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

REBUTTAL SUBMISSION
OF ANTIGUA AND BARBUDA

30 October 2006

SERVICE LIST

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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

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I. INTRODUCTION

1. On 16 October 2006, the United States of America (the "***United States***") filed its First Written Submission[1] 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.* Antigua and Barbuda ("***Antigua***") is pleased to make this rebuttal submission to the Panel.

2. Despite its strenuous efforts to the contrary, in its first submission the United States has highlighted the obvious–that it has *done nothing* to come into compliance with the recommendations and rulings of the Dispute Settlement Body (the "***DSB***") of the World Trade Organisation (the "***WTO***") in WT/DS285 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (the "***Original Proceeding***").

3. In Antigua's view, the clearest option available to the Panel in this proceeding is to rule that, because the United States has *done nothing* to come into compliance with the recommendations and rulings of the DSB in the Original Proceeding (the "***DSB Rulings***"), it remains out of compliance with the DSB Rulings. Such a concise (and warranted) determination would make unnecessary any further evaluation of the arguments and claims of the parties and the third parties in this proceeding.

4. Were the Panel to go further, Antigua believes that it would not be necessary to go *much* further, as under settled WTO jurisprudence the United States is not permitted a "second chance"[2] to persuade the Panel in a proceeding under Article 21.5 of the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "***DSU***") that it has met its burden of

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[1] First Written Submission of the United States, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSB by Antigua and Barbuda*, WT/DS285 (16 October 2006) (the "***US Art. 21.5 Submission***").

[2] *See* discussion at paragraphs 18 through 28 below.

proof under the "chapeau" of Article XIV of the WTO's *General Agreement on Trade in Services* (the "***GATS***").[3]

5. And, finally, regardless of whether the United States should be given a "second chance," it remains clear that, as before, the United States has failed to meet its burden of proof under the chapeau of Article XIV of the GATS that its measures are not applied in a discriminatory fashion or otherwise constitute a disguised restriction on trade in services.

6. This submission will consider each of the foregoing points in order. However, it is first important to correct some of the misstatements of law and fact contained in the first submission of the United States in this proceeding. This submission will conclude with a brief discussion regarding Antigua's concerns over the strategies pursued by the United States in this proceeding.

II. CORRECTIONS TO THE UNITED STATES SUBMISSION

A. THE FIRST PARAGRAPH

7. Setting the tone for the entire document, in the opening paragraph of its first submission the United States makes four significant misstatements. *First*, it fails to correctly identify the fundamental issue in this proceeding. Rather than being "whether the United States can show that three . . . federal criminal statutes . . . do not constitute a means of arbitrary or unjustifiable discrimination between countries,"[4] the issue in this proceeding is *whether the United States is in compliance with the DSB Rulings*.

8. Contrary to what the United States claims, in its *second* error of the short first paragraph, the "issue" as stated by the United States is not "unsettled" at all. Both the Original Panel and the

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[3] As discussed below, were the United States to be given a chance in this proceeding to satisfy the burden of proof it failed to meet in the Original Proceeding, then on the same hand Antigua should be given the opportunity to reargue before the Panel issues in the Original Proceeding with respect to which the panel in the Original Proceeding (the "***Original Panel***") or the Appellate Body had determined that Antigua had not met *its* burden of proof. *See* discussion at paragraph 28 below.

[4] US Art. 21.5 Submission, para. 1. *See also id.*, para. 4, where the same misstatement is made.

Appellate Body *ruled* that the United States had *not* shown in the Original Proceeding that the "three . . . federal criminal statutes . . . do not constitute a means of arbitrary or unjustifiable discrimination between countries."[5] The chapeau issue was resolved just as definitively as every other of the "many claims" in the Original Proceeding.

9. The *third* error in the opening paragraph of the submission is the United States' claim that the applicable federal statutes[6] are "facially non-discriminatory."[7] In fact, as Antigua had pointed out during the course of the Original Proceeding,[8] the statutes are indeed facially discriminatory.[9] The operative language of the Wire Act provides:

> "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in *interstate* or *foreign* commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both."[10]

By its application only to bets or wagers in "interstate or *foreign* commerce," the Wire Act clearly and on its face does not apply to *intra*state bets or wagers. As Antigua cannot provide its cross-

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[5] Report of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/R (10 November 2004) (the "***Panel Report***"), paras. 6.600, 6.608; 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) (the "***AB Report***"), paras. 364, 367-372, 373(D)(vi)(a).

[6] 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***].

[7] US Art. 21.5 Submission, para. 1.

[8] *See, e.g.*, 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), para. 92; Second Written Submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (9 January 2004), paras. 30-34.

[9] As observed by the United States, for purposes of this dispute the Travel Act and the IGBA rely on the applicability of the Wire Act to make a conduct unlawful. Therefore, the language of the Wire Act is operative. *See* US Art. 21.5 Submission, para. 19.

[10] 18 U.S.C. § 1084(a) (emphasis added).

border services on an *intra*state basis, the Wire Act *is* facially discriminatory.[11]

10. *Fourth*, in the first paragraph of its first submission the United States claims that an examination of a measure for compliance with the chapeau of Article XIV of the GATS is limited to "a matter of statutory interpretation."[12] Although the language of a measure may be a starting point in assessing the compliance or consistency of the measure with the WTO agreements,[13] it is by no means the exclusive avenue of enquiry–the actual *application* of the measure by the responding WTO Member is important as well.[14]

B. OTHER SIGNIFICANT ERRORS

11. Throughout its submission the United States makes a number of additional misstatements or errors of law or fact. These range from the relatively simple–such as the assertion[15] that Antigua had not cited the operative text of the Interstate Horseracing Act (the "***IHA***")[16]–to the patently absurd:

> "The present case is different: it involves an affirmative defense, *an explicit finding by the Appellate Body that neither the panel nor the Appellate Body had found that the affirmative defense did not apply* and repeated language indicating that compliance with the recommendations and rulings could be achieved by showing or demonstrating that the affirmative defense applied."[17]

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[11] The United States repeats its "facially non-discriminatory" claim with respect to the Wire Act in paragraph 17 of the US Art. 21.5 Submission, where it also claims that "Antigua does not argue otherwise." As noted above, Antigua has consistently argued otherwise. *See supra* note 8.

