

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

WT/DS285

**Executive Summaries of the Oral Statements of the United States
at the Second Substantive Meeting of the Panel**

February 4, 2004

Opening Statement (January 26, 2004)

1. Mr. Chairman, members of the Panel, we are now at the second panel meeting, and nothing has changed since the last time we met. In the view of the United States, this dispute still begins and ends with two threshold issues.
2. The first is Antigua's failure to make its *prima facie* case as to the existence and meaning of measures that are the subject of its claims. The Panel has asked Antigua to identify all relevant U.S. legislative and regulatory provisions Antigua is challenging. Antigua has responded it is "in essence challenging every legislative provision that *could be construed* to form a piece of the United States' total prohibition on the cross-border supply of gambling and betting services." Antigua then states that it has submitted statutory provisions that "are *most likely* to form part of the total ban."
3. This response confirms Antigua's failure to make its *prima facie* case. Antigua cannot sustain its burden by merely identifying laws that "could be construed" as relevant, or are "most likely" relevant. In order for the Panel to consider whether hundreds of U.S. laws interact together so as to be inconsistent with the GATS, and for the United States to even defend its laws, it is both reasonable and necessary for Antigua to first be very precise about the specific U.S. measures it is challenging, and their relevance, meaning, interaction, and interpretation under U.S. domestic law. Antigua has not done any of this.
4. The second threshold issue is the absence of any U.S. commitment for gambling services under the GATS. We see here a series of attempts by Antigua to turn the rules of treaty interpretation on their head by using preparatory work and other extrinsic sources, which could never be more than secondary means of interpretation, to override text of the Agreement. There are four key points to keep in mind on this issue:
 - First, on an ordinary meaning interpretation, for a service that is supposedly both "entertainment" and "recreation," as Antigua alleges, it is really neither. In fact, gambling is something else entirely. It is a *sui generis* activity that, if it belongs anywhere in sector 10, logically belongs in the "10.E. Other" subsector, where the United States made no commitment.

- Second, Antigua would like to place gambling in sector 10.D, but the ordinary meaning of the “except sporting” notation in that subsector of the U.S. schedule confirms that the United States has made no commitment for gambling under 10.D.
- Third, Antigua tries to use the UN provisional Central Product Classification (“CPC”) to override these ordinary meanings, but cannot do so because the United States chose not to use the CPC as the basis for its schedule.
- Fourth, the Appellate Body in *EC-LAN* made it clear that if Antigua or any third party desires addition of CPC references to the U.S. schedule, that is a matter for negotiations.

5. In spite of its failure to meet its burden on these two threshold issues, Antigua goes on to assert a violation of Article XVI of the GATS. There are three key points to bear in mind on that issue:

- First, Antigua’s “zero quota” argument would convert Article XVI:2 into a *per se* rule against prohibitions, and that result is inconsistent with its text.
- Second, Antigua has overstated the scope of U.S. restrictions on cross border gambling services – they are not a “blanket” or “total” prohibition. Moreover, even a “blanket” prohibition does not violate Article XVI unless it takes one of the specified forms under Article XVI.
- Third, Antigua’s new argument that prohibiting any fraction of a service in a committed sector automatically violates Article XVI:2 is also inconsistent with the text, and would undermine Members’ rights to regulate services in committed sectors.

6. Antigua further asserts a violation of Article XVII of the GATS. Two important legal issues to bear in mind there are:

- First, the importance of regulatory concerns to likeness of services, especially in the heavily regulated field of gambling services; and
- Second, the fact that the text of the GATS refers to likeness of both “services and suppliers,” and indeed the two are deeply intertwined. It is Antigua’s burden to prove likeness of both.

7. There are also numerous disputed issues of fact regarding Antigua’s failure to prove likeness and less favorable treatment under Article XVII. For example, with respect to Antigua’s continuous argument that the United States has not shown the link between Internet gambling and various forms of crime, the United States has already established that remote supply of gambling is particularly susceptible to organized crime, money laundering, and other forms of crime. While the United States remains unable to discuss pending law enforcement matters out of concern for

compromising criminal investigations, we have located publicly available evidence of one case study that illustrates the link between criminal activity and Internet gambling.

8. The United States also offers some very brief comments on Articles VI, XI, and XIV of the GATS.

- On Article VI, Antigua appears to be unable to cite any instance in which “authorisation to supply” a gambling service in the United States was refused. Moreover, Antigua states that it “has not been able to investigate all the criteria that all states apply to authorise a domestic operator to offer gambling and betting services,” making it difficult for the United States to understand how Antigua can credibly assert that such procedures “by their very terms exclude Antiguan suppliers.”
- On Article XI, Antigua’s claim still rests exclusively on the Paypal agreement, which is not a measure at issue in this dispute. The agreement itself is not an application of New York laws as such; rather, it is a mutual settlement of a disputed matter.
- On Article XIV, we would invite the Panel to reflect on the Article XIV implications of some of our earlier discussion – including the discussion of Mr. Scott, money laundering and other dangers, and the statistics on federal prosecutions in gambling cases. These observations further support the law enforcement arguments and the public order and public morals arguments discussed in our second submission.

