BEFORE THE

WORLD TRADE ORGANIZATION

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

WT/DS285

ANSWERS OF THE UNITED STATES
TO THE PANEL'S QUESTIONS
IN CONNECTION WITH THE SECOND SUBSTANTIVE MEETING

February 2, 2004

A. U.S. SCHEDULE

For the United States:

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

> *"Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)."*

The European Communities notes that the only further activity to be undertaken following circulation of this document by the United States was a process of "'technical verification of schedules' which did not modify at all the scope of the results of negotiations" (as provided for in GATT/AIR/3544 , which, in turn, refers to a decision of the GNS dated 11 December 1993 providing the same).

(a) Could the United States comment on the European Communities' reply.

1. The document MTN.GNS/W/112/Rev.4 cited by the European Communities includes a sentence, substantially identical to that which appeared in MTN.GNS/W/112/Rev.3, stating that "[e]xcept where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's revised Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)." The EC has incorrectly described the cover note to draft versions of the U.S. schedule as indicating a U.S. position "that the scope of [U.S.] commitments is based on the 1991 Sectoral Classification (W/120) *and the CPC*."[1] The addition of the words "and the CPC" at the end of that sentence misrepresents the content of the cover note. The United States did not refer to the CPC in that note. Also, the United States has previously explained that the ordering of a schedule according to W/120 and the use of the CPC were distinct issues.[2] Using W/120 did not bind a Member to the CPC, and this is confirmed by the fact that Members wishing to refer to the CPC inscribed CPC numbers in their schedules.

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

> I also intend to organise consultations, possibly on a fairly large scale and probably on 16 November, on drafting of schedules of commitments. I should stress that it would not be the purpose of this exercise to consider the economic content or value of offers, but rather, in the interest of all participants, to identify possible improvements in the presentation of offers, based on actual examples. The organisation of this discussion would be greatly assisted if participants informed the secretariat in advance of any common errors in scheduling which in

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1 *See* EC Answers to Panel Questions, para. 37 (emphasis added).

2 *See* U.S. Second Opening Statement, paras. 30-31.

> their view affect the clarity or the legal security of commitments. This would enable the secretariat to prepare a working document for the discussion.[3]

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

3. The GATT Secretariat subsequently asked that parties to the GATS negotiations submit their questions on others' schedules of commitments and MFN exemptions by January 27, 1994. Meetings were scheduled in early February 1994 at which interested parties were invited to discuss the draft schedules of individual participants as part of a "rectification" process, with final schedules requested by early March, 1994. While this period was mainly intended to address technical matters, a number of substantive issues remained outstanding as well.[4] Thus the United States would not agree with the assertion that the "scope of the results of the negotiations" was fully settled by December 1993.

(b) How does the United States define the term "scope" in this cover-note?

4. The note relates the "scope" of U.S. commitments to the "sectoral coverage" in W/120, from which one may infer that "scope of commitments" and "sectoral coverage" were being used as roughly synonymous terms.

5. Contrary to the EC's assertions, participants in the negotiations could not reasonably have read this note as an endorsement of the CPC classification. The United States was already on record as not wishing to be bound by any particular nomenclature. Moreover, as the United States noted in response to part (a) of this question, W/120 and the CPC were recognized to be distinct issues. While many favored the CPC, others did not wish to refer to it. The texts of the schedules reflect that Members wishing to refer to the CPC so indicated by the inscription of numerical CPC references.

Question 31. *In the European Communities' reply to Panel question No. 2 to the parties, the European Communities stated that "the relevance of unilateral practice has to be evaluated in the light of the obligation to be implemented." Could the United States comment on the European Communities' view of the relevance of unilateral practice of a Member in interpreting that Member's GATS Schedule.*

6. This statement was made in the context of the USITC document. In view of the limitations of that document already described at length by the United States,[5] the United States fails to see how it could constitute a "practice" in the application of GATS – even a unilateral one.

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[3] Informal GNS Meeting – 29 October 1993: Chairman's Statement, MTN.GNS/48 (29 October 1993).

[4] For example, participants continued to debate the scope of the GATS and the need to schedule certain types of measures. Participants were also given until June 1994 to complete the scheduling of certain sub-central measures. *See* Statement by the Chairman: Scheduling of Subsidies and Taxes at the Sub-Central Level, MTN.GNS/50 (13 December 1993).

