[PRELIMINARY–CHECK AGAINST DELIVERY]

STATEMENT OF ANTIGUA AND BARBUDA

to the

PANEL

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

Recourse to Article 21.5 of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes
by Antigua and Barbuda

Panel Session

27 November 2006

1. Good morning, Mr Chairman and members of the Panel. I am Dr John Ashe, the Ambassador of Antigua and Barbuda to the World Trade Organisation. Also with me today is our legal advisor, Mr Mark Mendel and his colleague, Mr Robert Blumenfeld. We thank you for your willingness to serve as panel members in this matter, and we realise that it requires significant commitment and effort on your part to fulfill your very important function. Again, we thank you. We also extend our cordial greetings this morning to the Secretariat staff in attendance today and to the delegation from the United States.

THE BIG PICTURE

2. At the outset, it is important to step back and take a look at the bigger picture here and to not be distracted by all of the side and phantom issues that the United States is trying to push to the fore. After all, it is well established in the Article 21.5 context that the implementing party does not set the scope of the enquiry–rather, that is for the Panel itself to decide in order for it to assess the compliance of the implementing party.

3. Thus, rather than a "limited review" of whether the United States can now meet the burden of proof it failed to meet in the original proceeding, it is for the *Panel* to examine such matters as it considers appropriate in conformity with the DSU to determine whether the United States has complied with the recommendations and rulings of the DSB in this matter.

THE UNITED STATES WAS FOUND OUT OF COMPLIANCE WITH THE GATS

4. The basic starting point here is that three federal statutes were found by the panel and the Appellate Body to be contrary to Article 16 of the GATS. And, whatever the United States may plead to the contrary, both the panel and the Appellate Body found that the United States was not entitled to the affirmative defence of Article 14. Neither the panel nor the Appellate Body ruled that the United States "almost" met its burden of proof, nor did they explicitly or otherwise "invite" the United States to meet its burden of proof at some time in the future. What both ruled was that the United States failed to meet its burden of proof on the chapeau of Article 14 and, as a result, the defence failed.

5. That is why, in the final paragraph of its report, the Appellate Body recommended that the DSB "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." We note that the "measures" found to be inconsistent with the GATS were the three federal statutes at issue, the Wire Act, the Travel Act and the Illegal Gambling Business Act.

6. *That* is indeed what the DSB recommended, and the United States' compliance with that recommendation is at the core of this proceeding.

THE UNITED STATES HAS DONE NOTHING

7. If there is one point on which there is complete agreement at this stage, it is that the United States has done nothing since the adoption of the DSB rulings to come into compliance with them. Even the United States, having first apparently been manoeuvring to cast the 10 April 2006 statement of the United States Department of Justice as its "compliance measure," has abandoned that effort and now clearly admits it has done nothing.

8. Actually, the United States *has* now done something–it has adopted new legislation affecting the cross-border supply of gambling and betting services which is just about as facially discriminatory and GATS-inconsistent as possible.

9. Yet, the United States would ask this Panel to declare the United States in compliance with the DSB rulings, based upon the exact same laws, facts and circumstances as were present–and argued by the United States–in the original proceeding and rejected by both the panel and the Appellate Body. For the very first time in the history of proceedings under Article 21.5 of the DSU, a party stands before a panel having done nothing to comply with a ruling, demanding that it be given a second chance to prove its failed case. It is remarkable in every way.

NO SECOND CHANCES

10. In the face of all contrary WTO law and jurisprudence, the United States asserts it is entitled to try and meet its burden of proof on the chapeau this time around. In fact, it asserts that *it alone* is entitled to reassert failed elements of its old case in hopes of convincing this Panel that it has met its burden of proof under the chapeau and thus is entitled to the Article 14 defence. In the view of the United States, its "special status" entitles it to revisit its case while Antigua must sit idly by, limited only to debating issues of "repeal by implication" as dictated by the United States.

11. Again, contrary to the most wishful thinking of the United States, the DSU does in fact contain a firm basis for Antigua's "second chance theory"–and that is Article 17.14 of the DSU. There is no ambiguity in that provision, and numerous panel and Appellate Body reports have consistently applied it. Once panel and Appellate Body reports are adopted by the DSB, they are approved by the parties as a final resolution of the issues in dispute. As Antigua, the EC and Japan have each pointed out, the Article 14 issue *was* definitively decided by the panel and the Appellate Body just as certainly as all of the other issues in the case.