9. Mr. Chairman, I will conclude the statement of the United States by once again requesting, for all of the foregoing reasons and all those that we have previously expressed, that the Panel reject Antigua’s claims in their entirety.

Closing Statement (January 27, 2004)

10. Mr. Chairman, members of the Panel, the United States would like to take a few minutes to rebut some of the assertions made yesterday by Antigua.

11. We begin with the burden of proof: First, the United States neither concedes nor agrees with any of Antigua’s propositions about the alleged “total prohibition.” Second, it is Antigua itself – not the United States – that established through its own panel request the terms of reference in this dispute, and thus the extent of its own burden of proof; if Antigua now finds it impossible to sustain this burden, it only has itself to blame. Third, Antigua claims to have met the standard for a *prima facie* case articulated in *German Steel* by merely providing the text of domestic laws – to the tune of a thousand pages or more – and short summaries of some of those laws. But this is not enough. The standard as articulated in *German Steel* calls for information that is necessary to engage in an analysis of the meaning, application, interpretation, and interaction of specific provisions of domestic law.

12. Let me now offer two observations on Antigua's arguments regarding the U.S. Schedule: First, the ordinary meaning of the U.S. schedule speaks for itself and should control. That ordinary meaning does not include gambling services, and does not include references to the CPC. Second, Antigua appears to concede that the definition of "sporting" includes gambling.

13. On the issue of likeness of services, let me add further observations on Antigua's remarks yesterday: First, Antigua is unable to persuasively rebut *its own evidence* on the differences in customers and customer experiences that distinguish remote and non-remote gambling. Second, in line with the views of the respected American Psychiatric Association, the United States continues to view Internet gambling as posing a greater health risk. Third, Antigua continues to make assertions about lotteries and other distinct U.S. gambling services without having proven likeness between these particular services and suppliers and any Antiguan services and suppliers. Fourth, Antigua insists that it does not ask that its services and suppliers be treated more favorably than U.S. services and suppliers, but it is in fact asking that its services and suppliers be allowed to do things that domestic services and suppliers cannot do.

14. I would like to hand the floor over to my colleague from the Department of Justice to comment on some of Antigua's statements about U.S. criminal law enforcement: Mr. Chairman and distinguished Panel members, the issues under discussion are of vital importance to the Justice Department and all of U.S. law enforcement. Enforcement of our gambling laws is a vital component in our battle against organized crime. For us, the issue is not an economic one. Let me address four general areas:

- First, Antigua states that we enforce our laws selectively, prosecuting only some criminals so as to protect a domestic gambling industry. Nothing could be further from the truth. Yesterday, we described the hundreds of prosecutions involving illegal gambling. However, only a handful of illegal gamblers based outside the United States have been prosecuted.
- Second, in response to Antigua's statements about international cooperation, we would welcome Antigua's continued assistance in the investigation and prosecution of money launderers and others who violate U.S. law. While it is not true that the United States has "refused" to pursue international requests for assistance as suggested in Antigua's statement, there is a basis for a reluctance to do so if the case involves Internet gamblers.
- Third, Antigua suggests that it effectively screens persons before granting them a license to operate an Internet gambling site. The lack of due diligence displayed before granting William Scott a license indicates otherwise. While the due diligence requirement may be the law in theory, Antigua's practice has sometimes diverged from this theory.
- Fourth and finally, the *Cabazon* case cited at paragraph 73 of Antigua's second opening statement affords no support for Antigua's attempts to downplay the threat of organized crime.

15. Mr. Chairman, members of the Panel, now that we have shared our views on particular issues in Antigua's statement yesterday, the United States offers a few closing remarks. The legal issues in this dispute boil down to questions of treaty interpretation. Over and over again, the United States has argued that these issues must be resolved through a textual analysis.

- Most obviously, we have asked that the Panel scrutinize the ordinary meaning of the text of U.S. commitments, while Antigua has called upon extrinsic sources in an effort to read extrinsic meanings into those commitments.
- We have also asked that the Panel examine the text of Article XVI of the GATS, while Antigua has asked that the Panel read in concepts that are simply not there in the text of the Agreement, such as a guarantee of market access under Article XVI:1 and a "prohibition on prohibitions" under Article XVI:2. Antigua's one concession to the text of Article XVI:2 is an improper reading of "whether" that is plainly inconsistent with the use of the term in the analogous provision of Article XI of the GATT 1994.
- We have asked that the Panel examine the text of Article XVII of the GATS, which refers to services *and* suppliers, as well as the contrast in the text of footnote 10 to the same Article, which refers to services *or* suppliers. Ignoring the text, however, Antigua asks that the Panel read these two provisions in exactly the same way.

16. On these and other issues, Antigua is asking the Panel to deviate from a textual analysis of the GATS, and import meanings and concepts not found in the Agreement. What Antigua is proposing is not a proper application of the customary rules of treaty interpretation, as required by Article 3.2 of the DSU. Those rules, properly applied, support the interpretations advanced by the United States throughout this dispute. The meaning of every provision of the GATS lies there in the text, even if Antigua refuses to acknowledge it.

17. With that observation, the United States would like to thank the Panel again for its time and consideration of our arguments.