

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

Notification of Other Appeal by Antigua and Barbuda
under Article 16.4 and Article 17 of DSU, and under Rule 23(1) of the *Working Procedures for
Appellate Review*

The following notification, dated 19 January 2005, from the Delegation of Antigua and Barbuda, is being circulated to Members.

Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, Antigua and Barbuda ("Antigua") hereby notifies the Dispute Settlement Body (the "DSB") of the World Trade Organisation (the "WTO") of its decision to appeal to the Appellate Body as an Other Appellant certain issues of law covered in the Report of the Panel in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/R) (the "Final Report").

1. Antigua seeks review of the Panel's legal conclusion that Antigua was not entitled to rely on what was referred to in the Final Report as the "total prohibition" as a "measure" under Article XXVIII(a) of the General Agreement on Trade in Services (the "GATS") and Article 6.2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").¹ The Panel erred when it concluded that Antigua had not identified the "total prohibition" in its Panel request. In making this finding, the Panel misinterpreted Antigua's Panel request and incorrectly interpreted and applied DSU Article 6.2 and GATS Articles I:1, I:3(a), XXIII and XVIII(a).

2. Antigua seeks review of the Panel's legal conclusion that, even if Antigua had identified the "total prohibition" as a "measure" in its Panel request, Antigua was not entitled to rely upon the "total prohibition" as a measure.² In coming to this conclusion, the Panel developed and applied a three-part test that is both unsupported by and inconsistent with DSU Article 6.2 and GATS Articles I:1, I:3(a) and XXVIII(a). The Panel also erred by failing to objectively assess and ascribe any significance to the United States' admission that it maintained a "total prohibition" on the cross-border provision of gambling and betting services, contrary to DSU Article 11.

3. In the event the Appellate Body were find in favour of the United States in the review sought by the United States pursuant to the third numbered paragraph of the United States' Notice of Appeal dated 7 January 2005 and reverse the conclusion of the Panel in paragraph 7.2(b) of the Final Report, Antigua seeks review of the Panel's legal conclusion that GATS Article XVI:1 is limited by GATS

¹See Final Report, paras. 6.171, 6.169, 6.170 and 6.177. See also *id.*, paras. 6.156 and 6.157.

²See *id.*, paras. 6.171, 6.175–6.185. See also *id.*, para. 197.

Article XVI:2.³ In making this determination, the Panel adopted a legally incorrect interpretation of GATS Article XVI.

4. Antigua seeks review of the Panel's legal conclusion that measures that prohibit consumers from using the gambling services offered by Antiguan operators through cross-border supply do not violate GATS Articles XVI:2(a) and XVI:2(c).⁴ In making this determination, the Panel adopted a legally incorrect interpretation of GATS Articles XVI:2(a) and XVI:2(c).

5. Antigua seeks review of the Panel's decision to consider the claimed defence of the United States under GATS Article XIV, which was affirmatively raised by the United States only at the last session of the second substantive meeting of the Panel with the parties—too late in the proceeding to allow for a fair opportunity by Antigua to rebut the defence and for proper assessment and adjudication of the claim by the Panel.⁵ Additionally, the Panel in essence constructed and completed the GATS Article XIV on behalf of the United States, thus relieving the United States of its burden of proof. The consideration by the Panel of the Article XIV defence submitted by the United States at such a late date in the proceeding, as well as the construction and completion of such defence by the Panel on behalf of the United States, is contrary to the requirements of due process, the principle of equality of arms and the terms of DSU Articles 3.10 and 11.

6. In the event the Appellate Body determines that the United States' GATS Article XIV defence was properly before the Panel, Antigua seeks review of the Panel's application and assessment of GATS Article XIV(a) to the defence, which was erroneous in a number of respects,⁶ including without limitation (i) failure to properly consider the text of GATS Article XIV; (ii) improper analysis and application of the test developed by the Appellate Body in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R ("*Korea – Beef*"); and (iii) failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

These errors are illustrated, for example, by:

(A) The failure of the Panel to take into consideration footnote 5 of GATS Article XIV(a), which was mentioned in paragraphs 6.467 and 6.468 of the Final Report, but never applied to the facts of the case nor mentioned again in the Final Report.

