BEFORE THE PANEL
OF THE
WORLD TRADE ORGANISATION

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

WT/DS285

RECOURSE TO ARTICLE 21.5 OF THE DSU BY ANTIGUA AND BARBUDA

FIRST SUBMISSION
OF ANTIGUA AND BARBUDA

25 September 2006

SERVICE LIST

RESPONDENT

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Table of Reports Cited in This Submission

SHORT TITLE	FULL TITLE
Australia – Automotive Leather II (Article 21.5 – US)	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States,* WT/DS126/RW and Corr. 1, adopted 11 February 2000
Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000
Brazil – Aircraft (Article 21.5 – Canada)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU,* WT/DS46/AB/RW, adopted 4 August 2000
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU,* WT/DS70/AB/RW, adopted 4 August 2000
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India,* WT/DS141/AB/RW, adopted 24 April 2003
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001
US – FSC II (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities,* WT/DS108/AB/RW2
US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/R, adopted 20 April 2005, as modified by the Appellate Body Report, WT/DS285/AB/R
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia,* WT/DS58/AB/RW, adopted 21 November 2001
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU,* WT/DS257/AB/RW, adopted 20 December 2005

TABLE OF CONTENTS

I. INTRODUCTION

1. Antigua and Barbuda ("***Antigua***") is pleased to make this its first submission to the Panel in WT/DS285 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *Recourse to Article 21.5 of the DSU.* Much like the original proceedings in WT/DS285 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (the "***Original Proceeding***"), Antigua believes that this proceeding presents the World Trade Organisation (the "***WTO***") with unique circumstances–but in the context of a recourse to Article 21.5 of the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). For Antigua believes that this is the first time in WTO dispute resolution under the DSU that an implementing party has announced itself in compliance with the recommendations and rulings of the Dispute Settlement Body of the WTO (the "***DSB***") *without having actually done anything at all.*

2. In the Original Proceeding, three federal measures[1] of the United States of America (the "***United States***") were found to be contrary to the obligations of the United States under Article XVI of the WTO's *General Agreement on Trade in Services* (the "***GATS***"). Having argued before an arbitrator appointed under Article 21.3(c) of the DSU that it needed "no less than 15 months"[2] in which to implement the recommendations and rulings of the DSB in the Original Proceeding "through legislative action,"[3] at a DSB meeting held on 21 April 2006, the United States informed the DSB that it was indeed in compliance with the recommendations and rulings of the DSB–based

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[1] These three laws are (i) 18 U.S.C. § 1084 (the "***Wire Act***") [***Exhibit AB-1***]; (ii) 18 U.S.C. § 1952 (the "***Travel Act***") [***Exhibit AB-2***]; and (iii) 18 U.S.C. § 1955 (the "***Illegal Gambling Business Act***" or "***IGBA***") [***Exhibit AB-3***].

[2] Submission of the United States of America, Arbitration under Article 21.3(c) of the DSU, WT/DS285 (12 July 2005) (the "***US Art. 21.3 Submission***"), para. 2.

[3] *Id. See also* discussion at paragraphs 17 through 20 below.

solely upon an oral statement of an un-named Department of Justice employee (the "***DOJ Statement***").[4]

3. As a simple restatement of an argument made to the panel and the Appellate Body in the Original Proceeding,[5] the DOJ Statement cannot be considered a measure bringing the United States into compliance with the recommendations and rulings of the DSB within the meaning of Article 21.5 of the DSU. The United States has in fact taken no action whatsoever to comply with the recommendations and rulings of the DSB in the Original Proceeding, and the three federal measures found in that proceeding to be contrary to the obligations of the United States under Article XVI of the GATS continue to be in violation of the GATS, without meeting the requirements of Article XIV of the GATS. Accordingly, Antigua requests that the Panel find that the United States remains out of compliance with the recommendations and rulings of the DSB in the Original Proceeding and that it recommend that the DSB request the United States to bring its laws into conformity with the obligations of the United States to Antigua under the GATS.

4. This Submission is comprised of five separate sections in addition to this Introduction:

- Section II contains the background of this case, including the Original Proceeding, proceedings under Article 21.3 of the DSU and the lead-in to these proceedings under Article 21.5 of the DSU.
- Section III is a general summary of the legal framework of a proceeding under Article 21.5 of the DSU, including the burden of proof.
- Section IV contains the argument of Antigua that the United States has not complied with the recommendations and rulings of the DSB in the Original Proceeding.

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[4] WT/DSB/M/210 (30 May 2006), paras. 33-35.

[5] *See* the discussion at paragraphs 36 through 41 below.

- Section V contains further discussion, evidence and argument of Antigua on the application of Article XIV of the GATS to the facts and circumstances of this dispute.
- Section VI contains the conclusions and requests of Antigua to the Panel.

5. As will be established in Section IV, the United States has failed to take any action to implement the recommendations and rulings of the DSB in the Original Proceeding. On this basis alone, the Panel has sufficient grounds on which to rule that the United States remains non-compliant with respect to such recommendations and rulings. The discussion in Part V demonstrates that, notwithstanding the DOJ Statement, the Wire Act, the Travel Act and the IGBA continue to violate Article XVI of the GATS, without meeting the requirements of Article XIV of the GATS.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. THE ORIGINAL PROCEEDING

6. The Original Proceeding commenced with a communication from Antigua to the United States dated 13 March 2003 pursuant to Article 4 of the DSU, requesting consultations regarding certain measures applied by authorities in the United States that affected the cross-border supply of gambling and betting services.[6] The subsequent consultations failed to resolve the dispute, and at the request of Antigua a panel (the "***Original Panel***") was formed by the DSB on 21 July 2003 to consider the claims raised by Antigua in its request for consultations and its panel request.

7. Antigua's claim before the Original Panel had four principal components:

- *First*, that in its Schedule of Specific Commitments under the GATS (the "***US Schedule***") the United States had made a full commitment for the cross-border provision of gambling and betting services to consumers in the United States,

[6] WT/DS285/1 (17 March 2003).

- *Second*, that the United States had adopted certain measures and taken certain actions effectively prohibiting the cross-border supply of these services,
- *Third*, that these measures violated, *inter alia*, Articles XVI and XVII of the GATS, and
- *Fourth*, that these measures could not otherwise be justified by the United States under Article XIV of the GATS.

8. On 10 November 2004, the Original Panel issued its report (the "***Panel Report***")[7] in which it ruled, *inter alia*, that (i) the United States had made full commitments to the cross-border provision of gambling and betting services in the US Schedule; (ii) the Wire Act, the Travel Act, the IGBA and four state laws are contrary to the obligations of the United States to Antigua under Articles XVI:1 and XVI:2 of the GATS; and (iii) the United States had not been able to demonstrate that the Wire Act, the Travel Act and the IGBA were (A) provisionally justified under Articles XIV(a) and XIV(c) of the GATS and (B) were consistent with the requirements of the "chapeau" of Article XIV of the GATS.

9. The Original Panel further determined (i) that Antigua had either not provided sufficient discussion during the course of the Original Proceeding of other state measures in order to enable the Original Panel to review them for consistency with the GATS or had not established the inconsistency of some of the measures with the GATS; (ii) that Antigua had failed to demonstrate that any of the identified measures were inconsistent with Articles VII:1 and VII:3 of the GATS; and (iii) to exercise judicial economy with respect to the claims of Antigua under Article XI and Article XVII of the GATS.

10. On 7 January 2005 the United States filed a notice of appeal with respect to certain aspects

[7] Report of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/R (10 November 2004).

of the Panel Report to the DSB,[8] and on 7 April 2005 the Appellate Body of the WTO (the "***Appellate Body***") issued its report (the "***AB Report***").[9] In the AB Report the Appellate Body upheld most of the determinations of the Original Panel, albeit in certain circumstances for slightly different reasons. However, the Appellate Body also (i) ruled that the four state laws found by the Original Panel to be contrary to the GATS had not been sufficiently discussed during the course of the Original Proceeding to be properly before the Original Panel for evaluation; (ii) determined that, contrary to the conclusion of the Original Panel, the United States had provisionally justified the Wire Act, the Travel Act and the IGBA under Article XIV(a) of the GATS; and (iii) while upholding the ruling of the Original Panel that the United States had failed to meet its burden of proof under the chapeau of Article XIV of the GATS, modified the Original Panel's conclusion with respect to the chapeau to find that the United States had not demonstrated–in the light of the existence of the federal Interstate Horseracing Act (the "***IHA***")[10]–that the Wire Act, the Travel Act and the IGBA were applied consistently with the requirements of the chapeau.[11]

11. At a meeting held on 20 April 2005 the DSB adopted the Panel Report, as modified by the AB Report, including the recommendation that the DSB request that the United States bring the Wire Act, the Travel Act and the IGBA into conformity with the obligations of the United States under the GATS.[12]

12. At the DSB meeting of 19 May 2005, the United States informed the DSB that it intended to implement the recommendations and rulings of the DSB in the Original Proceeding (the "***DSB Rulings***") and that it would require a reasonable period of time to do so.[13]

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[8] WT/DS285/6 (13 January 2005).

[9] Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (7 April 2005).

[10] 15 U.S.C. §§ 3001-3007 [***Exhibit AB-4***].

[11] AB Report, para. 373.

[12] WT/DSB/M/188 (18 May 2005), para. 75.

[13] WT/DSB/M/189 (17 June 2005), para. 47.

B. THE ARTICLE 21.3 PROCEEDING

13. On 6 June 2005, Antigua notified the DSB that the United States and Antigua had been unable to agree on a reasonable period of time for implementation of the DSB Rulings and requested that the period be determined pursuant to arbitration under Article 21.3(c) of the DSU.[14] Antigua and the United States were unable to agree on an arbitrator within ten days of the matter being referred to arbitration and accordingly, by letter dated 17 June 2005, Antigua requested that the Director-General of the WTO appoint and arbitrator. After consulting the parties, the Director-General appointed an arbitrator (the "***Arbitrator***") on 30 June 2005.[15]

14. In the arbitration proceeding (the "***21.3 Proceeding***") Antigua and the United States had two completely different opinions on how the United States could come into compliance with the DSB Rulings. Antigua believed that the United States was required to provide Antiguan service providers with market access to consumers in the United States.[16] The United States, however, asserted that it needed only to "[clarify] the relationship between the IHA and preexisting federal law" to come into compliance with the DSB Rulings.[17]

15. Antigua argued that the reasonable period of time for implementation of the DSB Rulings should not exceed six months from the date of adoption by the DSB.[18] Antigua observed that despite the claims of the United States Department of Justice (the "***DOJ***") to the contrary, there was significant doubt under United States law as to whether the Wire Act, the Travel Act and the IGBA actually prohibited the cross-border supply of certain of the gambling and betting services

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[14] WT/DS285/11 (9 June 2005).

[15] WT/DS285/12 (5 July 2005).

[16] Submission of Antigua and Barbuda, Arbitration under Article 21.3(c) of the DSU, WT/DS285 (12 July 2005) (the "***AB Art. 21.3 Submission***"), paras. 7, 9. Antigua also conceded that it may be theoretically possible for the United States to come into compliance with the DSB Rulings by prohibiting *all* forms of remote gambling in the United States–whether domestic or foreign and whether intrastate or cross-border. *Id*.

[17] US Art. 21.3 Submission, para. 9.

[18] AB Art. 21.3 Submission, para. 56.

offered from Antigua to consumers in the United States.[19] Further, Antigua noted that until 1998, when the United States reversed its policies 180 degrees, it had been the public position of the DOJ that United States laws did not apply to the provision of gambling and betting services to consumers in the United States by service providers from foreign jurisdictions such as Antigua.[20]

16. Accordingly, argued Antigua, the United States could come into compliance almost immediately with respect to most of the services covered by the DSB Rulings either by a reversion back to prior policy by the DOJ and other governmental agencies or through an "executive order" of the American president given to the DOJ and other agencies of the federal government.[21] With respect to the remaining services offered by Antiguan service providers, Antigua expressed the belief that the United States would need to come into compliance through legislation, which Antigua asserted could be enacted by the United States Congress, based upon precedent, within six months.[22]

17. The United States informed the Arbitrator that it would require a period of at least 15 months in which to accomplish implementation of the DSB Rulings through legislation[23] which would "have the effect of clarifying that relevant U.S. federal laws entail no discrimination between foreign and domestic service suppliers in the application of measures prohibiting remote supply of gambling and betting services."[24]

18. Crucially, the United States informed the Arbitrator that implementation by legislation would be pursued because "the Panel concluded that *existing high-level administrative*

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[19] *Id.*, paras. 12-13.

[20] *Id.*, paras. 14-16.

[21] *Id.*, paras. 16-22.

[22] *Id.*, paras. 23, 56.

[23] US Art. 21.3 Submission, para. 9.

[24] *Id.*, para. 11.

clarifications of the meaning of the [IHA] were not sufficient to sustain the U.S. burden of proof under the chapeau of Article XIV of the [GATS].[6]"[25]

19. On 19 August 2005, the Arbitrator issued his Award (the "***21.3 Award***")[26] in which the Arbitrator, relying on the United States' representations that implementation by legislation would be required, awarded a period of 11 months and two weeks from the adoption of the DSB Rulings as the reasonable period of time in which the United States had to implement them.[27]

20. In the 21.3 Award the Arbitrator observed with respect to Antigua's contention that implementation could be substantially achieved by executive order that:

> "[T]he United States disputes that an executive order could be used in the manner suggested by Antigua, because an executive order may not contradict an existing statute. In addition, in this specific case, it is extremely unlikely that an executive order could achieve the necessary clarification of the relationship between the [IHA], on the one hand, and the Wire Act, Travel Act and the IGBA, on the other hand. The United States points, in this regard, to the presidential statement on signing accompanying the bill enacting the December 2000 amendments to the IHA, which expressed the view that nothing in the IHA overrode previously enacted criminal laws. *The Panel in this dispute found that this statement was not sufficient to resolve the ambiguity in the relationship, and the Appellate Body did not depart from this view.*[12] *The United States submits that if a presidential statement accompanying signature of a bill could not achieve the requisite clarity in the relationship between the relevant statutes, then a presidential executive order could not do so either*."[28]

C. THE LEAD-UP TO ARTICLE 21.5

21. The reasonable period of time awarded by the Arbitrator passed on 3 April 2006 without any measures having been adopted by the United States to implement the DSB Rulings.[29] On 10

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[25] *Id.*, para. 9 (emphasis added, footnote omitted).

