

**BEFORE THE
WORLD TRADE ORGANIZATION**

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

WT/DS285

REQUEST FOR PRELIMINARY RULINGS

BY THE

UNITED STATES OF AMERICA

October 17, 2003

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I. Introduction

1. Pursuant to paragraph 11 of the Panel's working procedures, and having reviewed the first submission of Antigua and Barbuda ("Antigua") in the present dispute, the United States respectfully requests preliminary rulings on the following issues:

- The items cited as "measures" in Section III of the Annex to the panel request¹ are not in fact "measures" within the meaning of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and are therefore not within the terms of reference of this Panel.
- Antigua's request for establishment of the Panel improperly included certain measures that were not the subject of consultations.

2. In addition to these requests, the United States wishes to bring to the Panel's attention the fact that Antigua's first submission fails to establish a *prima facie* case of WTO inconsistency with respect to any specific U.S. measure. Instead, Antigua bases its claim on a proposition about the effect of one or more unspecified measure(s) from among the hundreds of items listed in the Annex to its panel request. For the reasons explained below, this approach cannot form the basis for a *prima facie* case. To provide for a constructive first panel meeting and ensure a full opportunity to respond to any claims that Antigua may wish to make regarding specific measures, the United States respectfully requests that the Panel invite Antigua to make a further submission presenting any arguments it wishes to advance with respect to particular measures listed in the Annex to its panel request. In the event that Antigua makes such a submission, the United States asks that the Panel extend its timetable so as to provide the United States sufficient opportunity to respond to Antigua's further arguments with respect to specific measures at issue. In the event that Antigua does not make such a submission, or continues to insist that it need not address any of the specific measures listed in the Annex to its panel request, then the United States respectfully requests that the Panel make a preliminary ruling and find that the specific measures and purported measures in the Annex to Antigua's panel request are no longer at issue in this dispute.

II. Certain items cited as "measures" in Section III of the Annex to Antigua's panel request are not in fact "measures."

3. Among the numerous items challenged by Antigua are several items in the Annex to its panel request, labeled "other ... actions or measures," that do not constitute "measures." The United States respectfully requests that the Panel find that these particular items are beyond its terms of reference.

¹ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Request for the Establishment of a Panel by Antigua and Barbuda, WT/DS285/2, circulated 13 June 2003 ("panel request").

4. A “matter” referred to the DSB consists of one or more “specific” measure(s), together with one or more legal claims relating to such measures.² A panel with standard terms of reference may only examine this matter, *i.e.*, claims relating to a “measure” in the panel request. For something to be a measure for purposes of WTO dispute settlement, it must “constitute an instrument with a functional life of its own” under municipal law – *i.e.*, it must “do something concrete, independently of any other instruments.”³ For example, a Panel recently found that a U.S. government “policy bulletin” did not constitute a measure that could be challenged in WTO dispute settlement proceedings because, in and of itself, it was not a legal instrument that operates on its own.⁴

5. Antigua’s panel request cites several press releases as measures.⁵ These press releases are self-evidently informational in character. They are merely designed to inform and educate the public about actions taken by officials. Press releases do not in themselves have any force under U.S. law,⁶ and therefore do not constitute “measures” under the DSU.

² See DSU Article 6.2. See also *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Appellate Body Report, WT/DS60/AB/R, adopted 25 November 1998, para. 72 (“*Guatemala – Cement I*”).

³ See *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, Panel Report, circulated 14 August 2003, para. 7.119 (“*U.S. – Sunset Japan*”), citing *United States – Measures Treating Export Restraints As Subsidies*, WT/DS194/R, Panel Report, adopted 23 August 2001, para. 8.85 (“*U.S. – Export Restraints*”) (“In considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, *i.e.*, that it would have to do something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations.” (original emphasis)); *United States – Anti-Dumping and Countervailing Measures on Steel Plate From India*, WT/DS206/R, Panel Report, adopted 29 July 2002, para. 7.23 (finding that a challenged practice “lacks independent operational status”) (“*U.S. – Steel Plate*”); *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, Panel Report, WT/DS221/R, adopted 30 August 2002, note 89 (discussing *U.S. – Export Restraints*).

⁴ See *U.S. – Sunset Japan*, Panel Report, para. 7.125. See also *United States – Sections 301-310 of the Trade Act of 1974*, Panel Report, WT/DS152/R, adopted 27 January 2000, para. 7.133 (finding that the U.S. Statement of Administrative Action accompanying the Uruguay Round Agreements Act “could be considered not as an autonomous measure of the Administration determining its policy of implementing Section 304, but as an important interpretative element in the construction of the statutory language of Section 304 itself.”).

