EXECUTIVE SUMMARY

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (AB-2005-1)

APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States appeals the report of the Panel in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ("*Gambling Panel Report*")[1] on four major grounds:

- First, the Panel erred by making the case for Antigua and Barbuda ("Antigua") concerning particular measures as to which Antigua's evidence and argumentation were insufficient to establish a *prima facie* case.
- Second, the Panel erred by finding that the United States undertook specific commitments covering gambling services in its schedule of specific commitments annexed to the *General Agreement on Trade in Services* ("GATS").
- Third, the Panel erred in its interpretation of Article XVI of the GATS (Market Access) and its application of Article XVI to the relevant U.S. measures.
- Fourth, the Panel erred in its interpretation of Article XIV of the GATS (General Exceptions) and its application of Article XIV to the relevant U.S. measures.

2. On each of these issues, the Panel's report reflects a pattern in which the Panel first made proper findings acknowledging the crucial legal and factual premises for its analyses, but then labored to reach contrary conclusions in spite of, rather than in accordance with, such findings. For example:

- The Panel correctly found that it could not make the case for Antigua as to particular measures, but then proceeded to do so.
- The Panel correctly found that interpretation of the U.S. schedule must begin with its ordinary meaning, but then set aside that ordinary meaning in favor of an interpretation based on preparatory work.
- The Panel correctly found that the only market access limitations within the scope

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

of Article XVI are the specific ones listed in Article XVI:2, but then erred in interpreting the scope of those limitations to include any limitation having prohibitive effect on part of a sector or mode of supply.

- The Panel correctly found that the relevant U.S. measures serve important U.S. interests within the scope of certain Article XIV exceptions, but then denied the United States the benefit of those exceptions on the basis of a requirement, newly invented by this Panel, to consult or negotiate with other WTO Members before adopting those measures.

3. The Appellate Body need not reach all of these issues; each one is independently dispositive. Nevertheless, should the Appellate Body find that the Panel erred with respect to any one of these issues, the United States respectfully requests that the Appellate Body also determine that the remaining Panel findings are without legal effect.

4. As the United States has stressed throughout this dispute, U.S. restrictions on gambling by Internet, telephone, and other remote means of supply apply equally to all services and suppliers, whether foreign or domestic. If an Internet gambling website based in Antigua moved its operations to the United States and engaged in precisely the same activity, that activity would be just as illegal as it is when supplied from Antigua. Its operators, moreover, would be even more likely to face prosecution. Aside from certain erroneous findings by the Panel in the narrow field of horseracing, which the United States is appealing, nothing in this Panel Report suggests the contrary.

5. In view of the fact that U.S. restrictions on gambling on gambling by remote supply are non-discriminatory, the central question in this dispute is whether anything in the GATS requires the United States, in the sensitive field of gambling services, to treat services and suppliers of Antigua *more favorably* than its own domestic services and suppliers by allowing them to provide gambling by Internet, telephone, and other means of remote supply in ways that domestic suppliers cannot. The answer is that nothing in the GATS requires that result. There is no U.S. commitment covering gambling. The United States imposes no limitation in the form of quotas or any other type of limitation prohibited by Article XVI. And finally, Article XIV confirms that nothing in the GATS prevents the United States from imposing restrictions on gambling by remote supply for reasons of public morals, public order, and the enforcement of

certain of its criminal laws.

A. The Panel erred by failing to find that Antigua did not make a *prima facie* case of GATS-inconsistency as to any measure, and by making a case for Antigua concerning several particular measures.

6. The United States seeks review by the Appellate Body of the Panel's legal conclusion that it "should consider" three federal and eight state laws "in determining whether or not the United States is in violation of its obligations" under the GATS, including the conclusion that Antigua had met its burden of proof that these laws "result in a prohibition on the cross-border supply of gambling and betting services."

7. In this dispute, Antigua did not make – indeed specifically declined to make – a *prima facie* case as to particular measures. Antigua made it clear over the course of the Panel proceedings in this dispute that "[t]he subject of this dispute" in its view was "the *total prohibition on the cross-border supply of gambling and betting services."* After the Panel properly rejected Antigua's attempt to treat the alleged "total prohibition" as the measure at issue in this dispute, properly found that Antigua had failed to identify the laws it viewed as supporting its case, and correctly found that the Panel could not do so on Antigua's behalf, the necessary conclusion was that Antigua lacked the most basic elements of a *prima facie* case. The Panel, however, erred by failing to draw that inevitable legal conclusion from its findings.