[26] WT/DS285/13 (19 August 2005).

[27] *Id.*, paras. 10, 64, 68.

[28] *Id.*, para. 9 (emphasis added, footnote omitted).

[29] It is undisputed that the United States Congress has not, as of the date of this Submission, adopted any legislation that would bring the United States into compliance with the DSB Rulings. However, during the reasonable period of time legislation was introduced into the Congress that if adopted by both houses of the Congress and approved by the president, would be expressly contrary to the DSB Rulings in a number of material respects. *See* discussion at paragraphs 108 through 114 below.

April 2006 the United States submitted a status report to the DSB regarding implementation of the DSB Rulings.[30] The United States informed the DSB that, in its opinion, it was in compliance with the DSB Rulings *based solely* upon the DOJ Statement:

> "On 5 April 2006, the US Department of Justice confirmed the position of the US Government regarding remote gambling on horse racing in testimony before a subcommittee of the US House of Representatives. The Department of Justice stated that:
>
> > The Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity. We have previously stated that we do not believe that the Interstate Horse Racing Act, 15 U.S.C. §§ 3001-3007, amended the existing criminal statutes.
>
> In view of these circumstances, the United States is in compliance with the recommendations and rulings of the DSB in this dispute."[31]

22. At a meeting of the DSB on 21 April 2006, the United States informed the Members that in light of the DOJ Statement, the United States was in compliance with the DSB Rulings. At the same meeting, Antigua expressed its disagreement with the United States' assertion of compliance, noting *inter alia* that the DOJ Statement was in fact a restatement of one of the arguments made by the United States to the Original Panel and the Appellate Body during the course of the Original Proceedings.[32]

23. On 23 May 2006, Antigua and the United States concluded "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding Applicable to the WTO Dispute *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285)" (the "***Agreed Procedures***").[33] In conformity with the Agreed Procedures, on 8 June

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[30] WT/DS285/15/Add.1 (11 April 2006).

[31] *Id.*

[32] WT/DSB/M/210 (30 May 2006).

[33] WT/DS285/16 (26 May 2006).

2006 Antigua made recourse to Article 21.5 of the DSU by requesting consultations with the United States.[34]

24. Subsequent consultations were held in Washington, D.C., but did not result in a settlement of the dispute. As there was clearly a dispute between the parties "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB in the Original Proceeding, on 6 July 2006 Antigua submitted a request for the establishment of a panel pursuant to Article 21.5 of the DSU,[35] and at its meeting of 19 July 2006 the DSB agreed to form the Panel. At the meeting, the European Communities, China and Japan reserved their rights to participate in the Panel proceedings as third parties.[36]

III. GENERAL FRAMEWORK OF LEGAL ANALYSIS

A. ARTICLE 21.5 PROCEEDINGS IN GENERAL

25. Article 21.5 of the DSU provides in pertinent part as follows:

> When there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

26. In general, proceedings under Article 21.5 of the DSU are subject to the same basic procedures as original panel proceedings under the DSU.[37] The complaining party establishes the scope of the proceeding, and the matter before the Article 21.5 panel consists of the measures at issue and the claims regarding those measures as set forth in the request for the establishment of the panel.[38]

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[34] WT/DS285/17 (12 June 2005).

[35] WT/DS285/18 (7 July 2006).

[36] As of the date of this Submission, minutes of this meeting had yet to be circulated to the Members. *See* WT/DS285/19 (16 August 2006).

[37] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 53, 67.

[38] Panel Report on *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.4.

27. Over the course of the development of WTO jurisprudence, the scope of what may be reviewed by a panel under Article 21.5 of the DSU has generally been interpreted broadly. With respect to the measures to be considered in an Article 21.5 proceeding, the panel is not bound by the implementing party's assessment of whether the measure is "taken to comply" and thus within the scope of the panel's review.[39] Further, the measures within the panel's purview include not only acts of the implementing party but omissions as well;[40] and even a measure which has the effect of moving further *away* from compliance rather than towards it is within the consideration of the panel.[41]

28. A panel under Article 21.5 of the DSU also has a broad mandate, not just to determine whether or not the recommendations and rulings of the DSB have been implemented, but also to determine whether the implementing party's measures are, in light of the circumstances at the time of investigation, compliant with the applicable covered agreements.[42] Because of this, the facts and evidence before an Article 21.5 panel may well be different than those presented in the original proceedings.[43]

29. Ultimately, the objective of a panel under Article 21.5 of the DSU is to determine whether the implementing party has come into full compliance with its obligations under a covered agreement.[44] Although the Appellate Body in its February 2006 report on *US –FSC II (Article 21.5 – US)* suggested that the panel conducting the review under Article 21.5 "could have used language more precise than 'fixing the problem' in describing its task under Article 21.5,"[45] the Appellate

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[39] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

[40] *Id*., para. 67.

[41] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10(23) (explicitly approved by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).

[42] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40-41; Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 79.

[43] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

[44] Appellate Body Report on *US – FSC II (Article 21.5 – US)*, paras. 87-96.

[45] *Id*., para. 95.

Body fundamentally agreed that with the panel that an implementing party must correct its deficient measures or remain out of compliance with the recommendations and rulings of the DSB.[46]

30. In this regard, it is important to note as well that an implementing party has not come into compliance with the recommendations and rulings of the DSB for such periods as *no* measures taken to comply exist.[47]

B. THE BURDEN OF PROOF

31. As is the case with proceedings under the DSU generally, the complainant in a proceeding under Article 21.5 of the DSU has the burden of proving its case to the satisfaction of the panel.[48] However, under circumstances where the implementing party's compliance with a covered agreement depends on meeting the requirements of an affirmative defence, it is well established that the burden of proof in the Article 21.5 proceeding is squarely on the implementing party to establish that it has met each of the requirements of the defence.[49]

C. EFFECT OF FINDINGS ADOPTED BY THE DSB

32. As a further consideration in an Article 21.5 proceeding, it is important to note that panel and Appellate Body findings adopted by the DSB constitute a final resolution of the dispute between the parties.[50] This is true whether a party failed to make a *prima facie* case and its argument was not given a substantive analysis by a panel or whether the party did make a *prima facie* case but ultimately failed to convince the panel. In the words of the Appellate Body in *EC –*

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[46] *Id.*

[47] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.35.

[48] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil),* para. *38.*

[49] Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 58; Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 105.

[50] *Id.*, paras. 89-96; Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 79; Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, paras. 90-93.

Bed Linen (Article 21.5 – India), a party "should not be given a 'second chance' in an Article 21.5 proceeding."[51]

IV. THE UNITED STATES HAS NOT COMPLIED WITH THE RECOMMENDATIONS AND RULINGS OF THE DISPUTE SETTLEMENT BODY

A. UNITED STATES HAS DONE NOTHING RESPONSIVE TO THE DSB RULINGS

1. The DSB Rulings.

33. The DSB Rulings, as contained in the AB Report, are simple and straightforward:

> "The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *General Agreement on Trade in Services*, into conformity with its obligations under that Agreement."[52]

The "measures . . . found . . . to be inconsistent" with the obligations of the United States under the GATS are the Wire Act, the Travel Act and the IGBA, and the inconsistency is in respect of Articles XVI:1 and XVI:2 of the GATS.[53]

2. United States relies solely on the DOJ Statement for compliance.

34. As noted earlier,[54] it is uncontroverted that the United States has not adopted any legislation to implement the DSB Rulings and that its assertion of compliance is based solely on the DOJ Statement–despite having assured the Arbitrator that it would be seeking compliance through legislation. The United States has not informed the DSB or Antigua that it has adopted any legislation to implement the DSB Rulings. Nor, to the knowledge of Antigua, has the United States made any public announcement that it has adopted any legislation to implement the DSB Rulings.

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[51] *Id.*, para. 96.

[52] AB Report, para. 374.

[53] *Id.*, para. 373(C).

[54] *See* the discussion at paragraph 21 above.

35. That the sole basis of the United States for compliance with the DSB Rulings is the DOJ Statement is borne out by the express language of its status report addendum of 10 April 2006, which first sets out the text of the DOJ Statement and then follows "[i]n view of these circumstances, the United States is in compliance with the recommendations and rulings of the DSB in this dispute."[55] Further, at the DSB meeting of 21 April 2006, the United States representative made it absolutely clear that the United States was justifying its assertion of compliance with the DSB Rulings solely on the contents of the DOJ Statement. The United States representative said, as reported in the minutes of that meeting:

> "As noted in the US report and its statement made at the present meeting, the US chief law enforcement agency, the US Department of Justice, had explained that US criminal statutes prohibited the interstate transmission of bets or wagers, including wagers on horse races; that it was currently undertaking a civil investigation relating to a potential violation of law regarding this activity; and that it did not believe that the [IHA] had amended relevant criminal statutes."[56]

3. United States argued the same point during the Original Proceeding.

36. In the Original Proceeding, the United States endeavoured to convince the Original Panel that the IHA did not permit domestic remote gambling on horse racing and thus could not serve as evidence that the Wire Act, the Travel Act and the IGBA did not meet the requirements of the chapeau under Article XIV of the GATS. The legal basis for its position was that the IHA, as a "civil" statute, did not "repeal" the pre-existing federal "criminal" statutes–the Wire Act, the Travel Act and the IGBA–which the United States was attempting to justify under the Article XIV chapeau.[57] This is apparently the same purpose for which the DOJ Statement was presented to the DSB on 10 April 2006.

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[55] WT/DS285/15/Add.1. *See also* discussion at paragraphs 21 through 22 above.

[56] WT/DSB/M/210, para. 35.

[57] Appellant Submission of the United States, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, AB-2005-1 (14 January 2005) (the "***US Appellant Submission***"), paras. 197-200.

37. In support of this proposition the United States advanced on a number of occasions during the course of the Original Proceeding the "view" of the United States (in some instances supported by statements from government officials, in particular from the DOJ and the American president[58]) that the IHA did not allow remote gambling on horse racing:

> "The Department of Justice has repeatedly affirmed the view that the IHA does not override preexisting criminal laws applicable to Internet gambling and other forms of remote gambling."[59]
>
> "Antigua claims that U.S. federal law in the form of the [IHA] creates an 'exemption' that permits remote supply of parimutuel wagering on horseracing by domestic suppliers.[79] This is incorrect. U.S. federal criminal statutes continue to prohibit the transmission of bets or wagers on horse races to the same extent that they prohibit other forms of remote supply of gambling services. The 2000 amendment to the IHA did not alter pre-existing federal criminal law.[80]"[60]
>
> "After hearings on Internet gambling in 2003, the Department of Justice reiterated its view that current federal law prohibits all types of Internet gambling, including gambling on horse races, dog racing, or lotteries. The Department of Justice maintains this view because the 2000 amendment to the IHA did not repeal the preexisting federal laws making such activity illegal."[61]
>
> "The United States does not agree that the 2000 amendment to the IHA permits the interstate transmission of bets or wagers on horse races because pre-existing criminal statutes prohibit such activity."[62]
>
> "Regarding the activities of entities such as Youbet.com, this issue came to prominence well after 1998, when the United States took action against Mr. Jay Cohen, Mr. Scott, and other Antigua-based remote suppliers. It was not until December 2000 that amendments to the [IHA] created what some now cite,

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[58] First Written Submission of the United States, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (7 November 2003) (the "***US First Submission***"), para. 34; US Answers, para. 39; US Appellant Submission, para. 197.

[59] US First Submission, para. 35.

[60] Second Written Submission of the United States, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (9 January 2004) (the "***US Second Submission***"), para. 63 (footnotes omitted).

[61] Answers of the United States to the Panel's Questions in Connection with the First Substantive Meeting, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (9 January 2004) (the "***US Answers***"), para. 40.

[62] *Id.*, para. 41.

> incorrectly, as the statutory basis for Internet gambling on horseracing. As the United States has pointed out, we are aware of these activities and U.S. law enforcement officials do not agree with assertions made by the service providers who rely on this alleged justification."[63]
>
> "The United States conclusively showed that it was the consistent position of the U.S. Government, clearly and officially articulated by the President of the United States upon signing the IHA into law, and consistently maintained since then by the nations' chief law enforcement agency, that the December 2000 amendments to the IHA did not repeal or amend pre-existing criminal statutes restricting such activity.[293]"[64]

38. To bolster its oft-repeated statements with respect to the relationship between the IHA and the three federal criminal statutes, the United States further raised the spectre of possible prosecutions or investigations of domestic remote service suppliers operating in reliance on the IHA.[65]

4. Assessment in the Original Proceeding.

39. The United States' arguments regarding the relationship between the IHA on the one hand and the Wire Act, the Travel Act and the IGBA on the other, including its "views," the "views" of public officials (including the American president) and the spectre of possible investigations or proceedings against domestic service suppliers, were all taken into consideration by the Original Panel during the course of the Original Proceeding.[66] The Original Panel also took into account Antigua's argument that the IHA appears, on its face, to allow remote wagering on horse racing, as well as a statement made by a member of the United States Congress during the debate over the passage of the 2000 amendments to the IHA to that effect.[67]

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[63] Oral Statement of the United States at the Second Substantive Meeting of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (26 January 2004) (the "***US Second Statement***"), para. 65.

[64] US Appellant Submission, para. 197 (footnote omitted).

[65] US First Statement, para. 35; US Second Statement, para. 66; US Appellant Submission, para. 194.

[66] Panel Report, paras. 6.587-6.588, 6.595-6.597.

[67] *Id.*, para. 6.599. *See* discussion at paragraph 55 below.