[5] *See* U.S. Second Opening Statement, paras. 26-28; U.S. Answers to Panel Questions, paras. 2-8.

7. The United States disagrees with the argument advanced by the EC that unilateral practice is relevant to the interpretation of the U.S. schedule in this dispute. The EC cites no customary rule of interpretation of public international law that gives weight to unilateral practice. The EC refers to *EC-LAN,* but ignores key aspects of that report that demonstrate that it supports the U.S. view, including the following:

- The Appellate Body in that dispute *criticized* the panel for looking at the classification practice of one Member while failing to look at that of another.[6]

- The Appellate body in *EC-LAN* found that "classification practice" was only a *supplementary* means of interpretation within the meaning of Article 32 of the Vienna Convention, not context within the meaning of Article 31.3(b).[7] In that respect, *EC-LAN* once again directly contradicts the arguments of the EC and Antigua.

- *EC-LAN* dealt exclusively with "classification practice" – *i.e.,* the practical application of customs classifications to goods.[8] The USITC document, by contrast, does not represent the practical application of classifications under the GATS; its purpose is only to "facilitate comparison." It therefore does not reflect substantive implementation of U.S. GATS commitments in the way that classification practice reflects implementation of goods commitments.

8. The United States further notes that, notwithstanding the fact that the USITC document does not represent the implementation, interpretation, or application of any U.S. commitment, the EC's comments on "unilateral practice" contain a number of surprising, and ultimately untenable, propositions.

9. First, the EC appears to suggest that *implementation* of a commitment is "particularly relevant" to the interpretation of a commitment. This is somewhat startling. In the first place, the EC cites no basis for this proposition in the customary rules of treaty interpretation. Indeed, it is hard to reconcile that position with the basic principle codified in Article 31(1) of the Vienna Convention: "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." Furthermore, the EC appears to ignore completely the fact that many specific commitments were the subject of request-offer or other bi- or plurilateral *negotiations*. The EC's approach would no doubt surprise many Members who thought that other Members' GATS schedules record the results of their negotiations, and not just a set of words that the scheduling Member can "implement" and thereby interpret.

10. Second, the EC appears to suggest that the absence of an objection by other Members to the way one Member applies a specific commitment can be determinative of the meaning of that commitment. It is not entirely clear what the consequences of the EC's approach would be, whether for the schedule of the United States or that of any other Member. (The suggestion that

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6 *European Communities–Customs Classification of Certain Computer Equipment,* Appellate Body Report, WT/DS62/AB/R, adopted 22 June 1998, para. 93 (*"EC-LAN"*).

7 *See id.,* para. 92.

8 *See id.,* paras. 92-93.

the GATS had led to that sort of outcome would no doubt also startle many Members who participated in the negotiations but lack the resources to monitor implementation of other Members' every commitment.) In any case, the EC's position fundamentally rests on a principle that was rejected under the GATT 1947. As a GATT 1947 panel rejecting a similar argument by the European Communities made clear, "... it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties."[9]

B. THE MEASURE(S) AT ISSUE

For Antigua and Barbuda:

Question 32. *In its first oral statement (para. 21), in arguing that a prohibition on the cross-border supply of gambling and betting services exists, Antigua points to three federal laws, namely the Wire Act (18 USC § 1084), the Travel Act (18 USC § 1952) and the Illegal Gambling Business Act (18 USC § 1955). In its first oral statement (para. 20), Antigua also refers, through Exhibit AB-84, to five state laws that prohibit Internet gambling. Could Antigua indicate whether or not these are the only specific laws it seeks to rely on in substantiating its allegation that a prohibition on the cross-border supply of gambling and betting services exists. If not, could Antigua identify and explain the other laws or measures upon which it seeks to rely in this regard.*

11. The United States wishes to reserve its right to respond to any new arguments and/or evidence put forward by Antigua in response to the Panel's additional questions. Consistent with the views expressed in the U.S. request for preliminary rulings, the United States would request that the Panel permit the United States a minimum of four weeks to respond to any new arguments or comment on any new evidence advanced by Antigua concerning measures that it has not addressed in its previous submissions and statements.