[12] US Art. 21.5 Submission, para. 1.

[13] Appellate Body Report on *US – Corrosion Resistant Steel Sunset Review*, para. 168.

[14] Appellate Body Report on *US – Shrimp*, para.160; Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 29; Appellate Body Report on *Chile – Alcoholic Beverages*, paras. 61-66.

[15] US Art. 21.5 Submission, para. 20.

[16] 15 U.S.C. §§ 3001-3007 [***Exhibit AB-4***]. *See* First Written Submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSB by Antigua and Barbuda*, WT/DS285 (25 September 2006) (the "***AB Art. 21.5 Submission***"), para. 50.

[17] US Art. 21.5 Submission, para. 54 (emphasis added). *See* discussion at paragraph 19 below, note 31.

12. A particularly inexplicable statement is made by the United States in paragraph 42 of its first submission, where it states:

> "In particular, the Appellate Body noted that neither the Panel nor the Appellate Body itself had found that the U.S. measures were out of compliance."

13. This statement is made without reference to the report of the Appellate Body or any other source. But it is most obviously *wrong*, as both the Original Panel and the Appellate Body found the United States measures–the Wire Act, the Travel Act and the IGBA–out of compliance with Article XVI of the GATS and not entitled to the affirmative defence of Article XIV of the GATS.[18]

14. Similarly, in its submission the United States avers that it was "explicitly invited" by the Appellate Body to demonstrate, apparently in this proceeding, to meet its burden of proof on the chapeau of Article XIV of the GATS.[19] Antigua is aware of no such "explicit" (or implicit, for that matter) "invitation."

C. A PLEA FOR ACCURACY

15. While the United States might argue that its serial misstatements and mischaracterisations are simply harmless advocacy, Antigua submits that glaring, purposeful errors such as those referenced above have no place in a voluntary system of dispute resolution that relies on the reciprocal good faith of all participants.[20]

III. THE UNITED STATES HAS DONE NOTHING

16. It is undisputed that the United States has done nothing to come into compliance with the DSB Rulings. In what amounts to its third permutation on "compliance"[21] in the context of this dispute, the United States now asserts that the "measures taken to comply" for purposes of this

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[18] AB Report, paras. 373(C)-(D), 374.

[19] US Art. 21.5 Submission, para. 44.

[20] See Appellate Body Report on *US – FSC*, para. 166; Appellate Body Report on *Thailand – H-Beams*, para. 97. *See also* discussion at paragraphs 66 through 74 below.

[21] *See* discussion at paragraphs 66 through 69 below.

proceeding are the three statutes ruled contrary to the United States' obligations under the GATS in the Original Proceeding–the Wire Act, the Travel Act and the IGBA.[22]

17. There being no assertion by the United States, nor any evidence, that any of the three statutes have been amended, supplemented or otherwise changed since the determination of the reasonable period of time under Article 21.3 of the DSU,[23] it is clear that the United States has taken no action towards compliance. Having taken no action towards compliance, the United States remains *out of compliance* with the DSB Rulings.[24]

IV. THE UNITED STATES DOES NOT GET A "SECOND CHANCE"

A. INTRODUCTION

18. In its first submission, the United States unabashedly takes the position that it is entitled to reargue its case under the chapeau of Article XIV of the GATS.[25] In doing so, the United States appears to rely on two utterly specious arguments–*first*, it alleges that the Original Panel and the Appellate Body did not *really* find that the United States had not met its burden of proof under the chapeau of Article XIV of the GATS[26] and *second*, it asserts that failures with respect to the establishment of affirmative defences should be treated differently than failures of a *complaining party* to establish proof required of it.[27]

B. FAILURE TO MEET THE BURDEN OF PROOF

19. At a number of turns in its first submission the United States attempts to cast its failure to meet its burden of proof with respect to the satisfaction of the chapeau as something less, or different, than what is really was–a failure of proof:

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[22] US Art. 21.5 Submission, para. 43.

[23] Antigua has independently verified that none of the three federal statutes has been amended since 2002. *See* ***Exhibit AB-112.***

[24] *See* AB Art. 21.5 Submission, paras. 44-45.

[25] US Art. 21.5 Submission, paras. 3, 4, 43-46, 53-54.

[26] *See, e.g. id.*, paras. 2, 42, 46, 54.

[27] *Id.*, para. 54.

> " . . . the Panel and the Appellate Body in the underlying proceeding were *not able to conclude* that the United States had assumed its burden of meeting [the chapeau]."[28]
>
> "Instead, the Appellate Body noted that it would not overturn under DSB Article 11 review the Panel's finding that the United States '*had not shown*' or '*had not demonstrated*' that its measures met the requirements of the Article XIV chapeau, and thus *did not establish* that the measures were entitled to an affirmative defense."[29]
>
> "Thus, where the responding party has a valid affirmative defense that *did not succeed* only because a lack of a full showing in the original proceeding . . .."[30]
>
> " . . . an explicit finding by the Appellate Body that *neither* the panel nor the Appellate Body had *found that the affirmative defense did not apply* . . .."[31]

20. The reality is that the United States simply failed to meet its burden of proof on the affirmative defence, and thus the defence failed. As the European Communities observed in its submission,[32] the United States has made selective use of language contained in the AB Report to obscure the *core finding* by the Appellate Body:

> "[W]e *find* that the United States has not established that these measures satisfy the requirements of the chapeau."[33]

21. It is beyond doubt that in order for a defence under Article XIV of the GATS to succeed, the responding party must not only establish whether a "challenged measure falls within the scope of one of the paragraphs of Article XIV,"[34] but it must also prove that the "measure satisfies the

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[28] *Id*., para. 2 (emphasis added).

[29] *Id*., para. 42 (emphasis added).

[30] *Id*., para. 46 (emphasis added).

[31] *Id*., para. 54 (emphasis added). Antigua has been unable to locate in the AB Report any such explicit finding" of the Appellate Body.

[32] Third Party Submission of the European Communities, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285 (23 October 2006) (the "***EC Art. 21.5 Submission***"), para. 14.

[33] AB Report, para. 372.