40. In the event, the Original Panel found the evidence submitted by the United States with respect to the IHA unconvincing:

> "Given the conflicting interpretations put forward by Antigua and the United States regarding the interpretation of the IHA and since it is for the United States to demonstrate that it has complied with the requirements of the chapeau of Article XIV, we find that the evidence presented to the Panel is inconclusive and that the United States has not demonstrated that the IHA, as amended, does not permit interstate pari-mutual wagering for horse racing over the telephone or using other modes of electronic communication, including the Internet.[1063]"[68]

41. The Appellate Body, having reviewed the arguments of the parties regarding the IHA issue,[69] agreed with the conclusion of the Original Panel:

> "The Panel found that the evidence provided by the United States was not sufficiently persuasive to conclude that, as regards wagering on horseracing, the remote supply of such services by *domestic* firms continues to be prohibited notwithstanding the plain language of the IHA. In this light, we are not persuaded that the Panel failed to make an objective assessment of the facts."[70]

Accordingly, the Appellate Body concluded that the United States had not met its burden of proof under the chapeau of Article XIV of the GATS.[71]

5. In the 21.3 Proceeding the United States conceded that "views" or statements of government officials could not bring about compliance.

42. The United States, in seeking a reasonable period of time of at least 15 months in the 21.3 Proceeding, expressly argued that "views" and statements of United States officials–including the American president–would not be sufficient for the United States to implement the DSB Rulings and that legislation would be needed to clarify the relationship among the different statutes at issue.[72] More specifically, the United States argued–and the Arbitrator accepted–that "*if a presidential statement accompanying signature of a bill could not achieve the requisite clarity in*

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[68] *Id.*, para. 6.600.

[69] AB Report, paras. 361-363.

[70] *Id.*, para. 364.

[71] *Id.*, para. 369.

[72] US Art. 21.3 Submission, para. 9. *See also* discussion at paragraphs 18 through 20 above.

the relationship between the relevant statutes, then a presidential executive order could not do so either.[73]

43. Having adopted no legislation in order to come into compliance with the DSB Rulings, despite asserting legislation was necessary, the United States relies only on the DOJ Statement and the arguments contained in it to evidence its compliance. However, in light of the United States' concession in the 21.3 Proceeding, it is clear that a statement issued by an unnamed, lower level executive branch employee which is virtually identical to the statements and "views" put forward by the United States in the Original Proceeding, cannot now serve as a basis by which the United States can announce itself in compliance with the DSB Rulings.[74]

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[73] US Art. 21.3 Submission, para. 9.

[74] *See* discussion at paragraph 20 above. It is relevant to note that under United States domestic law, the DOJ Statement would have limited value. It is well established that the judiciary is the final authority on issues of statutory construction and that a "view" or opinion of a governmental agency such as the DOJ does not control the judiciary in the construction of law. *See, e.g., Lewis Pub. Co. v Morgan*, 229 U.S. 288 (1913) [***Exhibit AB-5***]; *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981) [***Exhibit AB-6***]; *SEC v. Sloan*, 436 U.S. 103, 117-118 (1978) [***Exhibit AB-7***]; *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973) [***Exhibit AB-8***]; *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968) [***Exhibit AB-9***]; *NLRB v. Brown*, 380 U.S. 278, 291 (1965) [***Exhibit AB-10***]; *FTC v. Colgate-Palmolive Co*., 380 U.S. 374, 385 (1965) [***Exhibit AB-11***]; *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946) [***Exhibit AB-12***]; *Burnet v. Chicago Portrait Co*., 285 U.S. 1, 16 (1932) [***Exhibit AB-13***]; *Webster v. Luther*, 163 U.S. 331, 342 (1896) [***Exhibit AB-14***]. The United States Supreme Court has adopted a framework for determining when courts should provide some deference to interpretations of statutes by administrative agencies. An interpretation by an administrative agency, such as the DOJ, of an ambiguous statute may receive substantial deference by the courts. However, this deference is warranted only when it is clear that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *Gonzales v. Oregon*, 126 S. Ct. 904 (U.S. 2006) [***Exhibit AB-15***]. Otherwise, the interpretation is entitled to respect only to the extent it has the power to persuade. *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944) [***Exhibit AB-16***]. Neither the Wire Act, the Travel Act, the IGBA nor the IHA delegate any authority to any administrative agency, including the DOJ, to administer, interpret or issue rules and regulations thereunder. Therefore, under settled United States law, any interpretation or opinion regarding these statutes issued by the DOJ can at most be respected to the extent that such interpretation or opinion has the power to persuade. As the DOJ has, to date, chosen not to prosecute any person for engaging in the provision of remote gambling under the auspices of the IHA, United States courts have not had the chance to rule on whether or not the DOJ position is correct. *See* discussion at paragraph 62 below.

6. United States has not complied.

44. The United States certainly has done nothing to comply with the DSB Rulings, and has in fact done nothing at all other than reassert its old arguments, perhaps in the hope that it might do a better job in meeting its burden of proof a second time round. This, clearly, the United States is not entitled to do. The Panel Report and the AB Report have been adopted by the DSB, and the United States gets no "second chance."[75]

45. Whatever the DOJ Statement is, it certainly does nothing to, in the words of the Appellate Body, "bring [the United States'] measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *General Agreement on Trade in Services*, into conformity with its obligations under that Agreement."[76] As stated previously,[77] the United States is best viewed as having done *nothing at all* since the adoption of the DSB Rulings, despite its protestations to the contrary. Having done nothing, the United States cannot possibly be in compliance with the DSB Rulings.[78] While it does not require much more than common sense to come to this conclusion, it is also arguable whether the DOJ Statement could even constitute a "measure" for purposes of WTO dispute resolution under the GATS[79] or–if it were a "measure" for

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[75] Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 96.

[76] AB Report, para. 374.

[77] *See* discussion at paragraph 1 above.

[78] Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.35.

[79] Ironically, under the United States' own view of what constitutes a "measure" for purposes of the DSU, the DOJ Statement would clearly not rise to that level. As argued in the Original Proceeding, the United States believes that a "measure" must be a law or some "instrument containing rules or norms." Appellee Submission of the United States of America, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, AB-2005-1 (1 February 2005) (the "***US Appellee Submission***"), paras. 17-20. Further, the United States appears to believe that statements of government officials are insufficient in this regard as well. *Id*., para. 21-22. Antigua, on the other hand, had taken a very expansive view of what constitutes a "measure" during the Original Proceedings. Other Appellant Submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, AB-2005-1 (24 January 2005) (the "***AB Appellant Submission***"), paras. 27-31.

these purposes–whether it could constitute a "measure taken to comply" within the meaning of Article 21.5 of the GATS.[80]

B. THE IHA REMAINS DISCRIMINATORY

1. Introduction.

46. Because the United States has done nothing to bring itself into compliance with the DSB Rulings, it remains out of compliance with them. Although Antigua does not believe that the United States is permitted another attempt to meet its burden of proof under the chapeau of Article XIV of the GATS with respect to the IHA, in the event the Panel were to allow the United States to do so, the evidence is overwhelmingly in favour of the conclusion that domestic remote gambling on horse racing is not only authorised by the IHA, but is flourishing.

47. As discussed earlier, both the Original Panel and the Appellate Body determined that, based upon the evidence and argument submitted by the parties during the Original Proceeding, the United States had failed to demonstrate that "as regards wagering on horseracing, the remote supply of such services by *domestic* firms continues to be prohibited notwithstanding the plain language of the IHA."[81] Although the United States would argue, on the basis of the DOJ Statement, that the IHA does not permit domestic remote gambling, this is clearly not the case.

2. The Interstate Horseracing Act: Federal legal authorization for remote pari-mutuel account wagering.

48. The legal framework for lawful domestic wagering on horse racing in the United States is governed at the federal level by the IHA, initially enacted in 1978 by the United States Congress to regulate interstate pari-mutuel wagering on horse races. As expressed during the course of its adoption, the goal of the IHA was to "further the horseracing and legal off-track betting industries

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[80] Generally, a "measure taken to comply" contemplates something subsequent to the adoption of DSB recommendations and rulings. *Australia – Salmon (Article 21.5 – Canada)*, para. 22. In this dispute, although the DOJ Statement occurred subsequent to the adoption of the DSB Rulings, as in form and substance the DOJ Statement is virtually identical to what was advanced in the Original Proceeding, it is questionable whether it should be considered a "measure taken to comply."

[81] AB Report, para. 364. *See* discussion at paragraphs 39 through 41 above.

in the United States."[82] At the time it enacted the IHA, Congress recognised that pari-mutuel wagering on horseracing is a "significant industry which provides revenue to the States through direct taxation . . . and contributes favorably to the balance of trade."[83]

49. As a further justification for enactment of the IHA, Congress concluded that:

> "[P]roperly regulated and properly conducted interstate off-track betting may contribute substantial benefits to the states and the horse racing industry. These benefits would result from expanded market areas that would enable an increased number of fans to participate in racing, from additional media coverage of racing because of those expanded market areas and because of additional interest in racing engendered by the aforementioned two benefits, and from additional employment opportunities and additional revenues to states and the racing industry."[84]

Congress also concluded that the IHA was warranted because:

> "Off-track betting provides the public with a legal alternative to illegal bookmaking operations, thereby increasing the flow of revenue to legal parimutuel operations and to governments."[85]

50. The IHA allows interstate wagers, including bets placed by telephone and other electronic media. The IHA does not, however, permit participation in its scheme by operators located outside of the United States. The statute authorises "interstate off-track wagers" *only*, and under a number of conditions.[86] An "interstate off-track wager" is defined as:

> "a legal wager placed or accepted in one *State* with respect to the outcome of a horserace taking place in another *State* and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one *State* via telephone or other electronic media and accepted by an off-track betting system in the same or another *State*, as well as the combination of any pari-mutuel wagering pools."[87]

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[82] 15 U.S.C. § 3001(b).

[83] S. REP. NO. 95-1117, at 1 (1978), *reprinted in* U.S.C.C.A.N. 4144, 4147 [***Exhibit AB-17***].

[84] *Id.*

[85] *Id.*, p. 4149.

[86] 15 U.S.C. § 3004.

[87] *Id.*, § 3002(3) (emphasis added).

"State" is defined in the IHA as:

> "Each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States."[88]

51. It is thus clear from its face that the IHA not only authorises the placing of bets and wagers on a *remote* and interstate basis,[89] but also limits the scope of its coverage to bets and wagers placed and accepted within the territory of the United States.

3. Legislative history, the 2000 amendment and additional legal background.

(a) The legislative history of the IHA demonstrates the intent of Congress.

52. The legislative history of the IHA, which was originally proposed in 1977, adds further support to the conclusion that federal law permits remote, interstate account wagering. As originally proposed by the House of Representatives, the IHA would have banned all interstate off-track wagering in the United States.[90] The "findings and policy" portion of the first version of the proposed bill indicated that a complete prohibition was needed because interstate off-track wagering adversely affected the racing industry and illegal wagering might be increased through legalized off-track wagering.[91] The legislative history also examined the experience in France with off-track betting and indicated that a subsidy system would be required to protect the economic interests of smaller regional tracks which then furnished a primary reason for the outright ban.[92] This version of the bill did not become law.

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[88] *Id.*, § 3002(2).

[89] The Original Panel defined "remote" gambling as "any situation where the supplier, whether domestic or foreign, and the consumer of gambling and betting services are not physically together." Panel Report, para. 6.32. The argument of the United States under Article XIV of the GATS was predicated entirely on the distinction between "remote" and "non-remote" gambling. *Id.*, paras. 3.15-3.19, 3.279-3.282.

[90] S. REP. NO. 95-1117, at 1 (1978), *reprinted in* U.S.C.C.A.N. 4132, 4139 [***Exhibit AB-18***].

[91] *Id.*, 4137.

[92] *Id.*, 4135-36.

53. In 1978, the Senate completely revamped the IHA bill as proposed by the House of Representatives the previous year. The revised IHA *permitted* rather than prohibited interstate off-track wagering under the various terms and provisions specified in the IHA. The legislative history suggests that there would be no enforcement by the federal government of violations of the IHA and that enforcement would be left solely to private parties.[93] The Senate version was adopted by the House of Representatives and, after being signed by the American president, became law on 25 October 1978.[94]

(b) The 2000 amendment clarified the scope of permitted interstate account wagering under the IHA.

54. In 2000, a portion of the IHA was amended by Congress. The definition of "interstate off-track wager" was amended to provide that it was "a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or *transmitted by an individual in one State via telephone or other electronic media* and accepted by an off-track betting system in the same or another State . . .."[95] The insertion of this language was the only amendment made to the statute at the time.[96]

55. The plain language of the revised statute permits interstate pari-mutuel wagering over the telephone or other modes of electronic communication, including the Internet, so long as such wagering is legal in both states. The legislative history of the amendment supports this conclusion. As part of the underlying legislative debate surrounding the passage of the amendment,

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[93] *Id.* , 4146.

[94] 15 U.S.C. § 3001.

[95] 15 U.S.C. § 3002(3) (emphasis added).

[96] House Conference Report 106-1005, Making Appropriations for the Government of the District of Columbia and Other Activities Chargeable in Whole or in part Against Revenues of Said District for the Fiscal Year Ending September 30, 2001, and For Other Purposes, to accompany H.R. 4942, Sec. 629 (2000 WL 1606910, *151) [***Exhibit AB-19***].

Representative Frank R. Wolf of the State of Virginia expressed his understanding of the effect of this new language:

> "I want Members of this body to be aware that section 629 . . . would legalize interstate pari-mutuel gambling over the Internet. Under the current interpretation of the Interstate Horse Racing Act in 1978, this type of gambling is illegal, *although the Justice Department has not taken steps to enforce it.* This provision would codify legality of placing wagers over the telephone or other electronic media like the Internet."[97]

56. In summary, the 2000 amendment to the IHA codified into law the longstanding and uninterrupted policy of acceptance by the United States of remote wagering by off-track and telephone accounts.[98]

(c) Additional legal background–United States position is not supported by United States domestic law.