⁵ Florida Attorney General, *Press Release: Western Union Cuts Off Sports Betting Accounts* (December 23, 1997); New York Attorney General, *Press Release: Ten Banks End Online Gambling With Credit Cards-Spitzer Hails Establishment of New Banking Industry Standard* (February 11, 2003); New York Attorney General, *Press Release: Agreement Reached with Paypal to Bar New Yorkers from Online Gambling-Campaign Against Illegal Gambling Web Site in New York Continues* (August 21, 2002); New York Attorney General, *Press Release: Financial Giant Joins Fight Against Online Gambling- Leading Credit Card Issuer Agrees to Block Key Internet Transactions*, June 14, 2002.

⁶ See *United States – Import Measures on Certain Products from the European Communities*, Appellate Body Report, WT/DS165/AB/R, adopted 10 January 2001, para.73 (finding that statements by U.S. officials in a press release did not “in and of themselves” allow the Appellate Body to determine the legal relationship between two measures) (“*United States – Import Measures*”).

6. The same is true of a Michigan Gaming Control Board web page cited by Antigua.⁷ This web page (consisting of a “Frequently Asked Question” section) conveys information to the public, but does not have any independent legal status under U.S. law. The site provides an answer to a question designed to inform the public about laws relating to Internet gambling. The answer lacks any independent operational status under municipal law. On the contrary, it merely describes how state and/or federal law would operate. As such, this website does not constitute a measure under the DSU.

7. Antigua’s panel request also cites an opinion of the Kansas Attorney General⁸ as a measure. This opinion is an interpretation of the law applicable to Internet gambling provided by the Attorney General and Deputy Attorney General in 1996 at the request of a State Senator. In Kansas, as in other states, Attorney General opinions are not legally binding.⁹ The opinion states on its face that it is merely “our opinion” and does not presume to have any independent legal status under U.S. municipal law. Therefore it does not constitute a measure under the DSU.

8. The same reasoning applies with even greater force to the two web pages of Attorney Generals’ offices in Kansas and Minnesota cited as measures by Antigua in its panel request.¹⁰ The two documents are similar. Each one “sets forth the enforcement position” of the Attorney General. An “enforcement position” is at best a non-binding guide to the public about the attitude that state officials are likely to take in future prosecutions. The two statements are comparable in this respect to the “policy bulletin” that the panel in *U.S. – Sunset Japan* found was not a “legal instrument” that could “operate independently from other legal instruments,” and therefore could not be challenged in WTO dispute settlement proceedings.¹¹ As mere policy statements or position papers, these documents lack independent legal status beyond the laws upon which they rely, and therefore cannot be measures under the DSU.

9. Finally, Antigua’s panel request cites two judicial opinions as measures.¹² The operational status of a judicial opinion under U.S. municipal law flows from the measure interpreted and applied, and from the scope of the court’s authority. The opinions of a U.S. court of competent jurisdiction are binding as to the parties to the dispute only. They may also have

⁷ Michigan Gaming Control Board, *Frequently Asked Questions: Is it Legal to Gamble Over the Internet in Michigan?* The site states that “all forms of gaming are illegal in Michigan except those specifically permitted under Michigan law” and directs the public to “[c]ontact the Michigan Attorney General’s Criminal Division (517/334-6010) for more information.”

⁸ Kansas Op. Att’y Gen. No. 96-31 (March 25, 1996).

⁹ See *Kansas Ass’n of Public Employees v. Public Employee Rel. Bd.*, 13 Kan. App. 2d 657, 660; 778 P.2d 377, 379 (Court of Appeals of Kansas 1989) (“Attorney general opinions, of course, are not binding on the courts.”).

¹⁰ Kansas Attorney General, *Internet Gambling Warning*; Minnesota Attorney General, *Statement of Minnesota Attorney General on Internet Jurisdiction*.

¹¹ See *U.S. – Sunset Japan*, Panel Report, at paras. 7.125 and 7.126.

¹² *United States v. Cohen*, 260 F.3d 68 (2nd Cir. 2001); *Vacco ex rel. People v. World Interactive Gaming Corp.*, 714 N.Y.S.2D 844, 854 (N.Y. Sup. Ct. 1999).

value as precedent in future decisions – but opinions of courts inferior to the U.S. Supreme Court have such value only with respect to the same court and lower courts within the scope of the originating court’s authority.¹³ The United States submits that, while the Panel may consider the two opinions cited by Antigua in order to help determine the meaning of the U.S. laws they interpret (to the extent that those laws are within the scope of this dispute), these opinions are not “measures” under the DSU for purposes of this dispute.