[34] *Id*., para. 292.

requirement of the chapeau of Article XIV."[35] Thus, the United States' defence under Article XIV of the GATS did not succeed in the Original Proceeding, and *thus* the DSB Rulings–that the United States bring the Wire Act, the Travel Act and the IGBA into conformity with its obligations under the GATS.[36]

22. Astonishingly, in its first submission the United States blames the failure of its proof on the "limited evidence" before the Original Panel and the Appellate Body, as if somehow the United States had not been permitted to thoroughly present its evidence during the course of the Original Proceeding:

> "Now, at this stage of the dispute, the parties have the opportunity to present, and the Panel to consider, *complete* evidence on the interaction between the IHA and federal criminal statues. And, the evidence submitted by the United States concerning the text, legislative history, and applicable principles of statutory construction *was in fact not presented to the panel in the original proceeding*."[37]

23. In reality, the failure of the United States to meet its burden of proof rests squarely on its own shoulders. Despite Antigua having observed in its very first submission in the Original Proceeding that the United States might rely on Article XIV of the GATS and discussing the application of the provision at some length,[38] the United States did not even discuss Article XIV until its second–and final–written submission in the Original Proceeding.[39] Antigua claimed to the Appellate Body that the delay of the United States in asserting an Article XIV defence until so late in the Original Proceeding should have precluded any review of the defence,[40] but this point was

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[35] *Id.*

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

[37] US Art. 21.5 Submission, para. 53. *See also, id.*, paras. 2, 3, 5, 51-54.

[38] First Submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (1 October 2003), paras. 204-212.

[39] AB Report, para. 274.

[40] 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), paras. 72-77.

contested by the United States[41] and rejected by the Appellate Body.[42] In the course of contesting Antigua's position before the Appellate Body, the United States averred that it had "provided detailed evidence and argumentation on Article XIV in its second submission."[43] In addition, the United States remonstrated with Antigua for not asking the Original Panel to extend the term of its review if Antigua thought that the late assertion of the Article XIV defence by the United States was prejudicial to Antigua[44]–but at no point did the United States argue that it had been prejudiced or unable to submit sufficient evidence. Nor did the United States itself ask the Original Panel for an additional opportunity to submit further Article XIV evidence. Under the circumstances, it is absurd for the United States to argue that it had an inadequate opportunity to present its "complete evidence" in the Original Proceeding.

C. NO DIFFERENCE BETWEEN A FAILURE OF AN AFFIRMATIVE DEFENCE AND A FAILURE OF A COMPLAINANT'S PROOF

24. Although the United States seemingly concedes that the Appellate Body ruling in *EC – Bed Linen (Article 21.5 – India)* precludes the re-argument of a failed primary case in a proceeding under Article 21.5 of the DSU, in a virtually incomprehensible paragraph of its first submission the United States apparently would limit this doctrine to the case-in-chief of a complaining party.[45]

25. Under WTO jurisprudence, it is clear that there is no distinction between the burden of proof on a complainant to establish its case and the burden of proof on a responding party to

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[41] 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. 34-38.

[42] AB Report, para. 276.

[43] US Appellee Submission, para. 35.

[44] *Id.*, paras. 35-37.

[45] US Art. 21.5 Submission, para. 54.

establish an affirmative defence,[46] and in its first submission the United States provides no justification for saying so.

D. THE ISSUE HAS BEEN RESOLVED

26. A party that has, in the words of the United States, "failed to make its case on a particular issue"[47] has done just that–and under the unambiguous rule set forth in *EC – Bed Linen (Article 21.5 – India)* and others,[48] there is no "second chance."[49] As Antigua noted in its first submission in this proceeding, this rule clearly applies whether the failure is of establishing a *prima facie* case or whether the failure is of a fully considered issue.[50]

27. As both the European Communities[51] and Japan[52] have observed in this proceeding, to decide otherwise and give the United States an opportunity to meet its failed burden of proof in a proceeding under Article 21.5 of the DSU would, in the able words of Japan, run "directly counter to the plain language and structure of the DSU," opening up "a potentially endless loop."[53]

28. Taken to its logical extension, the position of the United States would open up a considerable amount of the Original Proceeding to re-assessment in this proceeding. For if the United States is to have a "second chance" on the chapeau, Antigua should have its "second chance" on the numerous other "measures" submitted to the Original Panel with respect to which

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[46] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14. *See also* Panel Report on *Argentina – Textiles and Apparel*, paras. 6.34-6.37. However, the Appellate Body has ruled that, if anything, the burden of proof of a responding party with respect to the application of the *chapeau* is in fact "a heavier task." Appellate Body Report on *US – Gasoline*, pp. 22-23.

[47] US Art. 21.5 Submission, para. 54.

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

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

[50] AB Art. 21.5 Submission, para. 32.

[51] EC Art. 21.5 Submission, paras. 3-34.

[52] Third Participant Submission of Japan, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285 (23 October 2006), paras. 7-10.

[53] *Id.*, para. 8.

Antigua was found to have offered insufficient proof in the Original Proceeding. After all, using the logic of the United States,[54] until the Appellate Body rendered its decision in the Original Proceeding, Antigua had no real way of knowing how the issue would ultimately come out. Perhaps also Antigua should have its "second chance" at defeating the United States' assertion of "necessity" under Article XIV of the GATS now that Antigua knows precisely how to meet its burden of proof.[55] Clearly, this approach is not sustainable.[56]

V. THE BURDEN IS NOT MET

A. INTRODUCTION

29. In its first submission, Antigua presented substantial evidence and argument as to why, even were the United States entitled to reargue its case under the chapeau of Article XIV of the GATS, the United States case would again fail. Not only does the IHA, on its face, expressly authorise remote gambling on an intra- and interstate basis,[57] but in practice the IHA has been applied to fuel a substantial domestic sanctioned, licensed and regulated industry.[58]

30. Ignoring the reality of its significant domestic industry and the fact that no remote gambling service provider operating under the authority of and in compliance with the IHA has

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[54] US Art. 21.5 Submission, para. 52.