57. Contrary to the DOJ, numerous commentators, cases and opinions indicate that interstate gambling under the IHA is completely legal in the United States,[99] and the position of the DOJ concerning the relationship between the IHA and the Wire Act has been criticised by commentators.[100] As further evidence that the Wire Act does not prohibit interstate pari-mutuel

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[97] 146 Cong. Rec. H 11230, 11232, 106th Cong. 2nd Sess. (2000) (emphasis added) [***Exhibit AB-20***].

[98] *See* discussion at paragraphs 69 through 88 below.

[99] *E.g.*, M. Shannon Bishop, *And They're Off: The Legality of Interstate Pari-Mutuel Wagering and Its Impact on the Thoroughbred Horse Industry*, 89 Kentucky L. J. 711, 725 (2001) (hereinafter "***Legality of Interstate Wagering***") [***Exhibit AB-21***] ("The enactment of the statute [IHA] alone proves Congress's recognition of the legitimacy and the legality of interstate wagering on horseracing between state-authorized facilities. Congress would not have passed a statute regulating an industry it deemed altogether illegal."); Office of the Attorney General of Maryland, Opinion No. 01-015 (2001) [***Exhibit AB-22***] ("The prohibition in the Wire Act is necessarily qualified by another federal statute - the Interstate Horseracing Act of 1978. 15 U.S.C. § 3001 et seq. From its inception, that statute [IHA] has authorized interstate off-track wagers in certain circumstances and, as recently amended, explicitly includes interstate account wagering within its purview.").

[100] *Legality of Interstate Wagering*, *supra* note 99 at 714 ("Although interstate pari-mutuel wagering has occurred for decades with the federal government's approval and encouragement, the Department of Justice has recently taken the position that interstate pari-mutuel wagering violates the Interstate Wire Act, indicating that the horseracing industry proceeds in its business at its own risk.").

wagering permitted by the IHA, there has never been a criminal prosecution of sanctioned wagering on interstate horse racing from 1961 to the present day.[101]

58. Assuming *arguendo* the IHA and Wire Act conflict, under United States domestic law common rules of statutory construction would result in the IHA controlling *over* the Wire Act. In a circumstance where it is impossible to comply with two statutes simultaneously, the statutes are said to be in *direct conflict*.[102] When two statutes directly conflict, the most recently enacted statute controls over the older one.[103] The Wire Act was enacted in 1961; the IHA was enacted in 1978 and amended in 2000. Under the "direct conflict" rule of statutory construction, the IHA would control over the Wire Act because it is the more recently enacted statute.

59. If two statutes *overlap* but do not directly conflict, a United States court will attempt to harmonise them to the extent possible.[104] Where the two statutes cannot be harmonised, the more specific statute will prevail over the more general one.[105]

60. These standards of statutory construction apply whether either or both of the statutes are civil or criminal.[106] It is also consistent with the rules of statutory construction that criminal statutes are to be narrowly construed with any ambiguity resulting in the legality of conduct.[107] The

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[101] *Id*., at 727 ("Since the Justice Department has never prosecuted the horseracing industry for violation of the Wire Act, no case law indicates whether the statutes directly conflict."). *See* discussion at paragraphs 104 through 107 below.

[102] *Humana, Inc. v. Forsyth*, 525 U.S. 299, 305-08 (1999) [***Exhibit AB-23***].

[103] *Watt v. Alaska*, 451 U.S. 259, 266 (1981) [***Exhibit AB-24***].

[104] *Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 941 (11th Cir. 2001) [***Exhibit AB-25***] ("Courts generally adhere to the principle that statutes relating to the same subject matter should be construed harmoniously if possible, and if not, that more recent or specific statutes should prevail over older or more general ones.").

[105] *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) [***Exhibit AB-26***] ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *United States v. Louwsma*, 970 F.2d 797, 799 (11th Cir. 1992) [***Exhibit AB-27***] ("It is a basic principle of statutory construction that a precisely drawn statute dealing with a specific subject controls over a statute covering a more generalized spectrum.").

[106] *United States v. DeLaurentis*, 491 F.2d 208, 212-13 (2nd Cir. 1974) [***Exhibit AB-28***].

[107] *United States v. Bass*, 404 U.S. 336, 347 (1971) [***Exhibit AB-29***] ("In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress

IHA unquestionably is the far more specific statute. It deals specifically with interstate wagering on horse racing via, *inter alia*, electronic means. On the other hand, the Wire Act is a general prohibition on generic cross-border wagering on sporting events and, as such, and to the extent of any conflict, under the principles outlined above the IHA would be expected to control.

61. The *only* reported United States court case that considered both the IHA and the Wire Act[108] together lends strong support to the conclusion that the IHA controls over any of the preexisting federal criminal legislation. In *Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Association, Inc.* ("***Sterling***"),[109] the United States Court of Appeals for the First Circuit, relying on the plain wording of the IHA and the Wire Act, as well as relevant Congressional history, came to the conclusion that in enacting the IHA, Congress intended to take conduct in violation of the IHA *out of the criminal coverage of the Wire Act* and instead make a party violating the terms of the IHA *civilly liable* to parties under the terms of the IHA.[110] The conclusion of the court in *Sterling* was appealed to the United States Supreme Court which denied the petition for review.[111]

(d) Additional legal background–pending legislation.

62. That the DOJ position with respect to the IHA is incorrect is further supported by the terms of legislation ("***HR 4411***") recently adopted by the United States House of Representatives which would amend the Wire Act to clearly increase its coverage to most gambling and betting

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made a crime, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite' thus ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

[108] Out of perhaps hundreds of thousands of United States legal decisions reported on electronic legal databases in the United States, Antigua was only able to find *one case* that considered the IHA and the Wire Act, the Travel Act or the IGBA together, whether in a criminal context or civil.

[109] 989 F.2 1266 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993) [***Exhibit AB-30***].

[110] *Id.*, p. 1273 ("For instance, the IHA's enforcement and remedies sections specifically exclude the possibility of governmental involvement and/or the specter of criminal penalties.").

[111] 510 U.S. 1024 (1993). Under United States law, the decision of the United States Supreme Court not to review a lower appeals court decision means that the case does not present a controversy that merits review by the Supreme Court.

services provided on a cross-border basis.[112] Despite the DOJ making its "views" clear during the process of the approval of HR 4411,[113] instead of "clarifying" that the IHA did not exempt remote, interstate betting on horse races from coverage of the Wire Act, the legislature expressly provided that HR 4411 did not effect activities conducted under the IHA:

> "Nothing in this Act may be construed to prohibit any activity that is allowed under [the IHA] Public Law 95-515 as amended (15 U.S.C. 3001 et seq.)."[114]

63. As if this reference were not sufficient to clarify the position of Congress on the issue, Section 106 of HR 4411 goes further to provide:

> "It is the sense of Congress that this Act does not change which activities related to horse racing may or may not be allowed under Federal law. Section 105 is intended to address concerns that this Act could have the effect of changing the existing relationship between the [IHA], and other Federal statutes that were in effect at the time of this Act's consideration; this Act is not intended to change that relationship; and this Act is not intended to resolve any existing disagreements over how to interpret the relationship between the [IHA] an other Federal statutes."[115]

64. Given the chance to "clarify" that the IHA does not permit remote wagering as the United States had asserted it would do during the 21.3 Proceeding, instead Congress in HR 4411 expressly refused to clarify the relationships among the various statutes in the manner suggested by the DOJ. In fact, as the nature of HR 4411 is to *prohibit* the cross-border supply or gambling services by "updating" the Wire Act, the objective of Sections 105 and 106 of HR 4411 is clearly to confirm the existing carve out under the IHA. If anything, the House of Representatives has "clarified" that Antigua's interpretation of the relationship between the IHA and the Wire Act is the correct one.

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[112] H.R. 4411, 109th Cong., 2nd Sess., "The Internet Gambling Prohibition and Enforcement Act" (12 July 2006) [***Exhibit AB-31***]. *See* discussion at paragraphs 108 through 114 below.

[113] *See* Statement of Testimony of Bruce G. Oh, Chief, Organized Crime and Racketeering Section, Criminal Division, United States Department of Justice, Before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, United States House of Representatives, Concerning H.R. 4777, The "Internet Gambling Prohibition Act" [later merged with H.R. 4111, *supra*, note 112], 5 April 2006 [http://judiciary.house.gov/Hearings.aspx?ID=137] [***Exhibit AB-32***].

[114] HR 4411, § 105.

[115] *Id*. § 106.

4. State authorisation and regulation of remote account wagering.

65. United States operators which offer cross-border, interstate account wagering[116] do so under the auspices of the IHA, related state enabling statutes and United States legal precedents which hold that states retain the discretion to determine the legal effect of in-coming communications into the state.[117] Generally, under United States law gambling is deemed to take place at the location where the money changes hands, not necessarily where the person placing the bet is located.[118]

66. There are currently 18 states that expressly sanction the operation of remote account wagering services on horse and dog racing within their states under the auspices of the IHA. These states and their respective regulatory schemes and related Internet site are summarised in the chart attached to this Submission as ***Schedule 1***.[119] An additional 20 states permit wagering in physical premises on horse races that take place in other states.[120]

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[116] "Account wagering" is wagering where the punter funds an account with the operator remotely and thereafter is permitted to gamble from, and limited to, the funds on deposit. *See* Panel Report, para. 3.3. *See also* discussion at paragraphs 89 through 103 below.

[117] Antonia Z. Cowan, *The Global Gambling Village: Interstate and Transnational Gambling*, 7 Gambling Law Review 251 (August 2003) (hereinafter "***The Global Gambling Village***"), pp. 259–260 (2003), [***Exhibit AB-33***], *citing Lescallet v. Commonwealth*, 89 Va. 878, 17 S.E. 546, 547-48 (Va. 1893) and *United States v. Truesdale*, 152 F. 3d 443 (5th Cir. 1998).

[118] *The Global Gambling Village*, p. 260, *citing* Jeffrey A. Modisett, *A Brief Look at The Past, Present and Future through The Eyes of A Former Attorney General*, 6 Gaming Law Review 198 (2002), p. 203 *and* Memorandum from Gregory C. Avioli, National Thoroughbred Horseracing Association (on the issue: "Whether Account Wagering may be lawfully conducted by a state-licensed pari-mutuel facility with account holders located in a state other than the state where the account is located") (August 3, 1999), pp. 2-8.

[119] *See* ***Exhibits AB-34*** through ***AB-51***.

[120] These states are Alabama, Arizona, Arkansas, Colorado, Delware, Florida, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Texas and Wisconsin. The Jockey Club, State Racing Industry Organizations [www.jockeyclub.com/industrylinks.asp?section=S&fact=F].

67. A number of the states which have authorised the provision of remote gambling services on horse racing have made it clear that their legislation is intended to come within the scope of the IHA:[121]

- ***Idaho***. "The advance deposit wagering rules, as set forth in Sections 042 through 050 of these rules, shall apply to the establishing and to the operation of an account for residents of the state of Idaho by the hub operator . . . accounts can be established and operated for people whose principal residence is *outside* of the state of Idaho including residents of foreign jurisdictions, if: a. Wagering on that same type of live racing is lawful in the jurisdiction which is the natural person's principal residence; and b. The hub complies with the provisions of the ***Interstate Horseracing Act***, 15 U.S.C. Sections 3001 to 3007."[122]

- ***Kentucky***. "Accounts may be established for individuals *outside* of the Commonwealth of Kentucky, including foreign jurisdictions, if: (a) Pari-mutuel wagering on horse racing is lawful in the jurisdiction of the account holder's principal residence; (b) The hub complies with the ***Interstate Horseracing Act***, 15 U.S.C. secs. 3001 to 3007." "A licensee may operate the hub either independently or in association with one (1) or more racetracks licensed by the authority to run live races and conduct pari-mutuel wagering in Kentucky. Hub operations may be physically located on property other than that operated by a racetrack and may accept wagers at that location and shall comply with the ***Interstate Horseracing Act***, 15 U.S.C. secs. 3001 to 3007." "Account holders may communicate

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[121] Many of the states which allow simulcasting but do not expressly authorise remote account wagering services in their jurisdictions also refer to the IHA in their legislation or regulatory schemes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 5-112 (B) [***Exhibit AB-52***] ("The department may, upon request by a permittee, grant permission for electronically televised simulcasts of horse, harness or dog races to be received by the permittee. . . .The department may, upon request by a permittee, grant permission for the permittee to transmit the live race from the racetrack enclosure where a horse, harness or dog racing meeting is being conducted to a facility or facilities in another state. All simulcasts of horse or harness races shall comply with the ***interstate horse racing act of 1978*** (P.L. 95-515; 92 Stat. 1811; 15 United States Code chapter 57)." (emphasis added); COLO. REV. STAT. ANN. § 12-60-602(5)(b)(IV) [***Exhibit AB-53***] ("All simulcasting or horse races shall comply with the provisions of the federal "***Interstate Horseracing Act of 1978***", 15 U.S.C. secs. 3001-3007, as amended.") (emphasis added); MO. ANN. STAT. § 313.655 [***Exhibit AB-54***] ("1. An organization licensed to conduct racing in this state, with the approval of the commission, may contract to conduct pari-mutuel wagering on a simulcast of horse races held at race tracks in this state or other states or countries where the conduct of racing and wagering is permitted by law. 2. Any wagering made under this section shall take place within the confines of the licensee's race track pursuant to rules promulgated by the commission. The licensed race track may simulcast up to, but not more than the number of days in which it conducts live racing. . . 6. The provisions of the ***Federal Interstate Horseracing Act of 1978***, Title 15, Sections 3001 through 3007, U.S. Code, shall be instructive regarding the intent of this section.") (emphasis added).