(B) The Panel giving total deference to the findings of United States authorities in making its assessment of (i) whether the applicable measures are measures designed to protect public morals or to maintain public order and (ii) the "necessary" test set out in *Korea – Beef*, and in each case not examining the actual facts before it in making the assessments. With respect to (i), in its assessment of the point, contained in paragraphs 6.479 through 6.487 of the Final Report, the Panel cites no evidence to support its conclusions other than findings or statements of the United States or its authorities. With respect to (ii), *first*, in its assessment of the "importance of the interests or values that the measures were designed to protect" aspect of the *Korea – Beef* test, contained in paragraphs 6.489 through 6.492 of the Final Report, the Panel cites no evidence to support its conclusions other than findings or statements of the United States or its authorities and *second*, in its apparent differentiation of "remote" gambling services from "non-remote" gambling services, contained in paragraphs 6.498 through 6.521 of the Final Report, substantially all of the evidence

³See *id.*, paras. 6.298, 6.299 and 6.318.

⁴See *id.*, paras. 6.382, 6.383, 6.397, 6.398, 6.401, 6.402, 6.405 and 6.406.

⁵See *id.*, paras. 6.444, 6.583 and 6.584.

⁶See *id.*, paras. 6.467–6.469, 6.474, 6.479–6.521, 6.533 and 6.535.

cited by the Panel in support of its conclusions are findings or statements of the United States or its authorities⁷ and a number of the findings are not supported by any evidence at all.

(C) The Panel, in its assessment of the "necessary" test set out in *Korea – Beef*, reaching its conclusions regarding the "importance of the interests or values" and the differentiation of "remote" gambling services based solely upon apparent "concerns" of the United States without requiring evidence—and without making any finding—that the "concerns" were justified under the circumstances of this case. The United States submitted *no* evidence associated with Antiguan⁸ cross-border supply of gambling and betting services of, *inter alia* (i) money laundering; (ii) fraud; (iii) health concerns; (iv) underage gambling; or (v) organised crime (collectively, the "Five Concerns").

(D) The failure of the Panel to make an objective assessment of the extent to which the measures at issue actually contributed to the ends ostensibly pursued by the measures. In paragraph 6.494 of the Final Report, the Panel dismissed this prong of the *Korea – Beef* test by concluding that because the United States measures prohibited the cross-border supply of gambling services, the measures "must contribute, at least to some extent, to addressing those concerns." However, the Panel failed to make any factual inquiry at all as to whether the measures actually contribute to addressing the Five Concerns.

(E) The Panel ignoring or misapplying factual evidence presented by Antigua. Antigua submitted substantial third-party evidence regarding the existence of the Five Concerns in the United States domestic gambling market, regulatory schemes and other contexts in which goods or services are provided on a cross-border or Internet-delivered basis.⁹ Very little of this evidence was taken into consideration by the Panel. The Panel erred by failing to consider this evidence (i) in the context of determining exactly how material the "concerns" of the United States are regarding problems associated with the Five Concerns; (ii) to assess the United States' tolerance of problems associated with the Five Concerns in its regulated domestic industry; (iii) to determine whether any basis exists for the differentiation of "remote" gambling services from "non-remote" gambling services in respect of the Five Concerns; (v) whether reasonable alternatives to prohibition were available to the United States; or (vi) in contrast to the complete lack of similar evidence adduced by the United States in the context of the provision of cross-border gambling services.

7. In the event the Appellate Body determines that the United States' GATS Article XIV defence was properly before the Panel, and further in the event the Appellate Body upholds the "three-part" measure identification test developed by the Panel in paragraphs 6.215 through 6.249 of the Final Report, Antigua seeks review of the Panel's finding that the United States had sufficiently identified the United States' "RICO" statute¹⁰ for consideration under GATS Article XIV(c).¹¹ The Panel's finding is not supported by analysis under the "three-part" test, is not supported by any evidence and is contrary to DSU Article 11.

8. In the event the Appellate Body determines that the United States' GATS Article XIV defence was properly before the Panel, Antigua seeks review of the Panel's application and

⁷The only other evidence considered by the Panel in this discussion is an out-of-context reference to some language in a report prepared for Antigua by certain experts (Final Report, para. 6.513) and extracts from a statement made by a credit card company executive before the United States Congress (*id.*, para. 6.518).