[55] Antigua realises that in its first submission, it has also argued some points that were raised if not considered in the Original Proceeding. However, Antigua believes not only that there are changed circumstances and developments that justify submission of new evidence in this regard, but also agrees with the European Communities that Antigua is in a bit of an awkward situation given the position of the United States in this proceeding–for if the United States gets to reargue its Article XIV defence, Antigua should be allowed to reargue its positions on Article XIV as well. *See* EC Art. 21.5 Submission, para. 41; AB Art. 21.5 Submission, paras. 46-146.

[56] Antigua submits that, if the Panel is to allow the United States a "second chance" on the chapeau of Article XIV of the GATS, then the Panel should inform the parties via a preliminary ruling in order to allow Antigua to make a supplementary submission on not only the chapeau of Article XIV, but on the other areas in which Antigua was found to have failed to meet its burden of proof in the Original Proceeding.

[57] *See* discussion at paragraphs 31 through 45 below. Incredibly, the United States continues to maintain that the IHA does not on its face permit interstate, remote wagering despite the plain words of the statute. *See* US Art. 21.5 Submission, paras. 20-25.

[58] This industry was described in substantial detail by Antigua in its first submission. *See* AB Art. 21.5 Submission, paras. 65-103.

ever been subject to prosecution, the United States continues to rely on its selective and haphazard "repeal by implication" reasoning as its sole basis of proof. As Antigua demonstrated in its first submission, the United States' position with respect to the IHA and the relationship between the IHA and the Wire Act is simply wrong.[59] And, if there was any doubt previously about the discriminatory application of United States law when it comes to remote gambling, as well as about whether the IHA authorises domestic remote gambling in the United States, these doubts were emphatically put to rest by the United States Congress and the president with the recent enactment into law of the so-called "Unlawful Internet Gambling Enforcement Act of 2006" (the "***New Prohibition Law***"), adopted by the Congress on 30 September 2006 and signed into law by the president on 13 October 2006.[60]

B. ADDITIONAL MATTERS REGARDING THE IHA AND THE WIRE ACT

31. Despite the poverty of the United States argument, it may be helpful to briefly revisit the IHA-Wire Act issue. The United States either miscomprehends or misconstrues certain fundamental provisions of the IHA along with the practical and actual realities of the present remote gambling landscape operating in the United States by virtue of the IHA.

32. The IHA was passed by the United States Congress in 1978 and was intended to "regulate interstate commerce with respect to wagering on horseracing, in order to further horseracing and legal off-track betting industries in the United States."[61] In connection with the adoption of this legislation, the Congress also found that:

> "(1) the *States should have the primary responsibility for determining what forms of gambling may legally take place within their borders*;
>
> (2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests; and

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[59] AB Art. 21.5 Submission, paras. 48-61.

[60] [WHAT IS THE PROPER CITATION FOR THIS?] [***Exhibit AB-113***]. *See* discussion at paragraphs 46 through 60 below.

[61] 15 U.S.C. § 3001(b).

(3) *in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers*."[62]

33. The IHA gives the individual 50 states the primary responsibility of determining what horserace wagering can take place legally within their borders.[63] The IHA also allows interstate horserace wagering between two states provided it is legal in both the state where the bet takes place and the state where the person placing the bet is located.[64] This definition of interstate off-track wagering, which was expanded and clarified by the 2000 amendment to the IHA, clearly authorises interstate wagering via the Internet from one state to another:

> "interstate off-track wager" means 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 . . .."[65]

34. The legislative history of the IHA makes its intent concerning the level of deference to the states and preemption or exclusion of federal criminal law even more apparent:

> "To ensure that the bettor is not overburdened by a potentially higher cost for interstate wagering, the Act provides that no parimutuel off-track betting system may employ a takeout which is higher for interstate wagers than for the comparable in-state wager unless such higher takeout is provided for by state law in the off-track state. *This procedure is intended to conform with the prevailing view that these matters are generally of state concern and that the states' prerogatives in the regulation of gambling are in no way preempted by this or other federal law*."[66]

35. To clarify its relation to existing federal law, the legislative history of the IHA indicates that:

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[62] *Id.*, § 3001(a)(emphasis added).

[63] *Id.*, § 3001(a)(1).

[64] *Id.*, § 3002(3).

[65] *Id.* (emphasis added).

[66] S. REP. NO. 95-1117, at 1 (1978), *reprinted in* U.S.C.C.A.N. 4144, 4146 [***Exhibit AB-17***].

> "While this bill provides for the regulation by the Federal Government of interstate wagering on horseracing, there will be no Government enforcement of the law. *Any person accepting an interstate wager other than in conformity with the act will instead be civilly liable in a private action . . ..*"[67]

36. The United States, while providing the Panel with certain of the generic rules of statutory construction under United States law, does not indicate how or why the Wire Act could allow for the prosecution of someone operating pursuant to the IHA. As one commentator has observed, "[t]he enactment of the [IHA] alone proves Congress' recognition of the legitimacy and legality of interstate wagering on horseracing between state-authorized facilities. Congress would not have passed a statute regulating an industry that it deemed altogether illegal."[68] It is patently absurd to suggest, as the United States apparently does,[69] that the IHA–with its extensive provisions regarding interstate remote wagering, revenue sharing and state regulation–would have been put in place solely to (i) provide *civil* remedies for what (the United States would argue) remains *criminal* conduct and (ii) allow racetracks to receive and share revenue from this (the United States would argue) *illegal* activity.

37. Despite the United States' protests to the contrary, the IHA must and can be harmonised with the Wire Act. In essence, what the IHA did was take one course of conduct that had arguably been prohibited by the Wire Act out of its coverage under certain conditions and circumstances, while leaving the remainder of the Wire Act's coverage completely intact. For the position taken by the United States concerning the Wire Act to be given effect, the entire regulatory scheme along with the preclusion of criminal claims predicated by the Congress in the IHA must be ignored–or itself be "repealed by implication." This would be completely contrary to United States law concerning statutory construction. The IHA was enacted later than the Wire Act and it is far more

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[67] *Id.* (emphasis added).

[68] 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***], at 725.

