United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda

WT/DS285

Oral Statement of the United States
November 27, 2006

1. Mr. Chairman, members of the Panel, at the outset I would like to express the appreciation of the United States for your willingness to serve in this dispute. I of course also would like to thank the staff of the Secretariat for their hard work in providing assistance to the Panel. The United States looks forward to this opportunity to address the claims raised by Antigua and Barbuda in its recourse to Article 21.5 of the DSU.

2. In this proceeding, the terms of reference are determined by the relevant provisions of the DSU and, pursuant to those provisions, the measures identified in Antigua's recourse to Article 21.5 of the DSU.

3. In an Article 21.5 proceeding, the matter to be addressed is a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB." As the United States understands it, Antigua in this proceeding challenges both the existence of a measure taken to comply, and the consistency of such measure with a covered agreement. In this dispute, of course, the "covered agreement" is the General Agreement on Trade in Services ("GATS").

4. This morning I will address both elements of the DSU Article 21.5 disagreement: that is, the existence of measures taken to comply, and the consistency of such measures with a covered agreement. But before doing so, I need to emphasize the last part of the phrase that sets out the

matter to be covered in an Article 21.5 proceeding; namely, the measure to be examined is the measure taken to comply with "the recommendations and rulings of the DSB." Thus, under the DSU, the starting point in any analysis must be the specific recommendations and rulings in the dispute.

5. In this dispute, the recommendations and rulings are unusual, due to the combination of two factors: (1) the limited nature of the factual record, and (2) the fact that when an affirmative defense is involved, the responding party has the burden of proof to show that the affirmative defense applies. The United States has previously agreed in this dispute that Article XIV of the GATS, like Article XX of the GATT 1994, is in the nature of an affirmative defense.

6. In this dispute, the Appellate Body found that the U.S. measures at issue provisionally fell within the scope of an exception to Article XIV of the GATS; namely, the exception for measures "necessary to protect public morals or maintain public order" under paragraph (a) of Article XIV.

7. The Appellate Body, quoting the original panel, explained the serious nature of those concerns regarding public morals and public order: "[T]he United States has legitimate specific concerns with respect to money laundering, fraud, health and underage gambling that are specific to the remote supply of gambling and betting services, *which suggests that the measures in question are 'necessary' within the meaning of Article XIV(a)*."[1]

8. The chapeau of Article XIV of the GATS provides that when a measures falls within Article XIV(a), "nothing in this Agreement shall be construed to prevent the adoption or

[1] Appellate Body Report, para. 324, quoting Panel Report, para. 6.533 (italics added in Appellate Body Report).

enforcement of such measures," subject only to the provisos set out in the chapeau.

9. In this dispute, due to the limited nature of the factual record, the Appellate Body finding on the Article XIV chapeau is unusual. On the one hand, due to the limits in the factual record, the Appellate Body was not able to conclude that with respect to one limited area involving horseracing, the United States had met its burden of showing that the U.S. measures at issue met one proviso of the Article XIV chapeau. But on the other hand, and again because the record was limited, the Appellate Body specifically noted that it could not conclude that the U.S. measures did not meet the proviso.

10. The Appellate Body was absolutely clear on these key points:

> "We have also upheld, but only in part, the Panel's finding under the chapeau. ***We explained that the only inconsistency that the Panel could have found with the requirements of the chapeau stems from the fact that the United States did not demonstrate that the prohibition embodied in the measures at issue applies to both foreign and domestic suppliers of remote gambling services,*** notwithstanding the IHA – which, ***according to the Panel, "does appear, on its face, to permit"*** domestic service suppliers to supply remote betting services for horse racing. In other words, ***the United States did not establish*** that the IHA does not alter the scope of application of the challenged measures, particularly vis-à-vis domestic suppliers of a specific type of remote gambling services. ***In this respect, we wish to clarify that the Panel did not, and we do not, make a finding as to whether the IHA does, in fact, permit domestic suppliers to provide certain remote betting services that would otherwise be prohibited by the Wire***

Act, the Travel Act, and/or the IGBA."[2]

11. So in this case, we are presented with an unusual situation in which the Appellate Body examined the dispositive issue, but due to the limited factual record, the Appellate Body was not able to determine whether or not the disputed measure fell within the exceptions set out in Article XIV. Moreover, since the responding party has the burden of showing the applicability of an affirmative defense, the result of the Appellate Body's finding was the issuance of recommendations and rulings with respect to measures that may, or may not be, consistent with the covered agreements.

12. It is now up to this Panel, on the basis of a far more complete factual record, to make that finding in this proceeding.

13. Accordingly, the issue to which I will turn first is the consistency of the U.S. measures with the GATS. As the Appellate Body found, the only remaining issue regarding the applicability of Article XIV is whether the U.S. prohibition embodied in the measures at issue applies to both foreign and domestic suppliers of remote gambling services, notwithstanding the Interstate Horseracing Act ("IHA").