⁸Nor was any evidence submitted by the United States pertaining to any other jurisdiction.

⁹Note that this evidence was not presented in the context of GATS Article XIV due to the failure of the United States to raise its GATS Article XIV defence until after all written submissions had been made, and was extrapolated by the Panel from Antigua's discussion of GATS Article XVII. *See* Final Report, para. 6.584. *See also* paragraph 5 above.

¹⁰18 U.S.C. §§ 1961–1968.

¹¹*See* Final Report, paras. 6.548–6.551.

assessment of GATS Article XIV(c) to the defence, which was legally erroneous in a number of respects,¹² including without limitation (i) in assessing the RICO statute, the Panel failed to properly apply GATS Article XIV(c) as the Panel had already determined that the state statutes upon which the RICO statute itself relies were not properly before the Panel;¹³ (ii) in assessing the RICO statute, the Panel failed to properly apply GATS Article XIV(c) as the Panel had already determined that with respect to the one "concern" addressed by the RICO statute, organised crime, the United States had not been able to demonstrate it was a specific concern related to "remote" gambling;¹⁴ (iii) in application of the "necessary" test under *Korea – Beef*, the Panel failed to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

These errors are illustrated, for example, by:

(A) The Panel giving total deference to the findings of United States authorities in making its assessment of (i) whether the applicable measures secure compliance with the RICO statute and (ii) the "necessary" test set out in *Korea – Beef*, and in each case not examining the actual facts before it in making the assessments. With respect to (i), in its assessment of the point, contained in paragraphs 6.552 through 6.556 of the Final Report, the Panel cited no evidence to support its conclusions other than findings or statements of the United States or its authorities. With respect to (ii), in its assessment of the "importance of the interests or values that the measures were designed to protect" aspect of the *Korea – Beef* test, contained in paragraph 6.558 of the Final Report, the Panel cited no evidence to support its conclusions other than findings or statements of the United States or its authorities.

(B) The failure of the Panel to make an objective assessment of the extent to which the measures at issue actually contributed to the ends pursued by the RICO statute. In paragraphs 6.559 and 6.560 of the Final Report, the Panel not only relied solely on findings or statements of the United States or its authorities in reaching its conclusions, but also failed to require or consider any evidence that organised crime is a legitimate concern in the context of cross-border gambling services provided from Antigua or that the measures actually contribute to the suppression of organised crime and to what extent they do so.

9. In the event the Appellate Body determines that the United States' GATS Article XIV defence was properly before the Panel, Antigua seeks review of the Panel's application and assessment of the "chapeau" of GATS Article XIV, which was erroneous in a number of respects,¹⁵ including without limitation (i) the Panel's determination to apply the chapeau in the absence of a finding of a "preliminary justification" in favour of the United States under GATS Article XIV; (ii) the Panel's determination to examine only certain narrow segments of the gambling industry in its assessment of the "discrimination" prong of the chapeau test set forth in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R ("*US – Shrimp*"); and (iii) the Panel's failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

These errors are illustrated, for example, by:

(A) In the discussion regarding video lottery terminals in paragraphs 6.590 through 6.594 of the Final Report, the Panel (i) made a conclusion regarding "identification and age verification" in connection with purchases at video lottery terminals that is not supported by any evidence; (ii)

¹²See *id.*, paras. 6.550, 6.553–6.557, 6.560, 6.562 and 6.564.

¹³*Id.*, para. 6.547.

¹⁴*Id.*, para. 6.520.

¹⁵*Id.*, paras. 6.567, 6.585–6.607.

ignored significant Antiguan evidence to the contrary; and (iii) shifted the burden of proof to Antigua to "refute" the unproven claim of the United States as to "identification and age verification."

(B) In the discussion regarding Nevada bookmakers in paragraphs 6.601 through 6.603 of the Final Report, the Panel (i) made a conclusion regarding the provision of gambling and betting services through the Internet in Nevada that is not supported by any evidence; (ii) ignored Antiguan evidence to the contrary; and (iii) shifted the burden of proof to Antigua to refute the unproven claim of the United States that Nevada bookmakers do not provide services via the Internet.

(C) The discussion regarding the letters from a state lottery association is without any context at all.