[69] *See* US Art. 21.5 Submission, paras. 33, 35.

specific than the Wire Act.[70] The IHA is specific to the interstate horseracing industry while the Wire Act is a generic criminal law aimed at the transmission of gambling information. While repeal by implication is disfavoured, it occurs when a subsequent or a more specific statute cannot be reconciled with an earlier statute.[71]

38. In its first submission**,** the United States focussed solely on *one* method of repeal by implication and conveniently ignored the second:

> "Where there are two acts upon the same subject, *effect should be given to both if possible*. There are two well-settled categories of repeal by implication: (1) *Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one*; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."[72]

39. The conflict, if any, between the IHA, the later statute, and the Wire Act, the earlier statute, over interstate wagering on horseracing results in a repeal by implication of the Wire Act *to the extent of the conflict*. Simply put, interstate wagering on horseracing is not subject to the Wire Act because the statutory scheme and Congressional intent made the participants subject to only civil liability even for non-compliance with the IHA. United States law allows for two different types of repeal by implication and does not require that the later act cover the *entire* subject matter–just that there is an irreconcilable conflict between portions of the applicable statutes.

40. In its submission, the United States also fundamentally misconstrues *Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Association, Inc.* ("***Sterling***").[73] A review

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[70] *Legality of Interstate Wagering*, at 728.

[71] *E.g., United States v. Belt*, 319 U.S. 521, 522 (1943) (provisions of earlier act impliedly repealed by later act) [***Exhibit AB-114***]; *United States v. Louwsma*, 970 F.2d 797, 800 (11th Cir. 1992) (more specific statute repeals or controls in conflict with general statute) [***Exhibit AB-27***]; *Bobula v. United States Department of Justice*, 970 F.2d 854, 857 (6th Cir. 1992) (comprehensive and exclusive legislative scheme controls over prior legal remedies) [***Exhibit AB-115***].

[72] *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936) (emphasis added) [***Exhibit AB-116***].

[73] 989 F.2d 1266 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993) [***Exhibit AB-30***].

of the facts and the court decisions in *Sterling* is instructive. *Sterling* involved a dispute between Suffolk Downs, a horseracing track located in the state of Massachusetts, and Lincoln Greyhound Park, located in the state of Rhode Island, concerning the scope of permissible gambling allowed under the IHA. Lincoln Greyhound Park operated an off-track betting establishment accepting interstate off-track wagers pursuant to the IHA.[74]

41. This interstate gambling on horseracing by Lincoln Greyhound Park was legal under the law of Rhode Island, but Lincoln Greyhound Park had failed to obtain the approval of Suffolk Downs as required by the IHA. As a result, Suffolk Downs brought suit against Lincoln Greyhound Park in federal court in Rhode Island.[75] In its lawsuit, Suffolk Downs sought an injunction for two claimed legal violations by Lincoln Greyhound Park, the first for a purported violation of the IHA and the second for a purported violation of the federal *Racketeer Influence and Corrupt Organizations Act* ("***RICO***").[76]

42. The lower court refused to grant injunctive relief to Suffolk Downs and instead granted summary judgment to Lincoln Greyhound Park, holding that Lincoln Greyhound Park could not be liable to Suffolk Downs as a matter of law for either a violation of the IHA or RICO.[77] In reaching this decision, the court carefully examined the relationship between the IHA and the Wire Act:

> "The Court concludes that Sterling's claim under this section [RICO] lacks merit and constitutes inappropriate bootstrapping. Sterling attempts to use a law Congress designed to deter criminal organized activity [RICO] as a vehicle to attack activity [interstate horseracing] that Congress clearly intended to be subject to *strictly* civil consequences."[78]

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[74] *Id.* at 1267.

[75] *Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Association, Inc.*, 802 F.Supp. 662 (D. R.I. 1992), *aff'd*, 989 F.2d 1266 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993) [***Exhibit AB-117***]. This is the lower court opinion in the *Sterling* case.

[76] 18 U.S.C. §§ 1961-1968.

[77] 802 F.Supp. at 674.

[78] *Id.* at 669.

43. The court was later even more direct and noted that in "adopting section 1084 [the Wire Act], Congress did not intend to criminalize acts that neither the states nor Congress desired to be treated as criminal."[79] "The Court refuses to ignore the *clear congressional intent to respect state gambling laws and not criminalize IHA violations*. Thus, the Court concludes that Sterling's RICO claim has no merit in this case."[80]

44. The decision by the lower court was then appealed to the First Circuit Court of Appeals where it was affirmed.[81] In affirming the decision by the lower court, the appellate court approved the analysis applied by the lower court in its judgement[82]

> "All available evidence indicates that Congress intended for the IHA to have purely civil consequences. For instance, the IHA's enforcement and remedies sections specifically exclude the possibility of governmental involvement and/or the specter of criminal penalties."[83]

Suffolk Downs appealed the decision to the United States Supreme Court, which declined to review the appellate decision.

45. Bizarrely, the United States claims in its submission that *Sterling* somehow stands for the proposition that the IHA and the Wire Act exist in different "spheres" of the law.[84] Far from it, *Sterling* actually reinforces the proposition that the IHA removes wagering on interstate horseracing from any possibility of prosecution under the Wire Act or any other federal criminal law. If interstate wagering on horseracing was subject to the Wire Act, the *Sterling* courts could not have summarily disposed of the RICO claim. Thus, while Antigua has identified the one actual decision by an American court on the scope of the interrelationship between the IHA and the Wire Act, the United States must rely upon bare claims from a Department of Justice that has *failed to*

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[79] *Id.* at 670.
[80] *Id.*(emphasis added).
[81] *Sterling, supra* note 73.
[82] *Id.* at 1272.
[83] *Id.* at 1273.
[84] US Art. 21.5 Submission, para. 31, note 15.

bring a single criminal action under the Wire Act against an IHA-sanctioned, licensed and regulated operator.

C. THE "UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006"

1. Introduction.

46. Less than a week after Antigua filed its first submission in this proceeding, the United States Congress adopted the New Prohibition Law. Although clearly derivative of the pending legislation described by Antigua in its first submission, the New Prohibition Law is different in a number of respects.[85] Contrary to the assertion of the United States,[86] the New Prohibition Law is clearly within the terms of reference of the Panel in this proceeding.[87]

47. While the New Prohibition Law *itself* clearly violates the GATS in a number of respects,[88] it is perhaps best suited to (i) demonstrate that the IHA permits remote gambling on horseracing in the United States by state-sanctioned operators; (ii) demonstrate that the Congress has conceded that states and Native American tribes can regulate remote gambling; (iii) confirm Antigua's argument that the Wire Act does not prohibit intrastate remote gambling; and (iv) highlight the trade-discriminatory affect of the Wire Act, the Travel Act and the IGBA.