12. While the United States' loss on the issue may have been narrow or wide–just as may have been Antigua's loss on a number of issues in the proceeding–at the end of the day, *it was a loss*. The DSB did not recommend to the United States that it do a better job convincing the Panel and the Appellate Body a second time around.

13. There is *no* authority supporting the United States position in this proceeding. Antigua submits, as strongly as it is possible to do, that were the United States to succeed in its primary argument in this case–that it can do nothing in response to the DSB rulings and get its second chance in this Article 21.5 proceeding–it would make

a complete mockery and farce of the DSB and the object and purpose of dispute resolution at the World Trade Organisation.

THE INQUIRY MUST END HERE

14. Not only for the sanctity of this proceeding, but for the health and integrity of the entire dispute resolution system, the enquiry *must end here*. To take it any further will be to distort the DSU beyond all reason and set a devastating and outrageous precedent. Whilst one might admire the gall of the United States in making its incredible plea, it *is* simply incredible in every possible way. The United States has done nothing at all to come into compliance with the DSB rulings and therefore must be found to be out of compliance with them.

NO "SPECIAL STATUS"

15. Although we consider it irrelevant in light of our strong belief that the United States must be found out of compliance, Antigua would like to briefly respond to the claim of the United States that it is somehow entitled to "special status" in an Article 21.5 proceeding. As we interpret this argument, found in paragraphs 28 through 31 of the second submission of the United States, the responding party in a 21.5 proceeding has the sole and exclusive right to reargue its failed case before the panel because the recommendations and rulings of the DSB only relate to the case as initially proven by the complaining party. This twisted logic not only has no basis under the DSU or WTO jurisprudence, but in fact is contrary to both.

16. While Antigua would submit that *no* party should be given a chance to reargue the same points in an Article 21.5 proceeding that it failed on in the course of the original proceeding, there is certainly no basis for favouring the implementing party in this respect over the complaining party–if anything, the contrary should be true. We will come back to this later in our presentation, but we wanted to dispel this notion at the

outset. There is nothing in Article 21 of the DSU to support this claim by the United States for "special status." There is, however, something in Article 21–that is Article 21.2–that expressly accords a "special status" in this proceeding to Antigua, as a developing country member.

EVEN GIVEN A "SECOND CHANCE" THE UNITED STATES LOSES

17. Were the Panel to give the United States its "second chance," nonetheless the United States fails, and fails miserably. First, it is important again in this context to look at the big picture. While the United States would limit the enquiry of the Panel to its "repeal by implication" arguments, there is no basis for such a restriction. If the United States wants to revisit the issue of the Interstate Horseracing Act and the chapeau of Article 14, then it must at the very least be forced to revisit it in whole, not just in selective parts.

18. It is well established that more than the simple words of a measure need to be taken into account in determining the effect of the measure. Although Antigua believes that the language of the IHA clearly on its face permits the placing of wagers on a remote basis (as did the panel and the Appellate Body in the original proceeding), Antigua's conclusion on this point is supported not only by our evidence and discussion on the proper interpretation of statutes in seeming conflict but also by legal commentary, the courts and the facts on the ground.

THE IHA/WIRE ACT ISSUE

19. The United States relies–*exclusively* I might add–on its selective use of cases and arguments on "repeal by implication" to prove that the IHA does not permit remote gambling. Of course, from our submissions you know that Antigua's view on this legal analysis is quite different. While the United States in its second submission urges the Panel to assign no weight to the opinion of a "mere" law student that

supports Antigua's reading of the two statutes, it glaringly overlooks a legal opinion of the Attorney General of the State of Maryland–found at Exhibit AB-22–that expressly supports our position as well. As stated by the Attorney General in that opinion, "[t]he prohibition in the Wire Act is necessarily qualified by another federal statute - the Interstate Horseracing Act of 1978."

20. A review of the United States submissions shows *no one* supporting *its* position on the issue. And, again, despite its strenuous arguments to the contrary, the *one* court case considering the two statutes together supports our interpretation of what the IHA allows. Under these circumstances alone, it would be impossible to conclude that the United States had met its burden of proof of establishing that the IHA is non-discriminatory.