14. The basic question then involves a question of fact concerning U.S. law. It is therefore necessary for the Panel to assess how U.S. law operates in this particular respect. In our first and second written submissions, the United States explained in detail how, under fundamental principles of United States law, the IHA does not alter the federal criminal probition on remote gambling set out in the Wire Act. I will not repeat all of the details now, but will highlight the key points.

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[2] Appellate Body Report, para. 371 (emphasis added).

15. First, under U.S. law, the starting point of statutory construction is the text of the statute. In this case, nothing in the text of the IHA indicates any intention to serve as an across-the-board permission for gambling on horse racing, nor to serve as an exemption from criminal laws.

16. To be sure, Antigua vigorously asserts that the IHA "allows" certain activities. Remarkably, however, Antigua never cites the specific text of the IHA which supposedly accomplishes such an exemption from other civil or criminal laws

17. Antigua appears to place its reliance on a single definition contained in the IHA. This reliance, however, is misplaced. The definitions in the IHA are used only in the IHA itself, and do not amend definitions provided in the Wire Act or any other federal statute. Moreover, nowhere in the IHA does the statute provide that all transactions meeting the definition of an "interstate off-track wager" are exempt from federal criminal laws.

18. In addition to its misplaced reliance on a definition in the IHA, Antigua also appears to rely on an exceptional doctrine of U.S. law known as "repeal by implication." However, "repeals by implication" are extraordinary, and nothing in the IHA could amount to a repeal by implication of the Wire Act. As the United States Supreme Court explained: "It is a cardinal principle of construction that repeals by implication are not favored. . . . There must be `a positive repugnancy' between the provisions of the new law and those of the old . . . ."[3]

19. As the United States illustrated in its first submission, U.S. courts will go to great lengths to avoid a finding of repeal by implication. Even when courts consider regulatory schemes with some degree of overlap, courts give effect to both regulatory schemes. We have provided an example of several such cases in Annex I of the First U.S. submission.

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[3] United States v. Borden, 308 U.S. 188, 198 (1939) (Ex. US-5).

20. In this case, there simply is not, as Antigua asserts, any "repugnancy" or "irreconcilable conflict" between the Wire Act and the IHA. To the contrary, the original legislative history of the Wire Act noted that a gambling operation in one state could offer betting on horse races held in another state – so long as the bet or wager did not cross state lines. And, the IHA fits with the Wire Act by creating a civil liability scheme to address the free-rider problem created by this type of interstate gambling on horse racing. Each scheme – the Wire Act's prohibition on interstate transmission of wagers – and the IHA's requirement for revenue sharing agreements – has its own purpose and effect, and there is no repugnancy between the statutes.

21. Finally, Antigua has relied on a legislative change in 2000 to the IHA's definition of the term "interstate off-track wager." Antigua, however, does not explain how the change in a single definition creates a "repugnancy" between the two statutes. In fact, the amendment can be seen as closing a loophole in the implementation of the IHA's goal of enforcing revenue-sharing between betting operators and racetracks. The IHA amendment clarifies the definition of "interstate off-track wager" in such a way that racetracks will not lose their civil enforcement rights when betting operators transmit wagers across state lines. Thus, even with the amendment, both the Wire Act and the IHA can continue to have their separate effects, and there is no repugnancy between the Wire Act and the IHA as amended in 2000.

22. I would also emphasize that, as pointed out in our first submission, the IHA amendment triggers another principle of repeal by implication. Namely, the rule that repeal by implication is disfavored "applies with even greater force when the claimed repeal rests solely in an Appropriations Act." The 2000 amendment was one part of a lengthy appropriations bill that provided funding for several Federal agencies and the District of Columbia. No other part of the

statute was aimed at the regulation of gambling or horse racing.

23. In sum, based on the full factual record, including principles of statutory construction, the legislative history of the Wire Act and the IHA, and relevant case law, the United States has shown the following. First, we have shown that the IHA, both before and after the 2000 amendment, contains no express language that in any way limits or repeals the Wire Act. Second, we have shown that the IHA, both before and after the 2000 amendment, is not repugnant to the Wire Act, and thus the exceptional principle of "repeal by implication" cannot apply. Accordingly, we have shown that the criminal prohibition on remote gambling in the Wire Act is not limited by the IHA, and thus that the Wire Act meets the provisos of the Article XIV chapeau.

24. I will now turn to Antigua's second main argument which, as I understand it, is that even if the United States has made its showing that the IHA does not limit the Wire Act, Antigua must nonetheless prevail under the "existence" requirement of DSU Article 21.5. In other words, Antigua argues that the Wire Act cannot be the measure "taken to comply" because the Wire Act is the same measure, without amendment, that was examined during the original proceeding.