2. The New Prohibition Law.

48. The New Prohibition Law starts with a "universe" of what it terms "unlawful Internet gambling,"[89] defined to mean:

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[85] AB Art. 21.5 Submission, paras. 108-114.

[86] US Art. 21.5 Submission, para. 55, note 30.

[87] Report of the Panel on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10(27)-(29) (explicitly approved by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 74).

[88] By criminalising certain financial transactions associated with what it calls "unlawful Internet gambling," the New Prohibition Law violates Article XVI:1 and Article XVI:2(a) and (c) of the GATS. It also clearly violates Article XI of the GATS. It has no hope of passing muster under Article XIV of the GATS, not only because it endorses a regulatory scheme on its face, but also because it openly excludes substantial domestic remote gambling from its coverage while unambiguously applying to all services provided remotely from foreign countries such as Antigua.

[89] 53 U.S.C. § 5362(10).

> "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet *where such bet or wager is unlawful under any applicable Federal or State law* in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made."[90]

Thus, rather than creating any new class of unlawful remote gambling, the New Prohibition Law starts with whatever is *already illegal* under federal or state law.

49. From this opening "universe," the New Prohibition Law proceeds to exclude certain activity from its application. The legislation first excludes remote, *intra*state gambling:

> "The term 'unlawful Internet gambling' does not include placing, receiving, or otherwise transmitting a bet or wager where–
>
> (i) the bet or wager is initiated and received or otherwise *made exclusively within a single State*;
>
> (ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include–
>
> (I) age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and
>
> (II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State's law or regulations; and
>
> (iii) the bet or wager does not violate any provision of [certain other federal laws, including the IHA]."[91]

50. Next, the New Prohibition Law excludes certain Native American remote gambling from its coverage:

> "The term 'unlawful Internet gambling' does not include placing, receiving, or otherwise transmitting a bet or wager where–

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[90] *Id.*, § 5362(10)(A) (emphasis added).
[91] *Id.*, § 5362(10)(B) (emphasis added).

(i) the bet or wager is initiated and received or otherwise *made exclusively–*

(I) *within the Indian lands of a single Indian tribe . . .* ;

(II) *between the Indian lands of 2 or more Indian tribes* to the extent that intertribal gaming is authorized by the Indian Gaming Regulatory Act;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the requirements of–

(I) the applicable tribal ordinance or resolution approved by the Chairman of the National Indian Gaming Commission; and

(II) with respect to class III gaming, the applicable Tribal-State Compact;

(iii) the applicable tribal ordinance or resolution or Tribal-State compact includes–

(I) age and location verification requirements reasonably designed to block access to minors and persons located out of the applicable Tribal lands; and

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with the applicable tribal ordinance or resolution or Tribal-State Compact; and

(iv) the bet or wager does not violate any provision of [certain other federal laws, including the IHA]."[92]

51. Next, the New Prohibition Law ensures that remote betting under the IHA is excluded from its coverage:

"(D) INTERSTATE HORSERACING.–

[92] *Id.*, § 5362(10)(C).

(i) IN GENERAL.– The term 'unlawful Internet gambling' shall not include any activity that is allowed under the [IHA]."[93]

52. The provision exempting remote gambling under the IHA continues with the following incredible paragraph:

"(iii) SENSE OF CONGRESS.– It is the sense of Congress that this subchapter *shall not change which activities related to horse racing may or may not be allowed under Federal law*. This subparagraph is intended to address concerns that this subchapter could have the effect of changing the existing relationship between the [IHA] and other Federal statutes in effect on the date of the enactment of this subchapter. This subchapter is not intended to change that relationship. *This subchapter is not intended to resolve any existing disagreements over how to interpret the relationship between the IHA and other Federal statutes*."[94]

53. After excluding a number of other activities by taking them out of the definition of "bet or wager,"[95] the New Prohibition Law creates a new class of criminal activity:

"**§ 5363. Prohibition on acceptance of any financial instrument for unlawful Internet gambling**

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling–

(1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);

(2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;

(3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or

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[93] *Id.*, § 5362(10)(D).

[94] *Id.*, § 5362(10)(D)(iii) (emphasis added).

[95] *Id.*, § 5362(1). These exclusions include securities-type transactions, insurance and similar contracts and so-called "fantasy" sports games. *Id.*

> (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person."

54. Having already criminalised the cross-border provision of gambling and betting services with the Wire Act, the New Prohibition Law now makes it a federal criminal offense for a remote gambling and betting service provider to accept funds from or pay funds to consumers in the United States–effectively yet another method of prohibiting the cross-border supply of gambling and betting services from Antigua to consumers in the United States. This violates Article XVI:1 and Article XVI:2(a) and (c) of the GATS for exactly the same reason that the Wire Act, the Travel Act and the IGBA violate the GATS.[96] As well, criminalising "international transfers and payments for current transactions" involving an activity–the cross-border supply of gambling and betting services–for which the United States has made specific commitments in its schedule under the GATS[97] clearly violates Article XI of the GATS.

3. The New Prohibition Law Endorses the IHA.

55. Ironically, in the arbitration proceeding (the "***21.3 Proceeding***") involving Antigua and the United States under Article 21.3 of the DSU, the United States took the position that it would enact legislation to in essence "clarify" that the IHA does not permit domestic remote gambling in the United States.[98] Given the chance to do so–in legislation adopted by the United States Congress and signed into law by the American president subsequent to the arbitration award in the 21.3 Proceeding–the United States has instead chosen to do the *opposite*.

56. The IHA is mentioned *six times* in the New Prohibition Law, including in Section 5362(10)(D), where "any activity that is allowed" under the IHA is excluded from "unlawful

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[96] *See* AB Report, paras. 216, 257-265.

[97] *See* AB Report, para. 213.