THE REALITY

21. We note that in neither submission did the United States even mention much less address other critical evidence submitted by us regarding the IHA. Whatever the United States may say about the legality of persons operating remote gambling and betting services under the auspices of the IHA, one thing is clear–there have been *no federal convictions, not even prosecutions, ever*, of a remote gambling and betting service provider licensed by a state and operating in conformity with the IHA. The significance of that cannot be ignored or under estimated. Further, of the states sanctioning IHA remote gambling, all of the states that responded to our enquiry as to whether the United States Department of Justice had contacted them to assert the "illegality" of their licensing and regulatory schemes replied that they had not received any such communication.[1]

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[1] *See* ***Exhibit AB-122***, submitted with these materials, for copies of the responses of these states.

22. Nor can be ignored the reality of the many, state-sanctioned and (in one form or another) regulated regimes operating currently in the United States in reliance on the IHA. Antigua would urge the Panel to carefully review the discussion and evidence contained in paragraphs 65 through 103 of our first submission, including the extensive exhibits. It is undeniable that these various licensing states and remote gambling service providers believe that the IHA permits remote gambling. It is also undeniable that sanctioned remote gambling exists in spades in the United States, operating under just this statute alone.

23. Even if one were to buy the increasingly specious argument of the United States that the IHA doesn't permit remote gambling, it is painfully obvious that a healthy, sanctioned domestic remote gambling industry exists in the United States. As we know, the United States asserted in the original proceeding that *all* remote gambling was prohibited in America. That is just not true.

THE NEW LEGISLATION AND THE IHA

24. Even assessing the new United States legislation–the so-called "Unlawful Internet Gambling Enforcement Act of 2006" solely from the perspective of the IHA, that new law has made it crystal clear that the IHA permits remote gambling on horse racing in the United States. Although the United States once again asks us to take a tortured, selective view of the plain language of the new law, what more needs to be said than the language of the statute itself:

> "The term 'unlawful Internet gambling' shall not include any *activity that is allowed* under the Interstate Horseracing Act of 1978."

Here we have the United States Congress expressly stating that "activity" is "allowed" under the IHA. Contrary, we might add, to what the United States has told this Panel in its submissions.

25. Why would the Congress feel a need to exclude from the definition of "unlawful Internet gambling" "*activity that is allowed under the [IHA]*" if the IHA did not permit Internet gambling in the first place? We await a plausible explanation.

THE UNITED STATES LOSES IN A FULL REASSESSMENT OF THE CHAPEAU

26. We know that the United States considers its "second chance" only open to a limited review of the IHA and the chapeau of Article 14. Why this would be the case is a mystery. Even were the "second chance" to be limited to a review of the chapeau, there is no reason why a full reconsideration of the chapeau should not take place. Despite its frankly incredible assertion that Antigua somehow prejudiced the United States in making its defence under Article 14, surely in the game of "second chances" there could be no prejudice in allowing *both* sides the opportunity to supplement the evidence in this regard.

27. Obviously, we believe that a full and complete assessment of the IHA and remote gambling and betting service providers operating under it unmistakeably establishes that sanctioned, domestic remote gambling exists in the United States. But as we observed in our submissions, not only does the express language of the Wire Act not prohibit all domestic remote gambling, but indeed there is considerable sanctioned domestic remote gambling in America now in addition to the activities under the IHA. And, particularly in light of favoured, domestic-only carve-outs in the new federal statute, this can only be expected to continue to grow.

28. Unfortunately, the Appellate Body failed to recognise the fact that, on its face, the Wire Act does *not* prohibit remote gambling, but in fact only prohibits (or restricts) *cross-border* gambling. Thus, as we stated out on many occasions, all American states are free under the Wire Act to offer virtually unlimited remote gambling solely within their own borders. Obviously, if the "remoteness" of the services is their vice,

the fact that the services do or do not cross a state or international border is irrelevant. If the United States was concerned about the "remoteness" of the services, then the Wire Act would reflect that. However, the Wire Act, on its face, absolutely does not prohibit remote gambling that does not cross a state or international border.

29. The new American legislation affirms this interpretation of the Wire Act with its exclusion from "unlawful Internet gambling" of *intra*-state and Native American Internet gambling. Interestingly, by adding the conditions of state regulation and assurances of protections against under-age gambling for the intra-state and Native American exemptions, the Congress has, clearly contrary to the assertion of the United States in the original proceeding, affirmed its belief in the efficacy of regulation and technology to control the provision of remote gambling and betting services–at least, as long as those services are regulated by the states themselves, and not by other WTO members.