[122] IDAHO CODE § 11.04.02.050(a)-(b) (emphasis added) [***Exhibit AB-55***].

instructions concerning account wagers to the hub *only* by telephonic or other electronic means."[123]

- ***Louisiana***. "Subject to applicable federal laws, including but not limited to the ***Interstate Horseracing Act of 1978*** (Chapter 57, commencing with Section 3001, of Title 15 of the United States Code) the commission may permit a licensee to participate in interstate common pools, including common pools which may include international jurisdictions." "Wagering accounts may be established for an individual whose principal residence is outside of the state if the racing association complies with all applicable provisions of federal and state law." "Agreements and contracts [for pari-mutual racing in another state or country] shall comply with all applicable laws of the United States (particularly 15 U.S.C. Section 3001 et seq., ***Interstate Horseracing Act***), and the laws of this state."[124]

- ***Maryland***. "(a) The intent of this section is similar to that of the ***Interstate Horseracing Act of 1978***, 15 U.S.C. §§ 3001 through 3007. (b) If the Commission approves, a licensee may contract to hold pari-mutuel betting on a race that is held at an out-of-state track where betting on racing is lawful." " Subject to the ***Interstate Horseracing Act of 1978***, 15 U.S.C. §§ 3001 through 3007, a licensee may simulcast races held in this State to another jurisdiction where betting on racing is lawful." "A telephone betting account may be established and maintained for an individual whose principal residence is outside this State if the racing association complies with all applicable provisions of federal and state law." "A 'telephone account betting system (TABS)' means a system, established by a licensed racing association and approved by the Commission, by which an individual may open an account in order to bet on horse races by telephone, electronic, or other means of communication."[125]

- ***Massachusetts***. "All simulcasts shall comply with the provisions of the ***Interstate Horse Racing Act of 1978***, 15 U.S.C. Sec. 3001 et seq. or other applicable federal law." "[W]agers may be made in person, by direct telephone call or by communication through other electronic media by the holder of the account to the licensee."[126]

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[123] KY. REV. STAT. ANN §§ 230.777(2); 230.779(1); 230.783(2) [***Exhibit AB-56***] (emphasis added).

[124] LA. REV. STAT. ANN. § 4:149.3; LA. ADMIN. CODE ANN tit. 35, §§ 12003(A); 12001; 10377 (emphasis added) [***Exhibit AB-57***].

[125] MD. CODE ANN. BUS. REG. § 11-804; MD. REGS. CODE tit. 09, §§ 10.04.24(C)(2); 10.04.24(A)(3) (emphasis added) [***Exhibit AB-58***].

[126] MASS. GEN. LAWS ANN., ch. 128C, § 2; *id*., ch. 128A, § 5C (emphasis added) [***Exhibit AB-59***].

- ***Oregon***. "If a licensee applies for authority to conduct mutuel wagering on horse races held at race courses outside this state, the commission may require that the licensee provide such evidence as the commission considers appropriate regarding the ability of the licensee to comply with the ***Interstate Horseracing Act of 1978***, 15 U.S.C. 3001 to 3007, as amended." "[A]ccounts can be established and operated for people whose principal residence is outside of the State of Oregon including residents of foreign jurisdictions if: (a) Wagering on that same type of live racing is lawful in the jurisdiction which is the natural person's principal residence; and (b) The hub complies with the provisions of the ***Interstate Horseracing Act***, 15 U.S.C. §§ 3001 to 3007."[127]

- ***Pennsylvania***. "An application for permission to establish a common pari-mutuel pool . . . shall contain . . .[a] copy of approvals required under the ***Interstate Horseracing Act of 1978*** (15 U.S.C.A. §§ 3001--3007)." "The race upon which patrons will be permitted to wager may be simulcast under section 216 of the act (4 P. S. § 325.216) or under the Interstate Horseracing Act of 1978 (15 U.S.C.A. §§ 3001--3007)."[128]

- ***Virginia***. "The Commission shall promulgate regulations and conditions regulating and controlling a method of pari-mutuel wagering conducted in the Commonwealth that is permissible under the ***Interstate Horseracing Act***, § 3001 et seq. of Chapter 57 of Title 15 of the United States Code, and in which an individual may establish an account with an entity approved by the Commission, to place pari-mutuel wagers in person or electronically." "Advance deposit account wagering' (hereafter account wagering) means a form of pari-mutuel wagering in which an individual may deposit money in an account with an account wagering licensee and then use the current balance to place pari-mutuel wagers in person or electronically."[129]

- ***Washington***. "The authorized advance deposit wagering service provider complies with the provisions of the ***Interstate Horseracing Act, 15 U.S.C. SS 3001 to 3007***, and the laws of the jurisdiction, which is the principal place of residence of the applicant." "'Advance deposit wagering' means a form of parimutuel wagering in which an individual deposits money in an account with an entity authorized by the commission to conduct advance deposit wagering and then the account funds are used to pay for parimutuel wagers made in person, by telephone, or through communications by other electronic means." "Account holders may communicate instructions concerning advance deposit wagers to the

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[127] OR. REV. STAT. § 462.710(6)(d); OR. ADMIN. R. 462-220-0020(2) (emphasis added) [***Exhibit AB-60***].

[128] PA. CODE § 173.3(c); § 190.3(c); § 190.4 (emphasis added) [***Exhibit AB-61***].

[129] VA. CODE ANN. § 59.1-369; 11 VA. ADMIN. CODE § 10-45-10 (emphasis added) [***Exhibit AB-62***].

advance deposit wagering service provider in person, by mail, telephone, or other electronic means."[130]

68. The individual state statutory and regulatory schemes for remote account wagering tend to be highly similar in almost all key respects. While no two state remote wagering laws are identical, there are core elements that are common to virtually every state remote gambling scheme. A review of the 18 state laws and regulations pertaining to remote account wagering results in a number of common practices and principles that govern most of the regulatory schemes. Most of these practices and principles are quite similar in form and substance to the regulations implementing the Antiguan regulatory scheme for remote gambling that were discussed by Antigua in considerable detail during the course of the Original Proceeding.[131]

5. IHA operations in the United States.

(a) Introduction.

69. There are currently over 20 domestic operators of remote gambling and betting services operating in the United States under licenses issued by one or more states.[132] The most prominent of these operators include companies with shares listed and publicly trading on major United States stock exchanges[133] and companies owned by states or other governmental bodies.[134] Some have

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[130] WASH. ADMIN. CODE §§ 260-49-0202(6)(CcC); 260-49-010(3); 260-49-060(5) (emphasis added) [***Exhibit AB-63***].

[131] Panel Report, paras. 32.3.6; First Submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTDS285 (1 October 2003) (the "***AB First Submission***"), paras. 28-74. Examples of some of the more common provisions in the state regulatory schemes are briefly discussed in the context of a "model" set of state gaming regulations at ***Schedule 3***, part A.

[132] Marc Falcone, Eric Hasler, Jason Ader, *The Global Account Wagering Industry: What Treasures Does It Hold?* (January 2002, Bear Stearns Equity Research), p. 64, Exhibit 28 [***Exhibit AB-64***] (identifying 23 "major" providers of remote account wagering services in the United States).

[133] *See, e.g.*, Youbet.com (NASDAQ:UBET); TVG.com, a subsidiary of Gemstar TV Guide International, Inc. (NASDAQ:GMST); XpressBet, Inc., a subsidiary of Magna Entertainment Corp. (NASDAQ:MECA).

[134] *See, e.g.*, CapitalOTB (state of New York); NYCOTB (New York City); 4NJBets.com (state of New Jersey).

been in continuous operations for decades[135] and *not one* has been prosecuted by the DOJ for their operations, whether under the Wire Act or otherwise.

(b) Sampling of prominent IHA operations.

70. A summary of some of the more prominent operations in the United States domestic market currently gives an indication of the significant extent of the apparently lawful remote account wagering industry in the United States.

71. YouBet.com, Inc. ("***YouBet***") is among the leading United States-based providers of telephone and Internet account wagering services on horse races.[136] YouBet currently has licenses in the states of California, Idaho, Oregon and Washington to operate an advance deposit wagering multi-jurisdictional wagering hub.[137] YouBet also accepts pari-mutuel wagers from punters in other states where existing state laws purport to prohibit or restrict the ability to accept pari-mutuel wagers from such states, nothwithstanding such prohibitions or restrictions.[138]

72. According to YouBet, it is legal to bet on horse racing over the Internet in 39 states and the District of Columbia.[139] YouBet has focussed on the United States wagering market through its main product, YouBet Express[SM], which features online wagering, simulcast viewing and

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[135] *E.g.*, CapitalOTB; NYCOTB.

[136] *See* www.youbet.com and www.youbet.com/faq/. Copies of YouBet's licenses and other pertinent information regarding the company can be found at ***Exhibit AB-65***.

[137] *Id.*, p. 8.

[138] YouBet.com, Inc., 2005 Annual Report on Form 10-K filed with the United States Securities and Exchange Commission (the "***SEC***") on 13 March 2006 (the "***YouBet 2005 10-K***") [included in ***Exhibit AB-65***], p. 8.

[139] The states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and Washington, D.C. *See* www.youbet.com/faq/.

information on horse racing.[140] Total wagers placed with YouBet for 2004 were US $395.2 million.[141]

73. According to filings with the SEC, "YouBet covers action at more than 100 domestic and international horse tracks and offers dozens of races daily. Our web-based, interactive system completes the wagering process, including exotic selections, much faster than face-to-face or telephone transactions with winning outcomes instantly credited to the customer's account for future events or prompt disbursement."[142] Specifically, YouBet's customers "receive the ability to wager on a wide selection of horse races in the United States, Canada, Australia, South Africa, Hong Kong, and the United Kingdom."[143]

74. As discussed at a recent meeting of securities analysts sponsored by YouBet, YouBet is aggressively targeting international markets[144] and younger customers to stimulate accelerating grow its account wagering business.[145] According to YouBet's Chairman, "YouBet's handle[146] improvements continue to be driven by our ability to attract and engage new customers, particularly in the age 21-40 segment, as we continue to focus on marketing programs that introduce the sport of horse racing and our wagering platforms to a broader, younger, tech-savvy audience."[147] YouBet has also announced that it is "working to expand the YouBet.com brand, its products, and its services throughout the United States and in select international markets."[148]

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[140] YouBet.com, Inc., Quarterly Report on Form 10-Q filed with the SEC on 4 May 2005 (the "***YouBet 10-Q***") [included in ***Exhibit AB-65***], pp 10-11.

[141] YouBet 2005 10-K, p. 2.

[142] YouBet 10-Q, p. 11.

[143] *Id.*

[144] YouBet Analyst Day presentation materials dated 23 March 2006, slide 11 [included in ***Exhibit AB-65***].

[145] *Id.*, slide 17.

[146] The term "handle" in this context means gross amount wagered.

[147] *Id.*

[148] *Id.*

75. In an effort to increase handle and expand business, YouBet has diversified its product offerings through new technologies that expand the availability of its gaming product offerings and services.[149] In September 2004, YouBet launched an automated interactive voice recognition system, "YouBet Mobile," to capture a greater share of the amount wagered telephonically. The YouBet Mobile website was launched in December 2005.[150]

76. Gemstar TV Guide International, Inc., operating TVG: The Interactive Horseracing Network ("***TVG***"),[151] is another prominent advance deposit wagering service. TVG offers a remote wagering service that "combines live, televised coverage from over 60 of America's premier tracks with the convenience of wagering from home online, by phone, and where available, set-top remote control."[152] TVG accepts Internet, telephone and satellite television account wagering from residents of 12 states.[153] Players can open accounts on the Internet, by telephone or through the post,[154] and can fund accounts by check, money order, credit card or debit card.[155] In 2005, TVG processed approximately US $396.9 million in wagers.[156]

77. In March 2005, TVG announced the launch of the first, nationwide interactive television ("***ITV***") horse racing application that accompanies TVG's network television channel. This ITV horse racing application is available to more than nine million ITV-enabled cable television subscribers. In certain markets, this new ITV horse racing application allows TVG network

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[149] YouBet 2005 10-K, p. 3.

[150] *Id.*

[151] Copies of TVG's licenses and other pertinent information regarding the company can be found at ***Exhibit AB-66***.

[152] TVG Press Release dated 12 May 2005.

[153] *See* www.tvg.com/iefive/about/faq.asp#CananyonebeaTVGsubscriber. Wagering services are currently offered by TVG in California, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, North Dakota, Ohio, Oregon, Virginia, Washington and Wyoming. *Id.*

[154] *See* www.tvg.com/Open/Information.aspx?section=Help%20General%20FAQs.

[155] *See id.*

[156] Gemstar TV Guide International Inc., 2005 Annual Report on Form 10-K filed with the SEC on 8 March 2006, p. 21.

viewers to participate in remote pari-mutuel wagering on horse races using their satellite television system.[157] As of 30 June 2006, the TVG network was available in approximately 18.5 million domestic cable and satellite homes.[158] Additionally, this TVG network is carried on Fox Sports Net in approximately five million southern California homes for two or more hours, five days a week.[159]

78. TVG is licensed by the Oregon Racing Commission, California Horse Racing Board and the Washington Horse Racing Commission.

79. XpressBet, Inc. ("***XpressBet***") is another remote account wagering operator with offices located in eight states in the United States.[160] XpressBet is a subsidiary of Magna Entertainment Corp., a publicly held company ("***MEC***"), and permits customers from 39 states[161] to place wagers by telephone and over the Internet on horse races at over 100 North American racetracks and internationally on races in Australia, South Africa and Dubai.[162] For the year ended 31 December 2005, the amount wagered through XpressBet was approximately US $135.1 million.[163] In addition to XpressBet, MEC owns and operates Horse Racing TV, a 24-hour horse racing television network, and operates a Europe-facing Internet site offering betting on horse races from the United States and elsewhere to consumers in a number of European countries.[164]

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[157] Gemstar TV Guide International Inc., Quarterly Report on Form 10-Q filed with the SEC on 8 August 2006, p. 15.

[158] *Id.*, p. 17.

[159] *Id.*

[160] *See* http://www.xpressbet.com/Mfirsttime.aspx?langversion=English#whatis. Copies of XpressBet's licenses and other pertinent information regarding the company can be found at ***Exhibit AB-67***.