For the United States:

Question 34. *How is paragraph 20 of the United States' second written submission relevant to Panel question No. 19? Is Internet/remote gambling and betting authorized between US states?*

12. In response to Panel question 19, the United States stated that gambling services described in paragraph 20 of the U.S. second written submission could be transmitted between U.S. states or on a cross-border basis, but other forms of Internet/remote gambling services were not authorized between U.S. states or on a cross-border basis. The reference to "paragraph 20" in that response was erroneous; the United States intended to refer to paragraph 26 of the U.S. second written submission, in which the United States stated that U.S. restrictions do not preclude cross-border supply of all gambling services, and listed several examples. The Internet/remote gambling services described in paragraph 26 are permitted between U.S. states and on a cross-border basis, but other forms of Internet/remote gambling service (*i.e.,* those

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[9] *Report of the Panel on "EEC–Quantitative Restrictions Against Imports of Certain Products from Hong Kong",* L/5511, adopted 12 July 1983, BISD 30S/129, para. 28. Another panel pointed out that "[t]he decision of a contracting party not to invoke a right vis-à-vis another contracting party at a particular point in time can therefore, by itself, not reasonably be assumed to be a decision to release that other contracting party from its obligations under the General Agreement." *Report on "EEC–Member States' Import Regimes for Bananas"*, DS32/R, 3 June 1993 (not adopted), para. 3.62.

involving transmission a bet or wager using a wire communications facility) are not. The United States thanks the Panel for bringing this error to our attention.

13. The United States wishes to note that paragraph 20 of the U.S. second written submission does, however, bear a relationship to question 19. The table provided in paragraph 20 clarifies that in order to violate Article XVI:2(a), on which Antigua now bases its Article XVI:2 arguments, a limitation must restrict the "number of service suppliers," and must be "in the form of numerical quotas," etc. Under U.S. law, whether a service is permissible between states and cross-border depends on the character of the activity involved. This type of restriction does not limit the number of suppliers (indeed, there can be an indefinite number of suppliers of permissible cross-border gambling services), and it does not take the "form" of "numerical quotas."

Question 35. *In paragraph 17 of its second oral statement, the United States submits that "We have very forthrightly told both the DSB and this Panel that the United States does not permit certain services, such as Internet betting, either domestically or on a cross-border basis." Could the United States identify the "certain services" for which supply is prohibited both domestically and on a cross-border basis?*

14. Yes. The United States is referring principally to services involving the transmission of a bet or wager by a wire communication facility across state or U.S. borders, such as Internet and telephone betting. Other gambling services that are similarly restricted both domestically and cross-border include the mailing of lottery tickets between states, the interstate transportation of wagering paraphernalia, and wagering on sporting events.

Question 36. *With respect to the reference to the "very few exceptions limited to licensed sportsbook operations in Nevada" in the second paragraph of Exhibit AB-73, could the United States identify these exceptions, even on an illustrative basis?*

15. Exhibit AB-73 is a letter from Deputy Assistant Attorney General John Malcolm to the National Association of Broadcasters. The sentence in that letter referred to by the Panel states that "[w]ith very few exceptions limited to licensed sportsbook operation in Nevada, state and federal laws prohibit the operation of sports books and Internet gambling within the United States, whether or not such operations are based offshore."

16. Nevada is the only state where sportsbook services are legal in the United States. This exception results from the historical fact that Nevada had already authorized such services at the time when the U.S. federal government decided to prohibit the further authorization of sports gambling by U.S. states.[10] Sportsbook services are limited to Nevada, and sportsbooks in Nevada cannot accept wagers from individuals located in other states.

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[10] *See* 28 U.S.C. §§ 3701-3704. This law was enacted in 1991 to "stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime." Senate Report 102-248, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555. Congress believed that "[s]ports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling. It undermines public confidence in the character of professional and amateur sports." *Id.* Nevada was the only state that had authorized sportsbooks at the time of the enactment of this federal statute (or within a year thereafter), thus under the terms of the statute it became the only state permitted to continue doing so.