8. Unfortunately, as it did several times in this dispute, the Panel in this instance turned away from its initial correct findings and conclusions and made the case for the complaining Party, despite acknowledging that this action was "not ... permissible," as made clear in previous guidance by the Appellate Body. In doing so, the Panel relied solely on the Appellate Body's statement in *Canada – Autos* that "claims made under the GATS deserve close attention and serious analysis" – a statement that in no way supports the Panel's actions. On that basis, the Panel perused Antigua's submissions and exhibits for raw materials from which it created entirely new arguments for Antigua that *particular* U.S. laws were inconsistent with Article XVI of the GATS. This approach prevented the United States from knowing precisely what measures and arguments it would be required to defend.

9. Separate and apart from the foregoing errors, the Panel's actions in making the case for

the complaining party in this dispute went so far that they also gave rise to a violation by the Panel of its duty under Article 11 of the DSU. Conscious of its lack of authority to make the case for the complaining party, the Panel nonetheless did so, and did it extensively. The United States respectfully requests the Appellate Body to find that this Panel violated its duty under Article 11 of the DSU to "make an objective assessment of the matter before it" by so egregiously exceeding its authority and discretion that it assumed the role of complaining party in this dispute.

B. The Panel erred by finding that the United States undertook specific commitments on gambling and betting in its GATS schedule.

10. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the U.S. schedule to the GATS includes specific commitments on gambling and betting services under subsector 10.D, "other recreational services (except sporting)." Here again, the Panel turned away from a correct initial conclusion – that the text is the paramount factor in interpretation GATS schedules – and erroneously went out of its way to use preparatory work to read the U.S. schedule as if it were based on the United Nations provisional Central Product Classification ("CPC").

11. The United States expressly excluded "sporting," the ordinary meaning of which includes gambling, from the U.S. commitment for recreational services. In spite of ample confirmation from numerous dictionaries that "sporting" included gambling, the Panel erred by interpreting the ordinary meaning of "sporting" as not including gambling. It reached this incorrect conclusion by relying on non-authentic languages, setting aside the ordinary meaning of "sporting" in English, and treating preparatory work for the GATS (the "W/120" document and "1993 Scheduling Guidelines") as context. On that basis, the Panel erroneously concluded, and created a presumption, that the U.S. schedule could be read according to the CPC – the source of Antigua's argument that "sporting" did not include gambling.

12. The proper context for the U.S. schedule is the schedules of other Members. They showed that many other Members' schedules refer to CPC numbers, but the U.S. schedule does not. This fact alone supports the view that the U.S. schedule must be interpreted according to its ordinary meaning and cannot be presumed to follow CPC meanings.

13. The Panel further erred by relying on an alleged unilateral "practice" of the United States reflected in a USITC document to "confirm" its interpretation of the U.S. schedule. The USITC document was not "practice" under the principles clarified in the Appellate Body's analysis in *Chile – Price Bands.* The Panel erroneously attempted to exaggerate the importance of this document by referring to other purported principles of international law that are, in the present context, wholly irrelevant.

14. In addition, the Panel erred by departing from the approach clarified in the Appellate Body report in *EC – LAN* and resolving alleged ambiguities in the meaning of an entry in the U.S. schedule against the importing party. The Panel's approach of construing GATS commitments against the importing party would, if upheld, encourage Members to seek market access for services by expanding commitments through dispute settlement, and would discourage Members from making commitments at all for fear that they will be so expanded.

15. Finally, the United States notes that, at the time of the Uruguay Round negotiations, U.S. measures regarding restriction of gambling were well-established. Antigua provided no evidence that Antigua or any other participant in the Uruguay Round ever tried to negotiate for the United States to change its gambling laws. These considerations confirm the correctness of the interpretation advanced by the United States, and should in any event demonstrate that the Panel's interpretation, with its unintended consequences, was in error.

C. The Panel erred in its interpretation of Article XVI of the GATS (Market Access) and its application of Article XVI to the relevant U.S. measures.

16. Article XVI of the GATS does precisely what it says it does: it stops Members from imposing, whether at the border or through domestic regulation, certain precisely defined limitations, such as limitations in the form of quotas, monopolies, economic needs tests, and the various other limitations expressly mentioned in Article XVI:2. Article XVI thus represents a precisely defined constraint on certain problematic limitations specifically identified by the Members.