[98] 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***"), paras. 9-11, 36.

Internet gambling."[99] And despite the bizarre paragraph contained in the legislation which expressly refuses to "resolve any existing disagreements over how to interpret the relationship between the [IHA] and other Federal statutes,"[100] by expressly excluding activities under the IHA from the definition of unlawful Internet gambling, the Congress is clearly endorsing the interpretation that the IHA permits remote gambling–*Internet gambling*–otherwise there would obviously be no need to refer to the IHA at all. By their public pronouncements upon the approval of the new legislation, the American horseracing industry obviously agrees.[101]

4. The New Prohibition Law Recognises Regulation is Possible.

57. In the Original Proceeding, in response to Antigua's argument that remote gambling services can be effectively regulated,[102] the United States argued that it had determined regulation of remote gambling was not possible:

> "The Panel has before it extensive evidence of the study and debate that has taken place in the United States concerning the possible regulation of remotely supplied gambling services. In spite of all of this study and debate, *the United States has not found it possible to develop regulations for the remote supply of gambling* on a domestic basis that would provide sufficient levels of law enforcement to satisfy the priorities of U.S. regulators."[103]

58. Antigua has shown that the United States *already* regulates the domestic, remote supply of gambling and betting services.[104] Sections 5362(10)(B) and (C) of the New Prohibition Law, by making adoption of regulations that include age and location verification requirements[105] a

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[99] 53 U.S.C. § 5362(10)(D)(i).

[100] *Id*., § 5362(10)(D)(iii). Whatever the point of this amazing provision, one thing is completely clear–that the United States Congress *expressly refused to say that remote gambling was not permitted under the IHA*.

[101] [INSERT REFERENCE TO NTRA STATEMENT] [***Exhibit AB-118***]; [AND THE OTHER INDUSTRY STATEMENT] [***Exhibit AB-119***].

[102] *See* AB Art. 21.5 Submission, paras. 133-136.

[103] 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), para. 122 (emphasis added, footnote omitted).

[104] *See* AB Art. 21.5 Submission, paras. 65-103.

[105] Apparently, the Congress has in this legislation determined that out of the "five concerns" that the United States associated with remote gambling in the Original Proceeding, it is only *really*

condition of the exclusion of intrastate and Native American remote gambling from coverage of the legislation, unambiguously demonstrate that–contrary to the position of the United States in this proceeding– the United States Congress believes that these services *can* be regulated.

5. The New Prohibition Law Clarifies the Legality of Intrastate Remote Gambling Under the Wire Act.

59. Antigua has consistently argued that nothing in the Wire Act prohibits solely *intrastate* remote gambling.[106] Section 5362(10)(B) of the New Prohibition Law affirms the position of Antigua in this regard, clarifying that "unlawful Internet gambling" does not include intrastate remote gambling while imposing the regulatory requirements discussed in the preceding paragraph if the intrastate gambling is to be clearly excluded from the scope of the new legislation.

6. The New Prohibition Law Highlights the Trade-Discriminatory Affect of the Wire Act, the Travel Act and the IGBA.

60. Passage of the New Prohibition Law, with its express "carve-outs" for a number of domestic remote gambling opportunities, has made it impossible to assert that the Wire Act, the Travel Act and the IGBA are applied in compliance with the chapeau of Article XIV of the GATS. Antigua cannot supply its services to consumers under the IHA,[107] nor by definition can Antigua provide cross-border services on an intrastate basis or within Native American lands. Rather than using a legislative opportunity to either provide Antigua with market access to United States consumers or to prohibit all domestic remote gambling, in an almost cruelly ironic act, the *Congress has instead chosen to make its laws even more discriminatory and WTO-inconsistent than they were at the adoption of the DSB Rulings*.

"concerned" about *one* of them–that is, underage gambling.

[106] *See* discussion at paragraph 9 above.

[107] *See* AB Art. 21.5 Submission, paras. 50-51.

VI. GOOD FAITH, THE EFFICACY OF THE DSU AND DEVELOPING COUNTRIES

A. INTRODUCTION

61. Antigua shares the concern evidenced by the European Communities over the position of the United States in this proceeding.[108] Although Antigua understands that participants in a dispute resolution process should be entitled to use the process to the best of their ability in order to achieve their legitimate objectives, Antigua believes that each Member must conduct itself in good faith, in accordance with principles of fair play and comity, when pursuing those legitimate objectives. While Antigua has a number of concerns about the conduct of these proceedings by the United States, it is particularly troubled by what has transpired with respect to compliance since the adoption of the DSB Rulings in May 2005.

62. These circumstances call into question not only the efficacy of the dispute resolution system under the DSU, but also whether developing countries such as Antigua can effectively avail themselves of the remedies ostensibly provided by the DSU when up against a developed country, such as the United States, with comparably endless resources.

B. THE REQUIREMENT OF GOOD FAITH

63. Article 3.10 of the DSU reads in pertinent part as follows:

> "It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute."

64. The Appellate Body has acknowledged not only the applicability of Article 3.10 of the DSU to the dispute resolution process by general principles of good faith under international law:

> "Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of

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[108] EC Art. 21.5 Submission, paras. 48-56.

> general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules."[109]

65. Further, in *US – Shrimp* the Appellate Body observed in the context of the principle of good faith as follows:

> "This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.' An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting."[110]

C. THE UNITED STATES AND COMPLIANCE

66. Having announced that it intended to comply with the DSB Rulings and would need a reasonable period of time to do so,[111] the United States argued in the 21.3 Proceeding that it would need at least 15 months to come into compliance with the DSB Rulings by adopting legislation.[112] The arbitrator, clearly relying on the United States' representation, awarded a reasonable period of time of 11 months and two weeks.[113]

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[109] Appellate Body Report on *US – FSC*, para. 166.

[110] Appellate Body Report on *US – Shrimp*, para. 158.

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

[112] The circumstances of this position of the United States in the 21.3 Proceeding are discussed in Antigua's first submission, as well as that of the European Communities. *See* AB Art. 21.5 Submission, paras. 13-20; EC Art. 21.5 Submission, paras.

[113] Award of the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Arbitration Under Article 21.3 of the DSU*, WT/DS285/13 (19 August 2005), paras. 10, 64, 68.