C. ARTICLE XVI

For the United States:

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

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

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

18. Antigua relies on the word "whether" to assert that Article XVI:2(a) is, internally speaking, an open list rather than a closed one. The word "whether" does not automatically imply an open list. In fact, the WTO agreements are replete with contrary examples where the drafters understood this, and therefore added some catch-all term such as "any other form." The particular example using that phrase is Article XVIII(a) of the GATS, which states that "'measure' means any measure by a Member, *whether* in the form of a law, regulation, rule, procedure, decision, administrative action, *or any other form*" (emphasis added).

19. Another example more functionally analogous to Article XVI of the GATS is Article XI of the GATT, which describes an open list by reference to "prohibitions or restriction ... *whether* made effective through quotas, import or export licenses *or other measures*" (emphasis added). Indeed, that example further confirms the previous U.S. arguments on the important differences between Article XI of the GATT and Article XVI of the GATS.

20. There is another example in the GATS Annex on Financial Services, which uses the phrase "*whether* on an exchange, in an over-the-counter market *or otherwise*" (emphasis added). Indeed, the WTO Agreements contain a number of other examples. Together they confirm that since Article XVI:2(a) includes no catch-all phrase, it is properly read as a closed list.

Question 39. *Could the United States comment on Antigua's arguments in paragraph 32 of Antigua's second oral statement regarding the significance of the 1993 and 2001 Scheduling Guidelines insofar as they state that a nationality requirement for service suppliers would be caught by Article XVI:2(a) of the GATS? Could the 2001 Scheduling Guidelines constitute a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention or "subsequent practice" under Article 31(3)(b) of the Vienna Convention?*

21. In paragraph 32 of its second oral statement, Antigua asserts that the 1993 and 2001 scheduling guidelines "state unequivocally that a nationality requirement for service suppliers would be caught by Article XVI:2(a) as *equivalent* to a zero quota despite the fact that it does not have the *form* of a numerical quota." Antigua bases this assertion on a list of examples of

limitations on market access provided in the scheduling guidelines. That list includes, under "[l]imitations on the number of service suppliers," the entry "[n]ationality requirements for suppliers of services (equivalent to zero quota)."

22. The United States disagrees with Antigua's broad assertions based on this line in the scheduling guidelines for the following reasons:

- Nothing in the text of Article XVI supports the theory of an implied "zero quota." The text of Article XVI:2(a) relied upon by Antigua refers in relevant part to "limitations on the number of service suppliers ... in the form of numerical quotas." Under the ordinary meaning of this text, the "form" of the limitation is the legally relevant fact, not its alleged implication or effect. The quoted language requires that this form be "numerical" (which means "of, pertaining to, or characteristic of a number or numbers") and a "quota" (which means a "quantity … which under official regulations must be … imported").[11] U.S. restrictions on remote supply of gambling do not take the form of numerical quotas on service suppliers.

- The scheduling guidelines themselves state elsewhere that "[n]umerical ceilings should be expressed in defined quantities in either absolute numbers or percentages."[12] This statement is more consistent with the text of Article XVI.

- The scheduling guidelines state on their face that they "should not be considered as an authoritative legal interpretation of the GATS."[13]

- The example of a nationality requirement is inapposite because such a requirement theoretically precludes all cross-border supply, whereas – as the United States has repeatedly stressed – U.S. restrictions on remote supply of gambling do not prohibit all cross-border supply of gambling services, and they apply regardless of nationality.

- Unlike nationality requirements, U.S. restrictions on remote supply of gambling are restrictions on the attributes of a service, not limitations on market access. In a 1997 paper discussing (among other things) the "zero quota" line in the Scheduling Guidelines, the WTO Secretariat observed that although a nationality requirement might be considered a zero quota (*quod non*), "[a] restriction on the composition of management of a commercial presence cannot be construed as a direct restriction on market access for a foreign services supplier."[14] The Secretariat thus distinguished between restrictions on the "attributes" of a service, which belonged in the national treatment column, and restrictions on "natural persons actually

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[11] *See The New Shorter Oxford English Dictionary,* pp. 1955, 2454 (4th ed. 1993).

[12] *See* Scheduling of Initial Commitments in Trade in Services: Explanatory Note – Addendum, MTN.GNS/W/164 /Add.1, response to question 3 (30 November 1993); Guidelines for the Scheduling of Specific Commitments under the GATS -- Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, para. 9 (28 March 2001) ("2001 Scheduling Guidelines").