[161] *Id.*

[162] Magna Entertainment Corp., Annual Report on Form 10-K filed with the SEC on 15 March 2005, p. 5.

[163] Magna Entertainment Corp., Annual Report on Form 10-K filed with the SEC on 16 March 2006, p. 25.

[164] *See* www.magnabet.co.uk.

80. XpressBet currently holds wagering licenses issued by the California Horse Racing Board, the Washington Horse Racing Commission, the Idaho Racing Commission, the Virginia Racing Commission and the Oregon Racing Commission.[165] The Oregon license enables XpressBet to open accounts and accept wagering instructions on behalf of United States citizens in respect of dog races and to open accounts and accept wagering instructions on behalf of *non-United States citizens* in respect of horse races.[166] XpressBet opens wagering accounts on behalf of residents from 39 states and processes wagering instructions from account holders in respect of races conducted throughout the United States and in other countries.[167]

81. The Racing Channel, Inc. (the "***Racing Channel***") is another Internet-based pari-mutuel account wagering service licensed by the State of Oregon.[168] It is a wholly-owned subsidiary of Greenwood Racing, Inc. ("***GRI***"), a leader in pari-mutuel wagering through its racetrack, off-track and account wagering operations. GRI produces live racing coverage that is distributed on the Racing Television Network via cable and satellite broadcasting. In 2004, the Racing Channel changed to a free subscriber based system open to active account holders of Oneclickbetting.com, Phonebet.com, Colonialdowns.com and CDPhonebet.com. All Racing Channel account wagering is "hubbed" through its service in Oregon. Like XpressBet, the Racing Channel offers gambling and betting services on North American horse race internationally through its Europe-facing Internet site, www.trni.tv.[169] The Racing Channel takes wagers from residents of 33 states and six territories,[170] and processed wagers aggregating US $99.8 million in 2005.[171]

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[165] *See* www.xpressbet.com.

[166] *Id.*

[167] *Id.*

[168] *See* www.oneclickbetting.com. Copies of the Racing Channel's license and other pertinent information regarding the company can be found at ***Exhibit AB-68***.

[169] *See* www.oneclickbetting.com.

[170] www.oneclickbetting.com/ocb_sign_up_form.asp.

[171] Oregon Racing Commission Licensee Handle Disclosure.

82. AmericaTab, Ltd. ("***AmericaTab***") offers two Internet wagering services under its Winticket.com and BresBet.com brands. AmericaTab offers secure online wagering to account holders, in addition to traditional telephone account wagering services.[172] AmericaTab is licensed by the Oregon Racing Commission,[173] and in 2005 processed bets aggregating US $126.7 million.[174] AmericaTab accepts accounts from residents of 35 states.[175]

83. US Off Track, LLC ("***US Off-Track***") is another account wagering service that owns and operates PayDog.com, an Internet site offering racing and wagering for the greyhound, thoroughbred and harness industry.[176] US Off-Track is licensed by the Oregon Racing Commission.[177] US Off-Track's "PayDog" product offers teller-assisted telephone, touch-tone and voice recognition wagering. Users may also place a wager online from a home computer or from a wireless Internet ready phone or Palm device.[178] Customers from 35 states[179] may fund accounts by online deposits through NETeller, as well as by credit or debit card, wire transfer and other conventional means.[180] US Off-Track reported total wagers of US $25.8 million for 2005.[181]

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[172] *See* www.winticket.com/aboutticket.aspx.

[173] *See* www.winticket.com and http://www.americatab.com/new_wagertote/affiliate/1100/brisbet.html About us

[174] Copies of AmericaTab's license and other pertinent information regarding the company can be found at ***Exhibit AB-69***.

[175] www.winticket.com/faq.htm.

[176] *See* http://www.paydog.com/AboutUS.asp. Copies of US Off-Track's license and other pertinent information regarding the company can be found at ***Exhibit AB-70***.

[177] *See* www.paydog.com.

[178] *Id.*

[179] www.paydog.com/checkstate.asp. However, only residents of 18 states may wager on dog races through US Off-Track. *Id.*

[180] *Id.* at FAQ no. 7.

[181] Oregon Racing Commission Licensee Handle Disclosure.

84. US Off-Track has also expanded into the global market, linking up with an established publicly traded European wagering company, listed on the London Stock Exchange, as well as broadcasting into the European marketplace on Sky television, channel 431.[182]

85. Capital District Regional Off-Track Betting Corporation ("***Capital OTB***") is a public benefit corporation owned and operated by the State of New York that offers account wagering on horse races via a phone wagering service, referred to as the "Phone-A-Bet System," which allows gamblers to place wagers with a telephone operator or through a touch-tone service.[183] Capital OTB has announced that it has plans to begin Internet account wagering services.[184]

86. Capital OTB also owns and operates its own horse racing television station that allows patrons to wager through Capital OTB's account wagering system "from the comforts of home."[185] There are no apparent restrictions on locations that punters may wager from, "enabling customers to wager from almost anywhere in the world."[186] According to the company, Capital OTB processes bets aggregating more than US $200 million annually.[187]

87. Another government-owned remote account wagering operator is New York City Off-Track Betting Corporation ("***NYCOTB***"), which was established in 1971 as the first legal, off-track, pari-mutuel wagering operation in the United States. NYCOTB processes over US $1.0 billion in wagers annually,[188] and with more than 40,000 phone accounts, NYCOTB is the largest

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[182] *Id.*

[183] *See* www.capitalotb.com/NewWeb/about.otb.main.frame.htm. *See* ***Exhibit AB-71***.

[184] *See* http://www.capitalOTB.com.

[185] See http://www.capitalotb.com/?action=about.

[186] www.capitalotb.com/default.aspx?action=about.

[187] *Id.*

[188] *See* www.nycotb.com/_uploads/docs/ntrarelease2.pdf. *See* ***Exhibit AB-72***.

telephone betting operation in the industry.[189] There are no apparent residency requirements to use the NYCOTB service.[190]

88. New Jersey Account Wagering ("***NJAW***") is owned by a public corporation of the state of New Jersey and offers account wagering on horse racing from New Jersey residents only though telephone and the Internet.[191] A single NJAW account can be used to bet online, by telephone and at self-service terminals located throughout New Jersey racetracks.[192]

(c) IHA account betting compared to Antigua-based account betting.

89. United States operators offering gambling and betting services over the Internet generally use the same basic method of acquiring customers, funding wagering accounts and taking and processing bets as do service providers operating from Antigua.

90. By way of example, the process for a customer to open an account and place bets with YouBet is virtually identical to the same process for customers of World Sports Exchange Ltd. ("***WSE***"), an Antiguan-based provider of cross-border gambling and betting services.[193]

91. ***Schedule 2*** to this submission graphically illustrates the similar nature of wagering with both YouBet and WSE, demonstrating the processes gone through by a customer who made the same bets on the same races occurring on 23 September 2006. This process is described in the following paragraphs.

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[189] *Id.*

[190] www.nycotb.com/taams_secure/index.cfm?pageId=7&tier1=2.

[191] *See* www.4njbets.com. *See* ***Exhibit AB-73***.

[192] *Id.*

[193] www.wsex.com. WSE has been licensed and operating in Antigua since 1997. A copy of its current Antiguan license is attached at ***Exhibit AB-74***, and is posted on WSE's Internet site as well [http://www.wsex.com/images/license05-06.jpg]. WSE is one of the Antiguan operators that has been the subject of DOJ prosecution. One of its former principals, Jay Cohen, was convicted of violating the Wire Act by virtue of operating WSE and spent 15 months in a federal prison in Las Vegas, Nevada. Three other principals or former principals remain under clouds of federal indictments. *See* Panel Report, paras. 3.216, 3.236.

Opening an account and betting at YouBet.com

92. To open an account at YouBet, a prospective customer submits an on-line application containing the customer's full name, e-mail address, residential address, mailing address, telephone number, social security number and birth date. The customer also selects a "user ID" and password for the account. Upon submitting the on-line application, the customer indicates agreement to YouBet's terms and conditions and grants permission to YouBet to verify information in the application through an independent third-party, in the case of YouBet, Equifax. In less than half a minute, the customer receives notice whether or not the application has been approved, with any approval being displayed at the bottom of the web page with the application.

93. Following approval of the application, the customer immediately receives an e-mail containing a link to verify the player's e-mail address. The customer follows the directions set forth in the e-mail and is immediately directed to a YouBet account activation screen that indicates whether the player's account is active. From that point, after entering the "user ID" and password, the customer can sign in to the YouBet online wagering board and fund the account by pressing the "FUND NOW" button located on the wagering board page.

94. A customer may fund a YouBet account by means of "Express Cash," which consists of funds transferred electronically and instantaneously from the player's checking account, or by credit card, debit card, check, money order or wire transfer. If the customer choses to fund the account by credit or debit card, the customer is then directed to a "Quick Case Forms" page that requires the customer to select the amount of the deposit, the credit card number, the credit card expiry date and other personal information. When the customer pays with a credit or debit card and clicks on the "Submit" button, it constitutes an agreement to "fully authorize the use of [this] card." If a customer has any problem funding a wagering account, the customer is directed to an account representative for manual processing.

95. A few minutes after the funding transaction, a customer can verify funding of the account by selecting the "Account" tab and clicking on the "Account Balance" button. At that point, a pop-up window appears on the screen with the customer's account balance. With the account funded, the customer is ready to place wagers. This entire process has taken place in a few short minutes, completely remotely with no physical contact between the prospective punter and YouBet or anyone else.

96. To place a bet on a horse race, the YouBet customer selects a horse track and then receives the odds and wagering alternatives for races at the selected track. The customer can also choose to watch a live video feed from the track.

97. When the customer is ready to bet, the customer selects the "Wagee" tab and the "Wager Pad" button. The customer selects the track, race, amount of wager, type of bet, and horse, and then submits a wager. A "Wager Confirmation" pop-up window then asks the customer to confirm the wager information, which is displayed in the form of a wagering ticket on the screen. If the customer confirms the wager, the bet is placed.

98. The customer can then view the race or check the results later by selecting the "RESULTS" tab. The customer can also review the results of its own wagers on an automated "WAGER LOG" or by checking the balance in its YouBet account.

Opening an account and betting at World Sports Exchange

99. To open an account at WSE, a prospective customer submits an online application containing the customer's full name, e-mail address, mailing address and telephone number, as well as a selected "username and password." When the customer submits the application, it acts as confirmation of the legal age of the customer and as acknowledgment of agreement to WSE's rules and regulations. WSE requires the customer to submit legible copies of credit cards and government identification, which are then verified through third party verification service providers.

100. The customer may then fund a WSE wagering account by means of credit card, debit card or other means of electronic payment. After funding the account, a customer can verify the funds have arrived by selecting one of the personalized reports offered by WSE under the "REPORTS" tab.

101. In order to place a bet on a horse race, the customer selects a horse track and then receives the odds and wagering alternatives for races at the selected track.

102. When the customer is ready to bet, the customer selects a track from the site's "HORSE RACING MENU." After selecting a track, the customer can view all available races, wagering alternatives and odds. The customer then can select the type of wager to be placed, and then enters the amount of the wager and terms of the wager in a separate window. The customer is then informed the wager is accepted.

103. After the race is completed, the customer may review the results of the race and outcome of the wager on a number of automated reports offered by WSE.

6. Recent prosecutions.

104. There has *never* been a federal prosecution of a domestic remote gambling service provider operating under the auspices of the IHA, whether before or after the 2000 amendment. Further, despite indications by the United States during the course of the Original Proceeding that prosecutions of certain of these domestic operators were pending,[194] some three years later there have still not been any prosecutions of domestic companies offering remote wagering in the United States in reliance on the IHA.

105. On the other hand, there have been a number of federal prosecutions of licensed Antiguan remote gambling service providers. In addition to the prosecutions against a number of Antiguan operators which commenced back in 1998,[195] since the end of the reasonable period of time in this

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[194] *See* Panel Report, para. 6.588.

[195] Responses of Antigua and Barbuda to the Panel's First Questions to the Parties, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (9

dispute, the United States has announced the indictments of a number of individuals and companies for alleged violations of United States federal laws in connection with the operation of licensed, *Antiguan* providers of cross-border gambling and betting services.[196]

106. In May 2006, a federal district court in the District of Columbia announced the indictment (the "***May 2006 Indictment***")[197] of a number of individuals and companies, including two Antiguan residents and a prominent Antiguan-based and licensed remote gambling and betting service provider.[198] All of the criminal offenses alleged in the May 2006 Indictment are predicated on purported violations of the Wire Act for operating the licensed, Antiguan service provider.[199] This prosecution remains pending.

107. On 17 July 2006, the DOJ announced[200] the indictment of 11 individuals and four companies (the "***July 2006 Indictment***").[201] As in the case of the May 2006 Indictment, all offenses alleged in the July 2006 Indictment are predicated on purported offenses of the Wire Act, although the July 2006 Indictment also accuses the defendants of violating the Travel Act and the IGBA.[202] And, also as in the case of the May 2006 Indictment, all offenses stem from the operation of an Antiguan-licensed cross-border gambling and betting service provider, BOS (Antigua) Ltd.

January 2004) (the "***AB Answers***"), Question 12.

[196] *See* discussion at paragraphs 106 through 107 below.

[197] *See* the May 2006 Indictment at ***Exhibit AB-75***.

[198] The company named in the indictment, W.W.T.S. Inc. ("***WWTS***"), had actually previously sold its operations in Antigua and, as of the date of the indictment, a new entity was the licensed operator of the services formerly provided by WWTS.

[199] *Id*., para. 2.

[200] *See* DOJ Press Release (17 July 2006) (the "***July 2006 Press Release***") at ***Exhibit AB-76***.

[201] *See* the July 2006 Indictment at ***Exhibit AB-77***.

[202] *Id.*, para. 22.