17. The Panel in this dispute – the first to interpret the scope of the Article XVI obligation in dispute settlement – appeared to believe that allowing limitations to "escape" Article XVI would permit Members to do anything they want, including discriminating against foreign

services and suppliers. The Panel thus made the misguided observation that an interpretation consistent with the terms of Article XVI would "allow a law that explicitly provides that 'all foreign services are prohibited' to escape the application of Article XVI, because it is not expressed in numerical terms." In making this observation, the Panel neglected 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). Notwithstanding this, the Panel apparently considered it necessary to import these functions into Article XVI by expanding the obligations beyond those found in the text.

18. Although the Panel started its analysis by correctly recognizing that it was required to focus on particular provisions of Article XVI:2, it once again turned away from this initial correct premise in pursuit of a misguided result. The heart of the Panel's error lay in converting the prohibitions on specific forms of market access limitations listed Article XVI:2(a) and XVI:2(c) into general prohibitions on any measure having an effect similar to that of a "zero quota," regardless of form. This "zero quota" theory is an invention that finds no support in the text.

19. The Panel erred in its reading of the ordinary meaning of Article XVI:2(a) by ignoring its requirement that limitations be "in the form of numerical quotas." The Panel erroneously found in spite of this text that "a measure that is *not* expressed in the form of a numerical quota or economic needs test may still fall within the scope of Article XVI:2(a)" if it has the effect of a "zero quota." This represented a failure by the Panel to give effect to the terms actually used in Article XVI:2(a).

20. The Panel further erred in its reading of the ordinary meaning of Article XVI:2(a) by using an incorrect reading of the French and Spanish texts as the basis for an interpretation that is inconsistent with the English text. This approach, which is contrary to the relevant rule of treaty interpretation, also led the Panel to erroneously conclude that Article XVI:2(c) applies to limitations on the total number of service operations that are not "expressed in terms of designated numerical units."

21. Under a proper interpretation of Articles XVI:2(a) and XVI:2(c), none of the U.S. state and federal laws as to which the Panel made adverse findings are limitations on the number of

service suppliers "in the form of numerical quotas" or limitations on service operations or output "expressed as designated numerical units in the form of quotas." To the contrary, these laws represent domestic regulation limiting the *characteristics* of supply of gambling services, not the *quantity* of services or suppliers. Since the form and manner of expression of these laws match none of the forms identified in Articles XVI:2(a) and XVI:2(c), the Panel should have found that these laws were consistent with Article XVI.

22. The approach to market access liberalization reflected in the GATS is not to provide for the unlimited ability to supply services throughout committed sector or mode of supply. That approach, which this Panel embraces with its "zero quota" theory, is inconsistent with the balance between liberalization and regulation reflected in Members' right to regulate services. Rather, the approach taken under the GATS is to single out for removal, in sectors where commitments have been made, certain carefully-defined forms of market access limitations consistent with the ordinary meaning of the text of Article XVI(a) and Article XVI(c). Other limitations – whether or not they have the *effect* of limiting the ability to supply a service – fall outside the scope of Article XVI(a) and Article XVI(c), but remain subject to other GATS provisions.

D. The Panel erred in its interpretation of Article XIV of the GATS (General Exceptions) and its application of Article XIV to the relevant U.S. measures.

23. The Panel correctly found that three U.S. federal statutes contributed to the realization of certain purposes specified in Articles XIV(a) and XIV(c) of the GATS. Once again, however, the Panel turned away from that correct beginning in pursuit of a misguided conclusion that the Wire Act, the Travel Act (together with the relevant state laws) and the Illegal Gambling Business statute (together with the relevant state laws) are not justified under Articles XIV(a) and XIV(c) of the GATS and are inconsistent with the requirements of the chapeau of Article XIV of the GATS. The United States appeals this legal conclusion.

