

STATEMENT OF ANTIGUA AND BARBUDA

TO

**THE DISPUTE SETTLEMENT BODY
OF
THE WORLD TRADE ORGANISATION**

19 MAY 2005

Mr Chairman, I am Dr Errol Cort, the Minister of Finance and the Economy of Antigua and Barbuda. Among the responsibilities of my Ministry is the financial services industry, including the directorate of offshore gaming. I am honoured to be here today, representing my country in this very important matter.

First, I would like to express my delegation's disappointment in the statement just made by the United States Ambassador. Prior to this meeting, we have had no contact or communication from the United States regarding its intentions in this matter. Under Article 21(3) of the DSU, we believe we were entitled to hear at this meeting specifically what the United States proposes to do to comply with the decision and what time frame it suggests in which to accomplish that. The statement of the United States Ambassador today gives us no substantive guidance as to the United States intentions, and we would respectfully ask the United States to be more specific in front of this Body today. Failing that, at the very least, I will extend an invitation to the United States delegation to meet with our delegation following this meeting in order that we may promptly get the clarity to which we are entitled.

Antigua expects full and complete compliance by the United States with the recommendations adopted by the DSB in this case. As we noted last month, we will monitor the situation very closely to ensure timely and sufficient implementation by the United States. We note

again how important this industry is to our delicate economy and to the betterment of our citizens, and time is of the essence in this matter.

I would also like to take this opportunity to make a few observations. First, it disturbs us that the United States has, in its public pronouncements regarding this case, said that it need only to “clarify internet gambling restrictions in certain ways” or “tweak” the US Interstate Horseracing Act. A close and thorough reading of the Appellate Body report demonstrates that the United States asserted in this dispute that it prohibits “the remote supply of gambling and betting services by any supplier, whether domestic or foreign. In other words, the United States sought to justify [its measures] on the basis that there is no discrimination in the manner in which the [measures] are applied to the remote supply of gambling and betting services.”¹

To comply with the ruling, the United States must give Antigua market access for the provision of gambling and betting services. This should not be a difficult or time consuming task. For a start, the United States federal government can immediately cease sending letters and issuing statements that Antiguan operators cannot lawfully do business in the United States. The United States also has experience governing its own domestic remote gambling industry. If our fellow members were not already aware of it, the United States has sanctioned domestic Internet and telephone account wagering services that accept hundreds of millions of dollars in wagers each year. There is extensive remote gambling on horse races and other events and contests in the United States. Under the rules of WTO law established by the Appellate Body report, it is discriminatory for the United States to allow its domestic remote gambling industry to flourish while seeking to ban the provision of remote gambling services from our country.

In this context, we believe that the ruling provides the United States with an alternative—and that is to prohibit all domestic remote gambling. Period. And it should be noted that we are talking

¹ Report of the Appellate Body, para. 350.

“remote” gambling here, not “internet” gambling, not “horse racing” gambling. The distinction that the United States impressed upon and which was explicitly accepted by the Panel and the Appellate Body was the “remote” and “non-remote” distinction. If “remote” gambling is bad enough, in the eyes of the United States, to deserve prohibition, then it should be prohibited in the United States across the board, whether it crosses international borders or state lines or not, whether it involves the internet, the telephone, the post or any other method of “remote” supply. That much is clear.

In its ruling, the Appellate Body determined that the United States had met the first part of the Article XIV exception under the GATS, but had not proven that its measures were non-discriminatory under the chapeau of Article XIV. However, it should be observed that the finding in favour of the United States under the first part of the test hangs by a very slender thread indeed. In its ruling, the Appellate Body established for the first time a clear rule for the assessment of an Article XIV claim and the respective burdens of the parties under it. The Appellate Body said that *first* the United States had to establish a *prima facie* case of necessity under Article XIV. At that time, the burden shifted to Antigua to demonstrate that one or more “reasonably available alternatives” to an outright prohibition existed, at which time the burden would then be shifted back to the United States to prove that these alternatives would not, in fact, work.

The Appellate Body concluded that “because the United States made its *prima facie* case of necessity, and Antigua failed to identify a reasonably available alternative measure . . . the United States demonstrated that its statutes are “necessary,” and therefore justified, under paragraph (a) of Article XIV.”² In the same paragraph of its report, the Appellate Body also stated that “Antigua raised no other measure that, in the view of the Panel, could be considered an alternative to the prohibitions on remote gambling contained in the [measures].” However, I would like to say that a complete reading of the proceedings reveals that this statement by the Appellate Body is, with the

² Report of the Appellate Body, para. 326.

deepest of respect, simply not correct. Over the course of the proceedings, we raised a number of alternatives, including of course our own regulatory scheme, but also the fact that sophisticated and experienced jurisdictions such as Ireland and the United Kingdom have seen fit to permit the internet gambling efforts of their licensed “bricks and mortar” operations and the fact that the United States itself had adopted a legislative approach to regulate conduct on the internet that might pose a danger to children. We also suggested that Antigua operators could engage agents in the United States who could be used to assess the identity and particulars of proposed customers in person prior to the creation of their accounts with Antigua operators. Notwithstanding the aforesaid and contrary to what was said by the Appellate Body, the panel report in this case in fact took note of some of this evidence, indeed even in the Article XIV context.

Given the considerable economic and other resources that our tiny country has invested in this case, it is most disappointing that the Appellate Body apparently chose to overlook this evidence, clearly in the record and referred to by us in our Appellate submissions. Be that as it may, we know that “reasonably available alternatives” to prohibition *do* exist.

Finally Mr Chairman, I would like to make clear to our fellow members of this important world body one fact that may only be known to students of our case against the United States. That is from the beginning of this dispute Antigua and Barbuda has made it clear that it recognises that gambling and betting services should be subject to regulation. We regulate them ourselves. We do not deny the right of the United States to reasonably regulate these services to ensure the protection of its citizens. But prohibition is not regulation. In this respect, due notice must be taken of the decision of the United States’ own Supreme Court, announced just this Monday, in a dispute among its states regarding cross-border wine sales. That case is remarkably analogous to our dispute and, we suspect, may very well soon have an impact on the resolution of *this* dispute. Antigua and Barbuda has offered the United States the opportunity to cooperate with us on the regulation and oversight of gambling and betting services. We hope that the United States will

accept our offer and work towards a resolution of this dispute that gives Antiguan operators fair, reasonable and responsible access to the enormous gambling market in the United States.

Thank you.