("***BOS***"), a subsidiary of BetonSports, plc, a public company listed on the Alternative Investment Market of the London Stock Exchange.[203] This prosecution remains pending.[204]

7. Developments in Congress.

108. Although the United States has not adopted any legislation to bring it into compliance with the DSB Rulings,[205] since the determination of the reasonable period of time by the Arbitrator in the 21.3 Proceeding legislation directly addressing the cross-border provision of gambling and betting services *has* been introduced into the United States Congress and one bill–HR 4411–has been adopted by the House of Representatives.[206] HR 4411 is in many significant respects *directly contrary* to the DSB Rulings, clearly entrenching and institutionalising the discrimination inherent in the application of current United States law addressing cross-border gambling and betting services.

109. HR 4411 has two main parts. The first is framed as an amendment to the Wire Act, among other things clearly bringing within its coverage gambling using any electronic transmission, including the Internet,[207] and also ending any ambiguity as to the applicability of the Wire Act to gambling services other than sports betting.[208] The second part of the bill adds a new law to

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[203] *Id.*, paras. 3, 19. *See* the information regarding BOS at the Internet site of the Antiguan Directorate of Offshore gaming, www.antiguagaming.gov.ag/licenseeInfo_withLinks.asp?ID=1132.

[204] The July 2006 Indictment attracted considerable attention, as the indictment had been kept unsealed until the general manager of BOS, David Carruthers, stopped at an airport in the United States in transit. Mr Carruthers, a citizen of the United Kingdom and an outspoken defender of Internet gambling and proponent of United States regulation of the Internet gambling industry, was arrested and kept in custody for some weeks before being released, subject to the requirement that he remain under supervised release in the St. Louis, Missouri, area. As a result of the prosecution, BOS has ceased trade. *See* Matt Richtel, "Arrest Made in Crackdown on Internet Betting," New York Times, C1 (18 July 2006) [***Exhibit AB-78***].

[205] *See* discussion at paragraphs 33 through 45 above.

[206] H.R. 4411, 109th Cong. 2nd Sess., "The Internet Gambling Prohibition and Enforcement Act" (12 July 2006); H.R. 4777, 109th Cong. 22nd Sess., "The Internet Gambling Prohibition Act" (16 February 2006).

[207] *Id.*, § 101(2), amending § 1081(5).

[208] *Id.*, § 101(3), adding a new § 1081(6).

existing federal statutes addressing money laundering and other financial crimes, expressly criminalising financial transactions related to gambling prohibited under federal law.[209]

110. Critically, HR 4411 has a number of specific exemptions from its coverage in favour of *domestic* remote gambling. *First*, the legislation expressly excludes from its coverage remote gambling that occurs solely within the boundaries of a state–or "*intrastate*" gambling.[210] *Second*, it excludes remote gambling that occurs on Native American lands within a state.[211] In both of these instances, HR 4411 also requires that the intrastate or Native American remote gambling must be authorised by state or applicable Native American law and the operators must be licensed and operating in compliance with the applicable law, and further that:

> "[T]he State or tribal law *requires a secure and effective location and age verification system* to assure compliance with age and location requirements . . .."[212]

111. HR 4411 also contains a provision that would appear to exempt domestic, state-owned lotteries from its coverage,[213] and another exempting remote gambling involving so-called "fantasy leagues," where punters engage in contests amongst themselves involving "teams" made of up a number of athletes from various actual teams and the results of the contests are determined from the various individual performances of the "team" members.[214]

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[209] *Id*., § 201, adding new §§ 5361-5363 to Title 31, U.S.C.

[210] *Id*., § 102, adding new § 1084(c).

[211] *Id*.

[212] *Id*. (emphasis added). The insertion of the language regarding age and location identification would appear to infer the belief of Congress that it is currently technologically feasible to do so. *See* discussion at paragraphs 144 through 146 below.

[213] *Id.*, adding a new § 1084(b)(3).

[214] *Id*., § 101(3), adding a new § 1081(6)(D)(ix).

112. Further, and as explained above, HR 4411 retains the current exemption of remote interstate gambling on horse racing, through two provisions that in essence preserve the status quo under United States law with respect to remote betting on horse races.[215]

113. Far from prohibiting domestic remote gambling, HR 4411 serves to clarify and expand the scope of domestic remote gambling while precluding the provision of these services on a cross-border basis from other countries. Clearly, if this legislation were to be approved by the United States Senate and signed by the American president, it would be directly contrary to the obligations of the United States under Article XVI of the GATS without any possibility of meeting the requirements of Article XIV of the GATS for justification.[216]

114. At the time of the preparation of this Submission, the leader of the republican party in the United States Senate is openly and aggressively attempting to get HR 4411 or similar legislation approved by the Senate before the expiration of its current term on or about 6 October 2006.[217]

V. ADDITIONAL CONSIDERATIONS UNDER ARTICLE XIV OF THE GATS

A. INTRODUCTION

115. In the Original Proceeding, the United States ultimately asserted a defence of the Wire Act, the Travel Act and the IGBA under Article XIV of the GATS. The Appellate Body ruled that the United States had provisionally justified the statutes under Article XIV as "measures . . . necessary to protect public morals or to maintain public order."[218] This conclusion was based on the assessment by the Panel and the Appellate Body of the claims of the United States with

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[215] *Id.*, §§ 105-106. *See* discussion at paragraphs 62 through 64 above.

[216] As will be discussed further, in addition to being problematic under the chapeau of Article XIV of the GATS, this legislation adversely affects the ability of the United States to argue that the Wire Act, the Travel Act and the IGBA are "necessary" to "protect the public health and welfare" given the legislation's unambiguous embracing of domestic remote gambling. *See* discussion at paragraphs 130 through 146 below.

[217] Nancy Zuckerbrod, "Frist Targets Internet Gambling," Washington Post (13 September 2006) [***Exhibit AB-79***].

[218] AB Report, para. 373(D)(iii)(c).

respect to specific "concerns" which the United States associated with "remote" gambling as opposed to "non-remote" gambling.[219] Since the date of the Panel Report, there have been significant factual developments which call into question the continuing validity of the United States' arguments in justification of the Wire Act, the Travel Act and the IGBA under Article XIV of the GATS.

B. REMOTE GAMBLING IN THE UNITED STATES IN ADDITION TO THAT UNDER THE IHA

116. It is important to realise that the Wire Act, the Travel Act and the IGBA are not couched in terms of prohibiting *remote* gambling, *per se*. Rather, each of the statutes on its face covers gambling which is *cross-border* in nature–whether interstate or international. In addition to gambling under the IHA, there is currently in the United States a considerable amount of state-sanctioned gambling which is "remote," some of which is cross-border and some of which is not.

117. In addition to remote gambling on horse races sanctioned under the IHA, Americans are permitted to bet remotely on sports contests, casino games and lotteries under a number of circumstances as well.

1. Remote telephone and Internet account wagering on sports contests in Nevada.

118. Nevada authorises the use of intrastate interactive gaming systems provided the systems are secure, reliable and reasonable assurance can be given that players will be at least 21 years of age.[220] Nevada sports betting operators may therefore accept wagers via telephone or the Internet, provided the punter is physically located within the state of Nevada.[221]

119. Under the Nevada interactive gaming statute, the term "interactive gaming" is defined as:

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[219] *Id.*, para. 323.

[220] NEV. REV. STAT. § 463.750(2).

[221] NEV. GAM. REG. 22.140(1)-(2).

> "[T]he conduct of gambling games through the use of communications technology that allows a person, utilizing money, checks, electronic checks, electronic transfers of money, credit cards, debit cards or any other instrumentality, to transmit to a computer information to assist in the placing of a bet or wager and corresponding information related to the display of the game, game outcomes or other similar information."[222]

The term "communications technology" is defined by the interactive gaming statute as:

> "[A]ny method used and the components employed by an establishment to facilitate the transmission of information, including, without limitation, transmission and reception by systems based on wire, cable, radio, microwave, light, optics or computer data networks, including, without limitation, the Internet and intranets."[223]

120. The Nevada interactive gaming statute imposes a physical presence requirement on service providers, and only Nevada-based casino resort hotels that already hold state gambling licenses may qualify for a license to conduct interactive gaming.[224] A foreign remote gaming provider cannot provide interactive gaming services to Nevada residents without committing a felony offence punishable by imprisonment for one to ten years and a fine not to exceed US $50,000.[225]

121. The Nevada Gaming Commission has enacted regulations governing interactive wagering which include, *inter alia*:

- *Licensing interactive wagering systems*. The licensing requirements for interactive wagering systems are similar to those for other types of gaming in Nevada.
- *Establishing an interactive wagering account*. To establish an interactive wagering account, a punter must personally appear at the premises of the gambling establishment (or a satellite or affiliated establishment) and present his

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[222] NEV. REV. STAT. § 463.016425(1).

[223] *Id.*, § 463.016425(2).

[224] *Id.*, § 463.750(5).

[225] *Id.*, § 463.750(6)-(7).

or her official identification.[226] The gambling establishment must then record the punter's name, address, telephone number, date of birth and gender.[227] A punter can fund an account with cash or receive credit.[228] Interactive account wagering is not limited to Nevada residents, and non-residents of Nevada can get a waiver for permission to use the account sports wagering system for up to eight days.[229]

- *Operation of interactive wagering accounts*. There is a detailed scheme governing the operation of interactive wagering transactions. For each interactive wagering transaction, the gambling establishment is required to record the nature of the transaction (*i.e*, each deposit, withdrawal, wager, payout, service charge, *etc*.).[230] All records must be electronically recorded and retained for at least 60 days.[231]

122. Nevada sports betting service providers offer gambling services under the state interactive wagering laws and regulations, and today, many of these operators offer bet-from-anywhere-at-any-time wagering services to Nevada residents.[232] Nevada residents can bet from home or another convenient location with Nevada betting service providers on a wide variety of professional or amateur sports events or races located in the United States or in a foreign jurisdiction.[233]

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[226] NEV. GAM. REG. 22.140(6)(b).

[227] *Id*., 22.140(6)(c).

[228] *Id*., 22.140(6)(c)(5).

[229] *Id*., 22.140(7).

[230] *Id*., 22.140(8).

[231] *Id*., 22.140(9).

[232] Stations Casino, for instance, offers an online race and sports book service known as "Sports Connection" to Nevada residents and visitors. *See* ***Exhibit AB-80***. [www.stationcasinos.com/templates/venue_corp_ia_tall.aspx?p=7&d=30&v=603].

[233] *See* NEV. GAM. REG. 22 (Race Books and Sports Pools), 26A (Off-Track Pari-Mutuel Wagering) and 26B (26B.010 to 26B.210, Off-Track Pari-Mutuel Sports Wagering).

2. Remote telephone and postal lottery gambling.

123. All lotteries currently operating in the United States are government-operated monopolies. As of 2006, state lotteries operate in 41 states and the District of Columbia.[234] Some United States lotteries allow punters to purchase lottery tickets via telephone or post and to direct payment of winnings by telephone and receive them by post.

(a) Massachusetts.

124. The Massachusetts Lottery offers cross-border remote lottery play. Residents or non-residents of Massachusetts can order lottery tickets by telephone and pay for the tickets by cash, check or credit card.[235] The remote sales policy is described on the Massachusetts Lottery Internet site as follows:

> "Can non-residents play the game? If so, how do they collect?
>
> Yes, anyone 18 and over can purchase any Lottery product at any agent location. All players can collect their prizes at the same locations listed in question four. Additionally, Season Tickets can be purchased directly from any sales agent while in the state or from out of state, by calling l-800-222-TKTS. The ticket can be registered in the owner's name by completing and returning the registration form to the Lottery. Season Tickets are available for Megabucks, Mass Cash, Mega Millions and Cash Winfall."[236]

125. This policy is condoned by Massachusetts law, which expressly permits a person living in another state to call a toll-free telephone number, place an order for lottery tickets on a credit card, and receive a lottery ticket subscription from the Massachusetts Lottery by United Parcel Service

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[234] La Fleur's 2004 World Lottery Almanac, Lottery Fast Facts, p. 16-17. *See* ***Exhibit AB-81***. Since the date of this publication, the state of North Carolina has adopted a lottery. http://lottery.nc.gov/.

[235] *See* www.masslottery.com/about/faq.html; *see also* MASS. REGS. CODE tit. 961, §§ 2.53(2)(i), 2.54(2)(i) and 2.55.(2)(i) ("The Lottery may cancel a season ticket or multiple drawing ticket which has been purchased . . . via an authorized telephone order in the event the check presented or credit card used for payment has insufficient funds for the purchase."). *See* ***Exhibit AB-82***.

[236] *See* www.masslottery.com/about/faq.html.

delivery.[237] Winning prizes are automatically sent to the out-of-state player.[238]

(b) Illinois.

126. Illinois residents may purchase lottery tickets by telephone or mail from the Illinois Lottery using a check, credit card, or debit card.[239] In connection with these remote sales, the Illinois Lottery Internet site states:

> "You can play 13, 26 or 52 consecutive weeks of Lotto or Little Lotto in advance from the convenience of your home by calling 800-PLAY-LOTTO (800-752-9568). Call Monday-Friday between 7:00 a.m. and 4:00 p.m. Pay with MasterCard® or VISA®. A confirmation of your numbers and the date that your games started will be mailed to you within two weeks. We'll even check your numbers for you, and if you win, we'll automatically mail your check to you."[240]

127. These remote sales are sanctioned by the Illinois Lottery regulations, which provide that the state lottery "may engage in direct sales of tickets at any selling points it establishes within the State. The [lottery] may also sell its products by means of telephone, electronic transmission, parcel delivery services and, to the extent permitted by federal statutes, through the U.S. Mail."[241]

128. With respect to claiming lottery winnings, Illinois residents can claim lottery prize winnings of up to US $1.0 million by mail.[242]

(c) Other examples of remote lottery gambling.

129. Other examples of remote lottery play in the United States include:

- The **Maine Lottery** offers subscription ticket sales to its residents by post on the Tri-

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[237] *See* ***Exhibit AB-83***.

[238] *See* www.masslottery.com/about/faq.html ("How do Season Ticket holders receive their prize? All prizes, with the exception of the jackpot prize are mailed directly to the owner").