24. The Panel erred in its legal analysis by failing to find that the three federal statutes in question, together with state laws in two of the three cases, were "necessary" for the realization of the purposes they serve under Article XIV(a) and XIV(c). The sole basis for the Panel's

adverse finding on this point was its legal conclusion that the "necessity" test in Article s XIV(a) and XIV(c) required the United States to "explore and exhaust reasonably available WTO-consistent alternatives to the US prohibition on the remote supply of gambling and betting services that would ensure the same level of protection," and that this test, in combination with the specific market access commitment that the Panel erroneously found in the U.S. schedule, imposed on the United States an unfulfilled "obligation to consult with Antigua before and while imposing its prohibition on the cross-border supply of gambling and betting services."

25. There was no legal basis for the Panel to conclude that Article XIV(a) and XIV(c) create a procedural requirement for a Member to consult or negotiate with another Member before adopting and while maintaining a measure that would otherwise fall within an Article XIV exception. The question under Articles XIV(a) and XIV(c) is simply whether a Member's measure has the property of being "necessary." That question is logically independent of the type or degree of efforts invested by the Member to find a different measure – an issue as to which the text of Article XIV lays down no procedural requirement. Moreover, the "reasonably available alternative" analysis that the Panel was purporting to apply does not support the Panel's finding of a procedural requirement for the United States to consult or negotiate with Antigua in order to maintain Article XIV rights. Prior to the Panel's findings in this dispute, no WTO panel, nor the Appellate Body, has ever found such a requirement in applying this type of analysis. In view of this error, the United States respectfully requests that, in the event that the Appellate Body reaches the Article XIV issues in this dispute, it complete the Panel's analysis and find that the U.S. measures are provisionally justified under Articles XIV(a) and XIV(c).

26. The chapeau of Article XIV imposes an additional requirement that any measure provisionally justifiable under Article XIV (a) through (e) not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services."

27. The Panel applied the wrong legal standard under the Article XIV chapeau. It required the United States to demonstrate "consistent" treatment of foreign and domestic supply of services. The Panel overlooked the fact that treatment that is "inconsistent" as between

services supplied domestically and services supplied from other Members is not necessarily "arbitrary", "unjustifiable", or a "disguised restriction on trade in services." Moreover, as a matter of law, the United States submits that the Panel's finding of non-enforcement against a mere three possible defendants domestically does not meet the standard of "arbitrary or unjustifiable discrimination" or a "disguised restriction on trade" under the chapeau in a case where uncontroverted statistical evidence shows that *overall* application of the relevant measures is non-discriminatory, including evidence that possible defendants based outside the United States have not been prosecuted.

28. The Panel also erred by making the rebuttal for Antigua under the Article XIV chapeau. By recycling certain of Antigua's Article XVII national treatment evidence and argumentation for consideration as arguments under the higher legal standard of the Article XIV chapeau, despite Antigua's failure to refer in any way to this evidence and argumentation for that purpose, the Panel improperly bore the burden for the complaining party.

29. The Panel also failed to live up to the mandate of DSU Article 11 in two of its findings relating to enforcement of U.S. gambling restrictions in the field of horseracing by ignoring uncontroverted evidence of the overall enforcement of U.S. law and the inability of the Interstate Horseracing Act to repeal preexisting criminal statutes.

30. In addition to reversing the Panel's finding against the United States under the Article XIV chapeau, the United States respectfully requests the Appellate Body to complete the Panel's analysis by finding that the Wire Act, the Travel Act (in conjunction with relevant state laws), and the Illegal Gambling Business statute (in conjunction with relevant state laws) meet the requirements of the Article XIV chapeau and are therefore justified under Article XIV.

E. The Panel erred in making any finding concerning "practice" as a measure and in concluding that "practice" is a measure that can be challenged "in and of itself."

31. The Panel in its report engaged in an analysis of what "practice" is "under WTO law," defining it as "a repeated pattern of similar responses to a set of circumstances," and ended by concluding that: "we consider that 'practice' can be considered as an autonomous measure that can be challenged in and of itself." In so doing, the Panel erred in two areas. First, the Panel

erred in conducting such an analysis at all because Antigua had not challenged any of the items that the Panel indicated could be considered U.S. "practices." Second, the Panel erred in its conclusion that "practice" as a general matter is "an autonomous measure that can be challenged in and of itself." Simply said, repeating a response to a particular set of circumstances, or repeatedly applying the same measure, does not somehow create a new and separate "autonomous measure." Rather, it is just what the definition implies – it is a repeated application of a measure. The United States respectfully requests that the Appellate Body reverse the Panel's finding that so-called "practice" is an autonomous measure that is subject to challenge as such.