[13] Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, para. 1 (3 September 1993) ("1993 Scheduling guidelines"); 2001 Scheduling Guidelines, para. 1.

[14] *See* Revision of Scheduling Guidelines – Note by the Secretariat, S/CSC/W/19, para. 20 (5 March 1999).

supplying the service," which belonged in the market access column.[15] Consistent with this analysis, U.S. restrictions on the attributes of a service are not limitations on market access.

23. The Panel asks whether the 2001 scheduling guidelines constitute a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention. They do not. The United States has already pointed out that the text of the document states that it "should not be considered as a legal interpretation of the GATS."[16] It would therefore be inconsistent with the terms of the document itself to construe it as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." Also, the General Council and the Ministerial Conference have the "exclusive authority" to adopt legal interpretations of the WTO agreements.[17] Finally, the 2001 scheduling guidelines do not relate to the "interpretation" or "application" of the GATS; rather, they represent preparatory work for the negotiation of new commitments. For all of these reasons, the 2001 scheduling guidelines do not constitute a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention.

24. The Panel asks whether the 2001 scheduling guidelines constitute "subsequent practice" under Article 31(3)(b) of the Vienna Convention. They do not. Article 31(3)(b) of the Vienna Convention refers to "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." The 2001 scheduling guidelines constitute non-binding guidance for the negotiation of treaty provisions, and as such represent preparatory work for future commitments, not practice "in the application of the treaty." Moreover, the 2001 scheduling guidelines do not "establish[] the agreement of the parties regarding" the interpretation of the GATS. On the contrary, these "guidelines" expressly state that they are not an interpretation, and were drafted with great care to suggest or recommend, rather than require, particular approaches, nomenclatures, or interpretations. Therefore one cannot conclude that the 2001 guidelines represent a practice of Members reflecting a common understanding by Members on the interpretation of any provisions of the GATS.

25. The positions expressed in the two preceding paragraphs are further confirmed by the text of the Decision by which the Council for Trade in Services adopted the 2001 scheduling guidelines. The Council decided:

> 1. To adopt the Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services contained in document S/CSC/W/30 *as a non-binding set of guidelines.*
>
> 2 . Members are *invited* to follow these guidelines *on a voluntary basis* in the *future* scheduling of their specific commitments, in order to promote their precision and clarity.
>
> 3. These guidelines *shall not modify any rights or obligations* of the Members under the GATS.[18]

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15 *See id.*

16 *See* U.S. Second Opening Statement, para. 32.

17 *See id.*

18 *See* Decision on the Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS) – Adopted by the Council for Trade in Services on 23 March 2001, S/L/91 (29 March 2001) (emphasis added).

The italicized language demonstrates that the 2001 scheduling guidelines were intended neither to bind Members nor to alter the extent of any right or obligation under the GATS (including the extent of commitments). Moreover, it was understood that the revised guidelines did not constitute an authoritative interpretation of GATS provisions, since such an interpretation would have to be based on Article IX of the WTO Agreement. Rather, they constituted preparatory work for "future scheduling" of specific commitments.

D. ARTICLE XVII

For the United States:

Question 42. *In its submissions, the United States has introduced a distinction between, on the one hand, remote supply of gambling and betting services and, on the other, the non-remote supply of such services. Could the United States clarify how it defines "remote" and "non-remote" supply of such services, making reference to the specific application of this distinction in the United States. For instance, if a lottery ticket for a New York State lottery is purchased through a licensed vendor in Florida, does this amount to remote supply, given the definition of this term referred to by the United States in paragraph 7 of its first written submission?*

26. By remote supply, the United States means situations in which the gambling service supplier (whether foreign or domestic) and the service consumer are not physically together. In other words, the consumer of a remotely supplied service does not have to go to any type of outlet, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier has no point of presence but offers the service directly to the consumer through some means of distance communication. Non-remote supply means that the consumer presents himself or herself at a supplier's point of presence, thus facilitating identification of the individual, age verification, etc.