[239] *See* www.illinoislottery.com/subsections/Subscrip.htm and www.illinoislottery.com/subsections/LottoSub.pdf. *See* ***Exhibit AB-84***.

[240] www.illinoislottery.com/subsections/OnLineRules.htm#_Toc123708141 (discussing up to 364 draws); *see also*, ILL. ADMIN. CODE tit. 11, § 1170.140.

[241] *Id.*

[242] *See* www.illinoislottery.com/subsections/games.htm; *see also* Illinois Lottery claim form included within ***Exhibit AB-84***.

State Megabucks game.[243] With a subscription, players can play certain lottery games for up to 52 consecutive weeks. Players can pay for the subscription by check, money order, or credit card.[244] To complete their remote lottery experience, players can claim any winnings by post.[245]

- The **Maryland Lottery** allows Maryland residents to purchase lottery subscriptions.[246] Players can purchase up to 52 weeks of Lotto or MegaMillions game tickets by posting a subscription form and paying by check or money order.[247] Winnings can be claimed by post as well.[248]
- The **New Hampshire Lottery** sells intrastate subscriptions to its residents by telephone and via post.[249] Players can purchase lottery subscription by check, money order or credit card.
- The **New York Lottery** allows state residents to purchase ticket subscriptions via post.[250] With a subscription, players can purchase lottery tickets for up to 52 weeks by money order or check and receive any winnings by post.[251]

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[243] *See* www.mainelottery.com/players_info/faq.html and www.mainelottery.com/games/megasubscribe.html. [***Exhibit AB-85***].

[244] *Id*.

[245] *See* www.mainelottery.com/pdf/ClaimForm.pdf; www.mainelottery.com/players_info/prizes.html; *see also*, CODE ME. R. 18-364 § 17.

[246] *See* www.mdlottery.com/subscriptions.html; *see also* MD. REGS. CODE tit. 14 § 01.03.02(C) [***Exhibit AB-86***].

[247] *See* www.mdlottery.com/resources/lotto_subscription_form_s.pdf; www.mdlottery.com/resources/megamillions.pdf.

[248] *See* Maryland Lottery mail claim form included within ***Exhibit AB-86***.

[249] *See* http://www.nhlottery.com/subscription/ [***Exhibit AB-87***].

[250] *See* www.nylottery.org/ny/nyStore/cgi-bin/ProdSubEV_Cat_401_SubCat_201673_NavRoot_300.htm; and www.nylottery.org/storelayoutimages/lottosub8-01.pdf [***Exhibit AB-88***]

[251] *See* www.nylottery.org/lottosubscriptions/lotto_subscription_application_download.pdf

- The **Vermont Lottery** sells lottery tickets to its residents by post, and allows the collection of all winnings via post as well.[252] The Vermont Lottery regulations and web site both state that players can purchase subscription lottery tickets by check, money order or credit card.[253]
- The **Virginia Lottery** allows Virginia residents to purchase lottery tickets via the post using a lottery subscription form.[254]

C. THE ISSUE OF "NECESSITY" AND REASONABLY AVAILABLE ALTERNATIVE MEASURES

1. The shifting burden of proof and alternative measures.

130. In the Original Proceeding the Appellate Body ruled that the United States had provisionally justified the Wire Act, the Travel Act and the IGBA under Article XIV of the GATS by determining the statutes as "'measures . . . necessary to protect public morals or to maintain public order', within the meaning of paragraph (a) of Article XIV of the GATS.[418]"[255] In reaching this conclusion, the Appellate Body established a methodology for assessing claims under Article XIV of the GATS, including the burden of proof.

131. First, the party invoking a defence under Article XIV has the initial burden of proof to present a *prima facie* case that its measure is "necessary" to protect the identified interests. At this stage of the enquiry, the panel is to assess the evidence submitted and "weigh and balance" the various factors applicable to the case. If the panel concludes that the party has established its

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[252] *See* http://www.vtlottery.com/where-to-buy/subscription.asp; http://www.vtlottery.com/where-to-buy/subscription-form.asp; and http://www.vtlottery.com/faqs/faqs.asp#q12 [***Exhibit AB-89***].

[253] *See* http://www.vtlottery.com/where-to-buy/subscription.asp.

[254] www.valottery.com/faq/kb_detail.asp?id=75 [***Exhibit AB-90***].

[255] AB Report, para. 327.

prima facie case, then it should find the measure "necessary" under Article XIV(a) of the GATS.[256]

132. Once the measure has been found "necessary," then the burden of proof passes to the complaining party to raise a WTO-consistent alternative measure that the complaining party believes the responding party could have taken to address its Article XIV concerns instead of the challenged measures.[257] Once an alternative is raised by the complaining party, the burden of proof then shifts back to the responding party to demonstrate that the proposed alternative is not "reasonably available." If it successfully demonstrates that the alternative is not reasonably available, then the responding party has met the requirements of provisional justification under Article XIV of the GATS.[258]

2. Argument that prohibition is "necessary" is no longer valid.

133. The United States' *prima facie* case that prohibition of remote gambling and betting services is "necessary" for purposes of Article XIV of the GATS is no longer valid. In the Original Proceeding, the case of the United States under Article XIV was predicated entirely on the "remote/non-remote" distinction.[259] In light of its own sanctioned domestic remote gambling industry–particularly betting on horse racing–the United States itself has clearly arrived at the conclusion that prohibition is not "necessary" to protect citizens from the concerns the United States has associated with remote gambling. This conclusion has recently been affirmed by the

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[256] *Id*., paras. 309-310.

[257] *Id.*, paras. 311, 320. Although the Appellate Body said that it is the burden of the complaining party to "raise" an alternative measure, it did not discuss what level of proof was necessary in connection with the "raising" of the alternative. The allocation of the burden of proof to the complaining party in the context of an affirmative defence of the responding party has been subject to some criticism. *See* Michelle T. Grando, *Allocating the Burden of Proof in WTO Disputes: A Critical Analysis*, Journal of International Economic Law, Vol. 9, No. 3, p. 651 n. 161 (advance publication 17 August 2006) [***Exhibit AB-91***].

[258] AB Report, para. 311.

[259] *Id*., para. 332.

United States House of Representatives in the express language of HR 4411, clearly opting for local regulation over remote gambling services over prohibition.[260]

3. Alternative measures and the Original Proceeding.

134. The Appellate Body's determination that the United States had provisionally justified the Wire Act, the Travel Act and the IGBA under Article XIV of the GATS was due in large part to the failure, in the view of the Appellate Body, of Antigua to demonstrate to the Original Panel that any "reasonably available alternative measures" existed.[261] It is unclear why the Appellate Body came to this conclusion, as Antigua had raised throughout the course of the Original Proceeding a number of alternatives to prohibition that it asserted were available to the United States in order to address the concerns that the United States alleged were present in "remote" gambling.[262]

135. In its first submission, Antigua presented almost 15 pages of discussion on the Antiguan regulatory scheme applicable to its remote gambling services. [263] Antigua also observed the efficacy of its regulatory scheme in addressing the concerns identified by the United States with respect to the provision of remote gambling and betting services on a number of occasions in the discussion.[264] Further discussion on the issue was presented to the Original Panel at the first panel session,[265] as well as at the second panel session, where Antigua observed:

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[260] *See* discussion at paragraphs 62 through 64 above.

[261] AB Report, para. 326.

[262] In its submissions to the Appellate Body in the Original Proceeding, Antigua had referred to alternative measures, including its own regulatory scheme. *See* AB Appellant Submission, paras. 103-104, 114; Appellee Submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, AB-2005-1 (1 February 2005), para. 94. *See also* Opening Statement of Antigua and Barbuda, Meeting of the Division, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, AB-2005-1 (21 February 2005), para. 38.

[263] AB First Submission, paras. 28-74.

[264] *See, e.g., id.*, paras. 37-38, 41-47, 53, 56-57, 60, 73-74.

[265] *See* Opening Statement of Antigua and Barbuda, First Panel Meeting, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (10 December 2003), paras. 4, 74, 80-85, 87.

> "For instance, the United States could cooperate with Antiguan operators in verification of social security numbers or other government means of identification. Or, gambling and betting accounts with Antiguan operators could be opened in person at news agents or other specifically designated shops. In such circumstances the age verification system would be exactly the same as that used by lotteries in the United States."[266]

136. It is clear that the Original Panel took Antigua's evidence into account during its deliberations in the Original Proceeding.[267] In the Panel Report, the Original Panel observed:

> "*Antigua has asserted that it has in place a regulatory regime that is sufficient to address the specific concerns identified by the United States* with respect to the remote supply of gambling and betting services. These include measures aimed at countering money laundering that meet international standards[971], requirements for identity verification, fraud prevention and gambling addiction[972], and that under age gambling is expressly prohibited by Antiguan law[973]."[268]

137. Antigua submits that the alternatives raised by it during the course of the Original Proceeding retain their relevance to this proceeding today.[269]

4. Other alternative measures.

138. Under current circumstances, there are a number of other alternative measures reasonably available to the United States in order to protect its residents from the concerns identified by the United States with respect to remote gambling.

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[266] Opening Statement of Antigua and Barbuda, Second Panel Meeting, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (24 January 2004), para. 78. *See also id.*, para. 77.

[267] Panel Report, paras. 3.14, 3.175, 3.178, 3.180-3.181, 3.209, 3.218, 3.290-3.291, 6.522, 6.525.

[268] *Id.*, para. 6.522 (emphasis in original, footnotes omitted).

[269] Antigua is uncertain as to why the Appellate Body concluded that Antigua had failed to identify any reasonably available alternative measures in the Original Proceeding. *See* AB Report, paras. 320, 326. At one point the Appellate Body said "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 Wire Act, the Travel Act, and the IGBA." *Id.*, para. 326 (emphasis added). It is true that the Original Panel did not make any *express* finding that any of the alternatives suggested by Antigua were "reasonably available," however it is Antigua's belief that the Original Panel felt it did not need to look further into the issue, given the United States' failure to engage with Antigua in discussions regarding its concerns. *See* Panel Report, paras. 5.25-5.27. *See* AB Appellee Submission, paras. 75-78.

(a) Existing regulatory schemes under the IHA.

139. The most apparent alternative measures reasonably available to the United States are the regulatory schemes already in place in a number of states governing the remote provision of gambling and betting services under the IHA. As Antigua has already pointed out, 18 American states currently have regulatory schemes of one kind or another governing the domestic provision of these services.[270] As the United States federal government has left its states free to determine what gambling to allow and under what conditions,[271] these regulatory schemes for remote gambling currently in existence in the United States should constitute "alternative measures" for the purpose of a "necessary" analysis under Article XIV of the GATS as determined by the Appellate Body in the Original Proceeding.

140. Most of these states require the use of methods of electronic age, identity or location verification[272] and have provisions regarding suspicious transactions as well as requirements regarding the provision of information on problem gambling resources.[273]

(b) Other analogous existing regulatory schemes.

141. A number of states have adopted age and identity verification schemes in connection with Internet sales of tobacco products in the United States.[274] These statutory schemes rely primarily on age and location verification technologies and methods that have proliferated in recent years.[275]

142. Some states have statutory requirements for age and identify verification in connection with remote sales of alcoholic beverages.[276]

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[270] *See* discussion at paragraphs 66 through 69 above.

[271] 15 U.S.C. § 3001(a)(1).

[272] *See* ***Schedule 3***, parts A.3 and B.1.

[273] *See* ***Schedule 3***, parts A.5(d)-(e).

[274] *See* ***Schedule 3***, part B.2.

[275] *See* discussion at paragraphs 144 through 146 below.

[276] *See* ***Schedule 3***, part B.3.

143. Having informally tolerated gambling services provided via the Internet by operators of licensed gambling establishments, in 2005 the United Kingdom adopted new legislation (the "***Gambling Act 2005***")[277] completely overhauling its regulatory scheme for gambling and betting services. In addition to provisions dealing with conventional "bricks-an-mortar" gambling, the Gambling Act encompasses remote gambling and provides for the licensing and regulation of remote gambling service providers operating from the United Kingdom.[278] The Gambling Act also contains a number of provisions designed to protect against under-age gambling, compulsive behaviours and other of the concerns associated with gambling.[279]

(c) Existing age, identity and location verification technologies.

144. With the growth of electronic commerce has come demand for effective and efficient identification verification methods. Age, identity and location are commonly verified by a number of techniques that rely on information furnished by the consumer to the service provider and then cross-referenced against proprietary and public record databases.[280]

145. Increasingly, age, identity and location are being verified by sophisticated on-line technologies that can be accessed on the Internet or purchased as a software interface.[281] Some of these methods are highly effective. For example a product called ExpectID™ was endorsed in August 2006 by the Michigan State Liquor Control Commission as an effective age verification product for remote purchase of alcoholic beverages.[282]

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[277] United Kingdom, Gambling Act 2005, chapter 19 [***Exhibit AB-92***].

[278] *Id.*, 67, 89.

[279] *Id.*, 45-64, 70(3).

[280] *See* ***Schedule 3***, part C.

[281] *Id.*, part D. *See, e.g.*, www.idology.com, www.choicepoint.com, www.trufina.com, www.verid.com, www.i-mature.net and www.netidme.com.

[282] *Id.*, part D.1. www.idology.com.

146. Another product depends on the use of biometric technology, using a device that can determine fairly narrow age ranges by scanning a person's hand.[283]

VI. CONCLUSIONS

147. In light of the foregoing, Antigua respectfully requests that the Panel:

(1) *find* that the United States has not taken measures to comply with the DSB Rulings;

(2) *find* that the Wire Act, the Travel Act and the IGBA remain in violation of the United States' obligations to Antigua under, *inter alia*, Article XVI of the GATS without meeting the requirements of Article XIV of the GATS; and

(3) *recommend* that the DSB request the United States to bring the Wire Act, the Travel Act and the IGBA into conformity with the obligations of the United States under the GATS.

[283] *Id.*, part D.5. www.i-mature.net.