25. The United States submits, however, that in the particular circumstances of this case, Antigua's argument is without any basis.

26. The overarching point is that compliance with the DSB recommendations and rulings must depend on the specific findings of the Appellate Body in this dispute. In this dispute, the Appellate Body noted that neither the Panel nor the Appellate Body itself had found that the U.S. measures were out of compliance. Instead, the Appellate Body noted that it would not overturn under DSU Article 11 review the Panel's finding that the United States "had not shown" or "had

not demonstrated" or "did not establish" that its measures met the requirements of the Article XIV chapeau, and thus did not establish that the measures were entitled to an affirmative defense. The Appellate Body explained there was only a "possibility" of non-compliance based on a finding by the panel that the IHA does "appear" to permit certain betting activities.

27. The United States submits that under these unusual circumstances – namely, where the responding party in the original proceeding did not meet its factual burden of showing that the measures at issue satisfy the requirements of an affirmative defense – it is appropriate for the statutes at issue to be the "measures taken to comply." Our view is much narrower than how Antigua has painted it. The United States is not "rearguing" any point of law or factual finding actually made by the Panel or Appellate Body; instead, we are introducing new factual evidence to show that the U.S. measures are in fact consistent with the GATS.

28. Antigua does not dispute that the U.S. statutes, in particular the Wire Act, are indeed measures. The only remaining issue is whether the measures are "taken to" comply. The phrase "taken to" is neither explicit nor self-defining. In fact, as Antigua noted this morning, the Appellate Body in *Softwood Lumber* took quite a broad view of a measure "taken to comply," finding that a U.S. measure never intended to serve as a compliance measure was nonetheless a measure "taken to comply" in the particular circumstances of that Article 21.5 proceeding. In the circumstances of the present dispute, this phrase must be construed to allow for the measures at issue to be the "measures taken to comply." If not, the application of the DSU to such circumstances could lead to absurd results.

29. The problem is that unless the measures in dispute are the "measures taken to comply," the responding party would be required under DSU Article 21 to enact new measures when it

was already in compliance with its obligations. This result would be inconsistent with the DSU, because Article 3.2 of the DSU explicitly provides that recommendations and rulings of the DSB cannot "add to or diminish the rights and obligations under the covered agreements." I would also note that this fundamental principle is so important that it is restated in Article 19.2 of the DSU, covering panel and Appellate Body recommendations. So, if – as the United States believes it has shown on a full factual record – it was entitled to maintain the Wire Act's criminal prohibitions under the Article XIV exception, that right cannot be diminished by any DSB recommendations and rulings. To the contrary, the United States has that right under Article XIV both before, and after, the DSB recommendations and rulings. The means to avoid such conflict with Article 3.2 is clear: in these circumstances, the measure examined in the original proceeding must be the "measure taken to comply" under DSU Article 21.5.

30. Furthermore, under Antigua's interpretation, the complaining party would gain nothing even by prevailing in the Article 21.5 proceeding. The complaining party could not expect the responding party to adopt any substantively different measure, because the original measure was already in compliance. Nor would the complaining party be entitled to suspend concessions. Under Article 22, the level of suspension of concessions must be equivalent to the level of nullification or impairment. Since the measures in dispute would already be in compliance with the responding party's obligations under the agreement, the level of nullification or impairment would necessarily be zero.

31. For these reasons, where the responding party has a valid affirmative defense that did not succeed only because of a lack of a full factual showing in the original proceeding, the only sensible result is to construe "measure taken to comply" such that the responding party can

proceed to make that showing in an Article 21.5 proceeding.

32. Antigua presents a number of additional arguments on this point regarding the "existence" of a measure taken to comply. We have addressed them in our written submissions. This morning, I would just like to focus on one of Antigua's arguments regarding the finding in *Bed Linen* that a *complaining party* in an Article 21.5 proceeding may not reargue claims upon which it failed to prevail in the original proceeding.

33. Antigua asserts that the finding in *Bed Linen* must apply both ways: that is, if the responding Member can attempt to meet a burden of proof for an affirmative defense in an Article 21.5 proceeding, then the complaining Member must likewise be allowed to re-argue all of its failed claims of alleged violations. Antigua's argument is wrong, because it fails to take account of the fundamentally different positions of complaining and responding parties under Articles 21 and 22 of the DSU.

34. Under Article 21 ("Surveillance of Implementation and Recommendations and Rulings") and Article 22 ("Compensation and Suspension of Concessions") the responding Member (known as the "Member concerned") is in a special status. This morning, Antigua tried to recast this statement as an argument that the United States somehow has a "special status" under the DSU, and that instead Antigua as a developing country must have a special status. Antigua's statement misses the point. The United States is simply noting that the responding party – be it the United States, Antigua, or any other WTO Member – is in a special status in an Article 21.5 proceeding. Under the DSU, it is the Member concerned, and not any other Member, that is called upon to comply with the DSB recommendations and rulings. In an Article 21.5 proceeding, the issue to be examined is the existence or consistency with a covered agreement of

a measure taken to comply by the Member concerned. And it is the Member concerned that, if it fails to comply with the recommendations and rulings, could be subject under Article 22 to the suspension of concessions.