27. The United States wishes to add a brief comment on the New York / Florida example. In practice, that example would not occur because the state lotteries operate on an exclusive territorial basis.[19] Setting that aside for the sake of discussion, the United States considers that if the consumer must go to a local vendor point of presence to purchase the gambling service, it is non-remote. In the Panel's example, the New York supplier needs to contract with a vendor in Florida, rather than supplying the service directly by means of distance communication.

Question 43. *What is the United States' reaction to statements made by the representative of Antigua during the Panel's second substantive meeting that there has been no communication between Antiguan and US authorities regarding the concerns that the United States has pointed to as justifying the drawing of a regulatory distinction between remote gambling and non-remote gambling?*

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[19] U.S. states could in theory permit businesses to procure for a person in one state a ticket, chance, share or interest in a lottery conducted by another state (without actually transmitting the ticket out of the state where it was purchased) pursuant to an agreement between the two states authorizing such activity. But the United States is not aware of any states that have entered into the agreements that would be necessary to permit such activity. Even if states did enter into such agreements, local presence in the consumer's state would be required, as the tickets could not be mailed between states.

28. The United States fails to see how Antigua's assertions bear on a likeness analysis under Article XVII. Nothing in Article XVII indicates that likeness depends on the degree of communication between Members' authorities concerning differences between services.

29. The United States has already observed that it has had significant interactions with Antigua and Barbuda on law enforcement issues. To the extent that the Panel's question refers to Antigua's assertions concerning requests for law enforcement assistance, the United States refers the Panel to paragraphs 7 through 10 of the U.S. second closing statement. Regarding other forms of regulatory cooperation, the United States welcomes inquiries and fact-finding missions from governments wishing to learn about U.S. regulation of gambling services. The United States is not aware of any effort by the government of Antigua to pursue such cooperation.

30. As explained in the U.S. second submission and second opening statement, the absence of any U.S. domestic regulatory regime that permits the remote supply of gambling services makes it unreasonable for Antigua to expect the United States to engage in international negotiations toward the establishment of such a regime for its cross-border suppliers. Moreover, Antigua's positions in this dispute make it clear that Antigua is unwilling to recognize the existence of specific U.S. regulatory concerns surrounding remote supply of gambling.

E. ARTICLE XIV

For the United States:

Question 44. *Is the United States formally invoking Article XIV and expecting a determination on the same, if necessary?*

31. The United States maintains its strongly-held view that it is not necessary to reach the issue. There is no requirement that a measure be inconsistent with the GATS in order for Article XIV to apply (although the U.S. would recognize that a panel would normally not want to reach Article XIV unless it had found an inconsistency). Article XIV thus applies in this dispute with or without a finding of an inconsistency with the GATS.

32. Because the measures discussed in the U.S. second submission serve important policy objectives that fall within Article XIV, the United States invokes Article XIV in this dispute and would expect a determination on the same, if necessary. However, in view of the express language of Article XIV ("nothing in the agreement shall prevent..."), the United States views the primary role of Article XIV in this dispute as further confirming the absence of any inconsistency.

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

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

State gambling laws and regulations

34. Sections 1084, 1952, and 1955 secure compliance with state laws restricting gambling and like offenses. State laws restricting gambling include the laws by which a number of states prohibit some or all gambling.[20] With respect to this issue, Antigua stated in paragraph 30 of its second submission that "[t]he existence of federal legislation facilitates the prosecution of suppliers of 'unauthorised' gambling" under state law." Thus Antigua itself recognizes that U.S. federal gambling laws serve as enforcement measures for state laws.

Organized crime laws and regulations

35. The United States argued in paragraphs 100-101 of its second submission that §§ 1084, 1952, and 1955 are measures against organized crime, and that inherent in the concept of "organized crime" are certain types of criminal activity in which organized crime groups typically engage. Thus, the United States submits that as measures against organized crime, §§ 1084, 1952, and 1955 secure compliance with the U.S. laws and regulations that define and/or prohibit organized crime, as well as laws and regulations that prohibit the criminal activity that, when committed in certain ways, constitutes organized crime. These laws and regulations include the following:

- Racketeer Influenced and Corrupt Organizations statute: Organized crime is a subset of the broader category of "racketeering." The predominant U.S. law defining and prohibiting racketeering is the Racketeer Influenced and Corrupt Organizations statute, or, more commonly, the "RICO" statute.[21]

