel's findings, enforcement of the RICO prohibitions is assisted by surrounding statutes dealing with activities typical of organized crime that comprise racketeering, including illegal gambling. Indeed, Antigua's own argument that RICO predicate offenses are essential to give "force" to the RICO statute¹⁴⁰ only further confirms that the Wire Act, the Travel Act, and the Illegal Gambling Business statute – each of which is itself a RICO predicate – are all indispensable to securing compliance with the RICO statute, and therefore meet the requirements of Article XIV(c) of the GATS.

2. The "end pursued" by RICO does not have to relate only to remote supply of gambling.

¹³⁸ See Panel Report, para. 6.549 (finding that the Panel was entitled to assume that criminal laws relating to organized crime that were not challenged by Antigua were WTO-consistent).

¹³⁹ See Panel Report, para. 6.552 (quoting U.S. arguments).

¹⁴⁰ para. 130.

74. Antigua argues that the Panel erred by finding that a restriction on remote supply of services was “necessary to secure compliance with laws or regulations which are not inconsistent” with the GATS because the “end pursued” by the law or regulation being enforced was not an end that relates only to remote supply of that service. Antigua thus urges that because the Panel elsewhere found that U.S. concerns relating to organized crime related to all supply of gambling (whether remote or non-remote),¹⁴¹ and because the “end pursued” by the RICO statute relates to organized crime, the Panel could not find that the Wire Act, the Travel Act, and the Illegal Gambling Business statute were measures to secure compliance with the RICO statute.¹⁴² Antigua cites no legal authority in support of this argument.

75. Antigua’s argument fails because Article XIV(c) does not require that the “end pursued” by the law or regulation being enforced must relate *only* to the precise service to which the enforcement measure applies.¹⁴³ In fact, it is clear from the text that the “end pursued” by an Article XIV(c) law or regulation may be much broader than the precise service at issue in any given dispute. For example, a restriction on a service could hypothetically be justified under Article XVI(c)(iii) as a measure to secure compliance with a “safety” law or regulation, even if the “end pursued” by that law or regulation was to ensure “safety” across a broader range of activity. Similarly, in this dispute it makes no difference that the purpose of the RICO statute “to seek the eradication of organized crime in the United States”¹⁴⁴ relates to all fields of activity where organized crime is active, and not exclusively to remote supply of gambling services.

3. The Panel did not violate DSU Article 11, in the ways alleged by Antigua, in its Article XIV(c) analysis.

¹⁴¹ Panel Report, paras. 6.519-6.520.

¹⁴² Other Appellant Submission of Antigua and Barbuda, paras. 131-132.

¹⁴³ Article XIV(c) is analogous in this respect to Article XX(d) of GATT 1994. For example, in *Korea – Beef*, Korea was not required to show that the end pursued by Korea’s *Unfair Competition Act* – to prevent “misleading the public to understand the place of origin of any goods” – related exclusively to beef and not other goods. See Appellate Body Report, *Korea – Beef*, para. 171.

¹⁴⁴ Exhibit U.S.-35 (cited in Panel Report, n. 1011) at p. 813 (quoting Congressional statement of purpose accompanying the RICO statute).

76. Antigua's cursory Article 11 arguments with respect to Article XIV(c) again do not meet the high standard of argumentation required of Article 11 claims.¹⁴⁵ Moreover, they once again turn on the notion that the Panel was somehow wrong to give weight to evidence from U.S. sources, which is without merit for the reasons described above.

I. The Panel did not err in reaching the conclusions challenged by Antigua with respect to the chapeau of Article XIV of the GATS.

77. The United States has already addressed the operation of the chapeau of Article XIV in its Appellant Submission. Antigua's final two arguments under the chapeau are that the Panel erroneously "segmented" the gambling industry, and that it violated DSU Article 11.

78. Antigua does not explain where or how the Panel allegedly "segmented" the industry, and articulates no legal basis for finding that a Panel may not "segment" an industry. Its argument fails for those reasons alone.

79. Antigua is perhaps referring to the fact that the Panel's findings adverse to the United States under the chapeau were limited exclusively to the "narrow segment" of Internet gambling on horseracing. Assuming that to be the case, the United States fails to understand why Antigua believes a panel is required to make a finding of discrimination across an entire industry even if it finds that the facts do not support such a finding. The United States also recalls its argument that the Panel's adverse findings relating to parimutuel Internet gambling on horseracing were erroneous for the reasons stated in the U.S. Appellant Submission.

80. Antigua's cursory Article 11 arguments with respect to the Article XIV chapeau once again do not meet the high standard of argumentation required of Article 11 claims.¹⁴⁶ Moreover, to the extent that they once again turn on the notion that the Panel was somehow wrong to give weight to statements of fact from U.S. sources that the Panel accepted as credible (e.g., the Panel's "Nevada" discussion),¹⁴⁷ that argument is without merit for the reasons described above.

¹⁴⁵ See Appellate Body Report, *United States – Steel 201*, para. 498.

¹⁴⁶ See Appellate Body Report, *United States – Steel 201*, para. 498.

¹⁴⁷ Other Appellant Submission of Antigua and Barbuda, para. 145.

81. With respect to video lottery terminals, Antigua incorrectly characterizes the Panel's findings of fact¹⁴⁸ and once again simply disagrees with the Panel's negative factual assessment of Antigua's evidence,¹⁴⁹ which is not a sufficient basis for finding a violation of Article 11.

82. Finally, the United States notes Antigua's observation that "the Panel admitted that it had taken evidence submitted by Antigua for another purpose and applied the evidence to an Article XIV discussion, a different GATS provision altogether with completely different issues and context."¹⁵⁰ Antigua further observed that "Antigua's evidence and argumentation under GATS Article XVII was submitted for purposes of demonstrating that the gambling services offered from Antigua were 'like' gambling services offered to American consumers domestically"¹⁵¹ – not for purposes of making a rebuttal under the higher "arbitrary or unjustifiable discrimination" standard of the Article XIV chapeau. The United States would simply note that these observations by Antigua support the argument in the U.S. Appellant Submission that the Panel improperly assumed Antigua's burden of rebutting the U.S. claims made with respect to the Article XIV chapeau.

III. CONCLUSION

83. For all of the reasons discussed above, the United States respectfully requests that the Appellate Body reject Antigua's other appeal in its entirety.

¹⁴⁸ Other Appellant Submission of Antigua and Barbuda, para. 143. The Panel's findings turned on the factual distinction between remote and non-remote supply – a distinction that was extensively argued by the United States, and accepted by the Panel. Panel Report, paras. 6.590, 6.593-6.594.

¹⁴⁹ Moreover, in its assertions about the burden of proof with respect to video lottery terminals, Antigua seems to forget that this was a rebuttal point on which the Panel was assessing Antigua's evidence (and erroneously so, as described in paras. 187-189 of the U.S. Appellant Submission) to determine whether it rebutted the U.S. *prima facie* case that the relevant laws were not "applied in a manner which would constitute arbitrary or unjustifiable discrimination" The Panel report reflects that the Panel scrutinized the evidence and argumentation that it assembled for Antigua on this point and found it unpersuasive. Panel Report, paras. 6.590-6.594.

¹⁵⁰ Other Appellant Submission of Antigua and Barbuda, para. 76.

¹⁵¹ Other Appellant Submission of Antigua and Barbuda, para. 76.