10. The United States respectfully requests that the Panel make preliminary rulings finding that the items discussed above are not “measures” within the meaning of Article 6.2 of the DSU, and that therefore these items are not within the Panel’s terms of reference.

III. Antigua’s request for establishment of a panel improperly included certain measures that were not the subject of consultations.

11. Antigua requested establishment of a panel for three measures that were not the subject of consultations: Article I, Section 9 of the New York Constitution; Article VI, Section 22 of the Rhode Island Constitution; and Sections 18-10-101 to 18-10-108 of the Colorado Revised Statutes. These provisions were not cited in Antigua’s consultations request,¹⁴ were not discussed during the consultations, and are unrelated to any of the measures and purported measures cited in the consultations request.

12. A Member may not request the establishment of a panel with regard to just *any* measure; rather, it may only file a panel request with respect to a measure that was consulted upon.¹⁵ Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request “including identification of *the measures at issue* and an indication of the legal basis for the complaint” (emphasis added).

¹³ The *U.S. v. Cohen* case cited by Antigua was decided by the United States Court of Appeals for the Second Circuit. The Second Judicial Circuit, of which the United States Court of Appeals for the Second Circuit is the highest court, consists of only the federal courts within the states of New York, Connecticut and Vermont, including the federal district and bankruptcy courts for the Southern, Northern, Eastern and Western Districts of New York, the District of Connecticut and the District of Vermont. The *Vacco v. World Interactive Gaming* case cited by Antigua was decided by the Supreme Court of New York, New York County. Under New York’s judicial system, the Supreme Courts are courts of original instance, not courts of appeal. Their opinions thus have very limited precedential value.

¹⁴ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Request for Consultations by Antigua and Barbuda: Addendum, WT/DS285/1/Add.1, circulated 10 April 2003 (“request for consultations” or “consultations request”).

¹⁵ See *United States – Import Measures*, Appellate Body Report, para. 70 (finding that an action “not formally the subject of the consultations” was, for that reason, not a measure at issue in the dispute and not within the Panel’s terms of reference (original emphasis)).

13. In this case, there is no dispute that Antigua failed to include the cited provisions in its request for consultations.¹⁶ Antigua did include *different* citations to the New York Constitution, the Rhode Island Constitution, and the Colorado Revised Statutes in its request for consultations, but those citations were, by Antigua’s own admission, wholly irrelevant and/or nonsensical.¹⁷

14. In its first submission, Antigua attempts to characterize the different citations in its request for consultations as “nothing but typographical errors” and argues that, based on the context and the subject matter of the erroneously cited provisions (voting rights and the right to bear arms), “it should have been clear” to the United States what the correct citations were.¹⁸ Contrary to Antigua’s implication, many of the items listed in the Annex to Antigua’s consultations request are unrelated to cross-border gambling, and have not been “corrected” in Antigua’s panel request. They include, among others, laws against dogfighting¹⁹ and bullfighting;²⁰ laws against bribery,²¹ cheating,²² and drugging of racing animals;²³ and a state statute making it illegal to dispose of a refrigerator without first removing the door.²⁴

15. In any event, the ability of a party to predict changes in the measures cited in the request for consultations is irrelevant. The request for consultations is not a guessing game. Antigua indisputably failed to request consultations on Article I, Section 9 of the New York Constitution; Article VI, Section 22 of the Rhode Island Constitution; and Sections 18-10-101 to 18-10-108 of the Colorado Revised Statutes. Therefore, the United States respectfully requests that the Panel find that the measures cited for the first time in Antigua’s panel request are outside the Panel’s terms of reference.

IV. Antigua has failed to offer a *prima facie* case regarding specific U.S. measures.

16. After listing hundreds of statutory provisions, and other items, as possibly being among the challenged measures in its panel request,²⁵ Antigua now states that, in its view, the “[t]he subject of this dispute is the *total prohibition on the cross-border supply of gambling and betting*

¹⁶ See Request for Consultations, Annex.

¹⁷ First Submission of Antigua and Barbuda, para. 150.

¹⁸ *Id.*

¹⁹ See Georgia Code § 16-12-37.

²⁰ See Iowa Code § 725.11.

²¹ See, e.g., Arkansas Statutes § 5-66-115 (prohibiting bribery of participants in sporting events); California Penal Code §§ 337b through 337e (same); Georgia Code §§ 16-12-33 and 16-12-34 (same); Massachusetts General Laws, Chapter 271, §§ 39 and 39A (same).