- Organized Crime Control Act of 1970 findings: While the term "organized crime" has no legal definition as such under U.S. law, the statutory findings of Congress in the Organized Crime Control Act of 1970 refer to "a highly sophisticated, diversified, and widespread activity" involving "unlawful conduct and the illegal use of force, fraud, and corruption" and which "derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation."[22]

- Attorney General Order 1386-89: "Organized crime" is defined for operational purposes at the U.S. federal level in the Appendix to Attorney General Order 1386-89. That document states that:

> The definition of "organized crime" … refers to those self-perpetuating, structured and disciplined associations of individuals or groups, combined together for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while protecting their activities through a pattern of graft and corruption.

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20 *See, e.g.,* Utah Code Ann. § 76-10-1102; Hawaii Rev. Statutes §§ 712-1221 through 712-1223.

21 *See* Exhibit U.S.-35.

22 *See* U.S. Second Submission, para. 82.

According to this definition, organized crime groups possess certain characteristics which include but are not limited to the following:

A) Their illegal activities are conspiratorial;

B) In at least part of their activities, they commit or threaten to commit acts of violence or other acts which are likely to intimidate;

C) They conduct their activities in a methodical, systematic, or highly disciplined and secret fashion;

D) They insulate their leadership from direct involvement in illegal activities by their intricate organizational structure;

E) They attempt to gain influence in government, politics, and commerce through corruption, graft, and legitimate means;

F) They have 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 and investment in legitimate business.[23]

- Underlying criminal activities: As the above descriptions make clear, organized crime ultimately consists of the commission in a given manner of a combination of underlying crimes. A measure against organized crime is therefore also a measure against the commission of such underlying crimes. Key examples of underlying crimes that are often committed as organized crime include the following:

  i. Violent crimes. U.S. state laws forbid the illegal use of force. For example, all of the states prohibit murder and assault.[24] Federal laws also apply to such acts when they occur within federal jurisdiction.[25] State and federal laws also prohibit acts involving the threat of force, such as extortion.[26]

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[23] Order Directing Realignment of Organized Crime Program Resources, Attorney General Order 1386-89, appendix (December 26, 1989). Excerpt at Exhibit U.S.-42.

[24] Examples of such laws from two of the larger U.S. states are Cal. Penal Code §§ 187-89 (murder) and §§ 240-41 (assault); N.Y. Penal Code §§ 120.00-.15 (assault). *See* Exhibit U.S.-43.

[25] *See, e.g.,* 18 U.S.C. § 1111 (federal crime of murder). Exhibit U.S.-43.

[26] An example of such laws at the federal level is 18 U.S.C. § 875. Examples from two of the larger U.S. states are Cal. Penal Code §§ 518-527 (extortion) and N.Y. Penal Law § 155.05(2)(e) (larceny by extortion). Exhibit U.S.-43.

ii. Property crimes: U.S. state laws also forbid acts of larceny and fraud,[27] and other property crimes. Federal laws also apply to such acts when they occur under certain circumstances, such as fraud schemes using the U.S. mails or interstate wire transmissions, or where stolen property is taken across state lines.[28]

iii. Corruption and conspiracy crimes: U.S. state and federal laws prohibit various forms of corruption and conspiracy.[29] One such law, the federal RICO statute, is mentioned above. Another is the federal conspiracy statute.[30]

iv. Money laundering. U.S. federal and state law also prohibits money laundering.[31]

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[27] Examples from two of the larger U.S. states are Cal. Penal Code § 484 (theft) and N.Y. Penal Law § 190.40-.83 (criminal usury, scheme to defraud, criminal use of an access device, identity theft, and unlawful possession of personal identification information). Exhibit U.S.-43.

[28] *See* 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), and 18 U.S.C. § 2314 (interstate transportation of stolen property). Exhibit U.S.- 43.

[29] *See, e.g.,* N.Y. Penal Law Arts. 180, 200 (bribery and bribery of public servants). Exhibit U.S.-43.

[30] *See* 18 U.S.C. § 371. Exhibit U.S.- 43.

[31] *See* 18 U.S.C. §§ 1956-1957; N.Y. Penal Law Art. 470. Exhibit U.S.-43.