67. On 10 April 2006, the United States informed that it was in compliance with the DSB Rulings.[114] Contrary to its assertion to this Panel in its first submission,[115] the United States informed the DSB that, in its opinion, it was in compliance with the DSB Rulings *based solely* upon a purported statement of a Department of Justice employee (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."[116]

68. That the United States considered the DOJ Statement its basis for "compliance" with the DSB Rulings was reinforced at a meeting of the DSB on 21 April 2006, when a representative of the United States told the Members that in "view of the circumstances" of the DOJ Statement, the United States was in compliance with the DSB Rulings.[117]

69. Now, in its first submission in this proceeding, the United States takes yet a *third* position with respect to compliance–that the Wire Act, the Travel Act and the IGBA *themselves are "compliance measures" and that the United States has been in compliance with the DSB Rulings all along*.[118]

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[114] WT/DS285/15/Add.1 (11 April 2006).
[115] US Art. 21.5 Submission, paras. 48-49.
[116] *Id*.
[117] WT/DSB/M/210 (30 May 2006), paras. 33-34.
[118] US Art. 21.5 Submission, paras. 43-50.

70. This unfathomable assertion of the United States is without precedent in WTO dispute resolution. Under the logic of the United States' current position, it was in compliance with the DSB Rulings immediately upon the rulings having been made. If that is so, then why did the United States not simply say exactly that at the DSB meeting of 18 May 2005?

71. What the United States has done is precisely what Antigua had explained at the 21 April 2006 meeting of the DSB:

> "36. The representative of Antigua and Barbuda said that his delegation thanked the United States for that recollection of the history of the rulings of the DSB, which it found somewhat selective. To no one's surprise, his country disagreed with that interpretation and was disappointed with the statement made by the United States at the present meeting. His country found it rather incredible that the United States would take the position that in essence it had been in compliance with the rulings and recommendations of the DSB in this matter all along. (...) For the United States to have taken that position with not only Antigua and Barbuda but with the WTO arbitrator, *to buy itself an additional period of almost a year and then to state in effect that it had been compliant all along, not only reflected poorly on the United States and its good offices, but also put into question the efficacy of the dispute resolution process*.
>
> 37. Clearly then, it would seem to his country that the United States believed that the Panel and the Appellate Body in this dispute had simply gotten the matter wrong by concluding that the United States had not met its burden of proof with respect to the chapeau of Article 14 of the GATS, and that the United States was going to use Article 21.5 proceedings to reassert its case and 'meet its burden of proof' in the second go-round. The position of the US Department of Justice that the USTR had used now to assert its 'compliance' was in fact no different to the position which had been raised during the course of the proceedings and found unpersuasive by both the Panel and the Appellate Body. How a Member could take a position already adjudicated in the dispute and assert that exact same position as a basis for coming into compliance with the DSB's recommendations and rulings was beyond his delegation's comprehension.
>
> 38. If this matter were to go to a compliance panel under Article 21.5 of the DSU, it would be, his country believed, the first instance in which a Member had gone before a compliance panel on the basis of having done nothing at all to bring itself into compliance with the DSB's rulings and recommendations. This was deeply troubling, not only to his country, but for the health of the dispute resolution system. *What it meant to his country was that the United States might indeed have bought itself yet another year during which it could assert its offending measures against Antiguan industry with seeming impunity, while its*

> *'compliance' wound its way through the Article 21.5 procedure and it would have bought this extra year - extra two years really - taking into account its dissembling with respect to the reasonable period of time, and having done nothing at all to come into compliance*."[119]

72. Antigua agrees with the general proposition that an implementing Member should retain the right to determine how to come into compliance with recommendations and rulings of the DSB, and further that under certain circumstances an implementing Member may change its original opinion on how to achieve compliance. That being the case, Antigua agrees with the European Communities when it said:

> "However, should that Member then come to the view that contrary to earlier declarations to the DSB, enactment of fresh legislation is not longer necessary, the implementing Member should be required to provide a reasonable explanation. As set out above, the only reasoning offered by the United States in the present case is that ids 'old' measures were already in compliance, and that it is allowed to have a second chance at meeting its burden of proof in relation to the affirmative defence under Article XIV(a) of the GATS. This line of reasoning cannot be regarded as a reasonable explanation; it is at odds with the *res judicata* principle set out above."[120]

D. THE UNITED STATES POSITION THREATENS THE DISPUTE RESOLUTION SYSTEM

73. The circumstances of this proceeding raise into serious doubt the efficacy of the WTO dispute resolution system, particularly where a small nation with limited resources is attempting to secure compliance of large, developed economy such as the United States with an adverse ruling from the DSB. In the 17 months since the DSB adopted its recommendations and rulings in this case, the United States has done nothing to come into compliance with the DSB Rulings; it has refused on repeated occasions to engage in any constructive dialogue with Antigua towards a mutually satisfactory resolution of the dispute; it has arrested, indicted and prosecuted Antiguans and Antiguan service providers simply for providing licensed, regulated gambling and betting

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[119] WT/DSB/M210 (30 May 2006), paras. 36-38 (emphasis added).
[120] EC Art. 21.5 Submission, para. 65.

services to consumers in the United States; and it has adopted a punishing, discriminatory law that has already had a material, adverse impact upon Antigua and its citizens.[121]

74. As Antigua's representative to the WTO told the DSB back in April 2006:

> "If this was a flaw in the system, it should be fixed. Members should not be allowed to take the rules to illogical extremes to subvert the process. The need for urgency in the resolution of disputes, was explicitly written throughout the DSU. It was clear that the objective was expediency and even more so, when impairment effected a developing country such as Antigua and Barbuda. It was difficult to understand why an overt objective of fair and fast resolution of trade disputes should be subject to substantial dilution by recourse to legalistic and formulaic approaches to what the written word of the rules might be stretched to permit. While his country was not certain where this dispute was headed from here, it was certain of its commitment to seeing this process through to the end, whenever and however long it might take."[122]

VII. CONCLUSIONS

75. 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.

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[121] [REPORTS OF JOB LOSSES] [***Exhibit AB-120***].

[122] WT/DSB/M210, para. 39.