²² See, e.g., California Penal Code §§ 337u through 337z; Delaware Code §§ 1470 and 1471; Maryland Code, Criminal Law, § 12-109; Massachusetts General Laws, Chapter 271, §§ 12 and 32; Ohio Revised Code § 2915.05; Oregon Revised Statutes § 167.167; Virginia Code § 18.2-327; Washington Revised Code §§ 9.46.196 through 9.46.1962.

²³ See, e.g., California Penal Code §§ 337f through 337h; Vermont Statutes title 13, § 2153.

²⁴ Massachusetts General Laws, Chapter 271, § 46 (imposing a fine for failure to remove doors from discarded refrigerators).

²⁵ See Panel Request, Annex.

services.”²⁶ While appearing to accept that this “total prohibition” is comprised of particular “laws or regulations,”²⁷ Antigua has neither quoted, attached, nor argued the meaning of any such law or regulation. Instead, Antigua asserts that “there is no need to conduct a debate on the precise scope of specific United States laws and regulations.”²⁸ It further states that “[t]he precise way in which this import ban is constructed under United States law” – allegedly through one or more of the measures and purported measures listed in its panel request – “should not affect the outcome of this proceeding.”²⁹

17. So long as Antigua refuses to identify specific measures as the subject of its *prima facie* case, the United States submits that Antigua has established no *prima facie* case with respect to any measure. As explained above, it is well established that a “matter” referred to the Dispute Settlement Body (“DSB”) consists of one or more “specific” measure(s), together with one or more legal claims relating to such measures.³⁰ A panel with standard terms of reference may only examine this matter, *i.e.*, claims relating to the “specific” measures included in a panel request.

18. Antigua, as the complaining party, bears the burden of identifying the specific measures as to which it asserts violations of WTO provisions. Even under the minimal requirements applicable to a panel request, a panel has recently found that “[d]ue process requires that the complaining party fully assume the burden of identifying the specific measures under challenge” so that the opposing party does not bear the burden of determining what measures are or are not at issue.³¹

19. If this much is required of the panel request, due process clearly requires no less specificity with respect to identification of specific measures that are the subject of the complaining party’s *prima facie* case.³² The complaining party bears this burden, and cannot

²⁶ First Submission of Antigua and Barbuda, para. 136 (original emphasis).

²⁷ See First Submission of Antigua and Barbuda, paras. 135-136.

²⁸ First Submission of Antigua and Barbuda, paras. 143, 136, and 133.

²⁹ *Id.*

³⁰ See DSU Article 6.2. See also *Guatemala – Cement I*, Appellate Body Report, para. 72.

³¹ *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/12, circulated 21 July 2003, para. 24.

³² For example, the Appellate Body clarified in *India – Patent* that parties may not be deliberately vague regarding their claims and factual allegations, including what specific measures are at issue. *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998 (“*India – Patent*”), para. 94 (“All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims.”).

shift it to the responding party – as Antigua is explicitly seeking to do here.³³ Antigua must make it clear what specific measures are at issue in this dispute.

20. Antigua’s proposition regarding a “total prohibition” is not itself a measure.³⁴ As explained above, the term “measure” refers to something that has a “functional life of its own” under municipal law.³⁵ Under U.S. municipal law, Antigua’s “total prohibition” assertion has no functional life. For example, U.S. authorities could not prosecute a service provider by alleging a violation of the “total prohibition.” Prosecutors must rely on some specific law, such as the federal statute relied upon in the *U.S. v. Cohen* case cited in Antigua’s panel request.³⁶

21. The United States has raised this concern many times with Antigua, including during consultations and at the DSB meetings at which Antigua requested establishment of a panel.³⁷ The United States, and indeed the third parties, would suffer prejudice if Antigua were allowed to substitute a general proposition for specific measures in this dispute. Because Antigua has not identified the specific measures that are the subject of its *prima facie* case, the United States has not been able to prepare its defense; it simply does not know which specific U.S. measures of the hundreds listed by Antigua are being challenged. Moreover, without knowing the specific measures at issue and how such measures are allegedly violating WTO rules, the third parties will confront the same difficulties as the United States in presenting their views to the Panel. Finally, Antigua must not be permitted to hide behind the excuse that U.S. law is supposedly too complex and opaque; Antigua and its two outside law firms are certainly capable of identifying and attempting to establish a *prima facie* case as to specific measures if they choose to do so.³⁸

³³ First Submission of Antigua and Barbuda, para. 133 (stating that the United States is “better positioned than Antigua to coherently construe its own laws”). If necessary, the United States will address the burden of proof issue further in its first submission. For the moment, the United States simply notes that the Appellate Body has previously clarified that a party making a claim of WTO inconsistency regarding another party’s municipal law “bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.” *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, Appellate Body Report, WT/DS213/AB/R, adopted 19 December 2002, para. 157.