35. The DSB's recommendations and rulings serve as instructions to the Member concerned with regard to what is expected of that Member during the compliance period. For example, Article 21.3 requires the Member concerned to state its intentions with respect to implementation of "the recommendations and rulings of the DSB," and provides for a reasonable period of time in which to do so. Article 22 provides for consequences where the Member concerned has not done so. In this context, it would not be consistent with the scope of Article 21.5 to allow a complaining party in an Article 21.5 proceeding to present new evidence on its prior, failed claims of WTO breaches, because those failed claims would not have been included in the DSB recommendations and rulings. Thus, the Member concerned would have had no basis for making any response to such failed claims during the compliance period, and there would be no basis for finding that the Member concerned had failed to comply with DSB recommendations and rulings based on unsuccessful claims during the initial panel proceeding.

36. Unlike the scope of original panel proceedings, the scope of Article 21.5 proceedings is limited. And in this dispute, the DSB recommendations and rulings were concerned with what the United States has or has not "established" or "demonstrated." For these reasons, Antigua is wrong in asserting that the complaining Member and the responding Member must be placed in the exact same position with regard to the opportunity for presenting new evidence on issues where the burden of proof was not met during the initial panel proceeding.

37. Finally, I would like to address briefly Antigua's discussion in its second submission of

the new Internet gambling legislation enacted in October of this year, after the terms of reference for this proceeding were established. The new legislation does not amend any of the measures at issue. Moreover, this new measure was not covered in Antigua's recourse to Article 21.5, nor could it be, since the measure did not exist when Antigua requested this proceeding. In these circumstances, the new measure is not within the Panel's terms of reference.

38. Antigua's assertion to the contrary has no basis. Antigua's only explanation is a reference, without explanation, to the Appellate Body report in *Softwood Lumber IV (Article 21.5 – Canada),* which Antigua has quoted from at length this morning. That report, however, does not address which measures are within the terms of reference of an Article 21.5 panel. Rather, the issue in that dispute was whether a measure that was mentioned in the request for recourse to a panel was a measure "taken to comply" under the terms of Article 21.5.

39. The present situation is entirely different. The question is not about whether the new Internet gambling law is a measure "taken to comply." The question is whether a measure not in existence at the time of panel establishment can nonetheless somehow be within the Panel's terms of reference. Past reports have already addressed the question of whether a measure not yet in existence when a panel is established can be within the panel's terms of reference, and have concluded that such a measure cannot be within the terms of reference.

40. To summarize: the new Internet gambling legislation was enacted after the date of panel establishment and thus was not and could not have been included in the request for recourse to an Article 21.5 panel. It is not within the Panel's terms of reference.

41. Before concluding, I would like to add a couple of points regarding Antigua's opening statement. Antigua calls attention to a Maryland Attorney General's opinion cited in a footnote

to its first submission. This opinion suffers from the same defects as Antigua's arguments and the student-written note upon which Antigua relies; namely, the opinion simply asserts – without analysis – that the very existence of the IHA must provide an exemption from federal criminal laws. As the United States has explained, this is simply wrong under fundamental U.S. principles of statutory construction. Moreover, the opinions expressed by State officials have no role in the construction of a federal statute.

42. A second point is one I hoped not to have to address, and it is unfortunate that we have to do so. Antigua's opening statement calls into question the good faith of the United States. It also uses phrases such as "prevarication," "intent of doing nothing," "blatant dissembling," and "cynical attempt." There is no basis for this type of name calling in this dispute. During the Article 21.3 proceeding, the United States was very clear on its view of the U.S. law and on the means of compliance. In particular, we explained that we viewed the U.S. statutes as not containing any exemption for IHA activities and that the U.S. measures thus met the requirements of the Article XIV chapeau and were consistent with U.S. GATS obligations. The United States further sought a reasonable period of time to allow for a legislative clarification that would show that the statutes were, in fact, as the United States described them. The United States did not assert that legislation was the only possible means of compliance. We also emphasized the difficulty involved in passing legislation, including that such legislation was not in the control of USTR or the Executive Branch as a whole. The fact that such legislation was not adopted during the reasonable period of time in no way indicates that the United States was not acting in good faith. It simply shows – as the United States explained in the Article 21.3 proceeding – that obtaining a clarification through legislation was indeed difficult.

41. Mr. Chairman, this concludes the statement of the United States. We would be pleased to respond to any questions that you or the other members of the Panel may have.