³⁴ Antigua makes much of the supposed agreement between the parties about the existence of a “total prohibition.” It relies in this regard on the United States’ statement at the June 24, 2003, DSB meeting, where 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.” This statement does not relieve Antigua of its responsibility, as the complaining party, to state which specific measures are at issue and to make a *prima facie* case of a WTO violation as to each measure identified.

³⁵ See *supra* note 3.

³⁶ See *United States v. Cohen*, 260 F.3d 68, 71 (2nd Cir. 2001) (“Cohen was arrested in March 1998 under an eight-count indictment charging him with conspiracy and substantive offenses in violation of 18 U.S.C. § 1084.”).

³⁷ See First Submission of Antigua and Barbuda, para. 132.

³⁸ See First Submission of Antigua and Barbuda, para. 133. The United States recalls that an official of the U.S. Department of Justice was flown in for consultations with Antigua in Geneva on April 30, 2003, for the purpose of explaining to Antigua and its outside counsel in some detail various U.S. laws relating to gambling. In addition to this explanation, the United States notes that Antigua appears to have no shortage of other expertise on

22. In the interest of providing for a constructive first panel meeting and ensuring a full opportunity to respond to any claims that Antigua may wish to make regarding specific measures, the United States respectfully requests that the Panel invite Antigua to make a further submission, identifying the specific measures at issue from the Annex to its panel request and presenting arguments with respect to these measures, before October 29, 2003, the date the U.S. first written submission is currently due.

23. If the Panel agrees and if Antigua accepts this invitation, the United States respectfully requests that the Panel adjust its timetable so that the U.S. first submission would be due four weeks after receipt of Antigua's supplemental submission (duplicating the time initially provided between Antigua's first written submission and that of the United States).³⁹ This is because ample time will be required for the United States to respond to any arguments Antigua may wish to advance regarding specific measures in a supplemental submission. Moreover, there is potentially a large number of measures at issue, including sub-federal measures; as the United States noted during the Panel organizational meeting, consultations with sub-federal entities are required by U.S. law in preparing the defense of specific sub-federal measures. Since Antigua has done nothing thus far to shed light on the specific measures that are the subject of its *prima facie* case, the United States will require sufficient time to prepare its submission, pursuant to Article 12.4 of the DSU.

24. If Antigua, however, states that it does not intend to make any arguments with respect to any specific measures, there would of course be no need for the Panel to adjust the timetable to provide for a supplemental submission. In this regard, the United States further requests that Antigua be invited to state, no later than October 24, 2003, whether it will make a supplemental submission, so that the United States can know in advance if its first written submission will still be due on October 29. In the event Antigua confirms that it will not file this further submission, the United States would request that the Panel make a preliminary ruling to find that all the measures and purported measures listed in the Annex to Antigua's panel request are no longer at issue in this dispute. This ruling would ensure that the United States is not prejudiced and deprived of due process by having the WTO-consistency of specific measures raised at some later stage of the proceedings, when the U.S. and third parties will not have a full opportunity to respond to Antigua's claims with respect to these specific measures.⁴⁰

³⁸ (...continued)

U.S. gambling law, since it was able to devote more than 18 pages of its first written submission to explaining the various forms of gambling it alleges to be authorized under U.S. law. The United States therefore finds it curious that Antigua should profess itself unable to cope with the supposed "complexity and opacity" of U.S. laws restricting gambling.

³⁹ Dates for other meetings and submissions would need to be adjusted accordingly.

⁴⁰ See *United States – Anti-Dumping and Countervailing Measures on Steel Plate From India*, WT/DS206/R, Panel Report, adopted 29 July 2002, para. 7.28 (finding that allowing a party to resurrect a claim after stating that it would not pursue the claim would "deprive other Members participating in the dispute settlement proceeding of their full opportunities to defend their interest with respect to that claim").

V. Conclusion

25. For the reasons stated above, the United States respectfully requests that the Panel make preliminary rulings finding (1) that the items discussed above are not “measures” within the meaning of Article 6.2 of the DSU, and (2) that the measures cited for the first time in Antigua’s panel request are outside the Panel’s terms of reference. The United States also respectfully requests that the Panel invite Antigua to make a further submission presenting any arguments it wishes to advance with respect to specific measures listed in the Annex to its panel request; and that the Panel make a preliminary ruling – if Antigua chooses not to make this further submission – that all the items listed in the Annex are no longer at issue in this dispute.