30. The remote gambling that exists in the United States today–in addition to remote gambling under the IHA–that we have outlined in our first submission, operates in the gulf that yawns between what the United States tells the WTO exists under domestic law and what the reality of American law and practice is. In light of the express language of the Wire Act, the new federal legislation and ample evidence of sanctioned, domestic remote gambling in the United States it is impossible for the United States to assert that it enforces or applies its laws in anything but a discriminatory fashion–contrary to its commitments under the GATS and in clear conflict with the chapeau of Article 14.

GOOD FAITH AND FAIR DEALING

31. At this point, we would like address an issue we directly raised in our second submission, and which the EC touched upon as well. While it is always delicate to

accuse a sovereign nation of not acting in good faith in dealings with another, we submit that despite being a government-to-government process here at the WTO, ultimately this is a court of trade and economics, and not high diplomacy.

32. Under those circumstances, we feel it fair and appropriate to point out what we consider to be unfair dealings on the part of the United States and demand that these factors be considered by the Panel in assessing the relative merits of the parties in this proceeding.

33. We feel that we have been callously misled during this entire compliance process–from the adoption of the DSB rulings, when the United States said it intended to comply; to the Article 21.3 arbitration, when the United States represented to Antigua and to the WTO arbitrator that it needed 15 months to adopt "complex legislation" in order to comply; to the statement of 10 April 2006 and the representations at the subsequent DSB meeting that the DOJ statement formed the basis for its compliance; to its submissions in this proceeding, where it now says that it has been in compliance all along and that the original measures are themselves the compliance measures.

34. The United States falls back on the excuse that it is entitled to seek compliance in which ever way it chooses, and this "right" justifies its prevarication and capricious target-moving. We agree with the EC that under the circumstances, at the very least all of us were and are owed a reasonable explanation for the contortions of the previous year and a half. And the proffered explanation–that the WTO was wrong and the United States was right–is *per se* unreasonable.

35. The unreasonableness of the United States position is underscored in its latest submission, where it baldly admits that from the very beginning, it simply believed the WTO to be wrong. It further claims that it *had* been considering a legislative

option, but as the Congress never acted, it "had but little choice to rely on a different means of compliance."

36. Yet we observe that no legislation was *ever* introduced into the Congress that would have brought the United States into compliance had it been adopted. Although, as it explained during the course of the Article 21.3 proceeding, part of the role of the USTR is to suggest legislation to the Congress and seek its introduction and approval, the USTR certainly did not do so in this case.

37. Moreover, if the USTR *had* actually been seeking a legislative solution, but was simply stymied at every turn, or if it *had* considered all possible alternatives and decided to shift its method of compliance, why then did not the United States advise Antigua of the fact during one of the many futile sessions we had with the USTR, or otherwise contact our delegation?

38. Instead, the United States kept all of us in the dark, most certainly doing *nothing*, with the intent of doing nothing, until we brought these proceedings following the United States' unilateral declaration of compliance earlier this year. Although you would think us beyond being surprised at this point, we must admit to having been taken aback at the ultimate position of the United States disclosed in its first submission–that its offensive measures are and always have been the compliance measures *themselves*.

39. We submit that there has never been a case of such blatant dissembling in the history of dispute resolution in the WTO–and most certainly not in a 21.5 proceeding. These kinds of tactics are unreasonable and overreaching under any circumstances, but are even more so when you consider the relative resources available to the parties in this proceeding. After all, according to the 2000 United States census, there are over 600 counties alone in the United States with populations greater than that of our entire

country. If Article 21.2 of the DSU is to have any application at all, it should come into play here.

40. We cannot over-emphasise the fact that our government has been extremely proactive in our attempts to open dialogue with the United States, to obtain compromise, to come to a reasonable, negotiated solution. And we also cannot over-emphasise the complete and utter disinterest that these overtures have generated and the lack of any substantive engagement. We wonder if all of its trading partners are treated with such disregard by the USTR. We suspect not.

OTHER ISSUES

"Second Chances" for all . . .

41. Finally, we would like to address, very briefly, a few other issues that have been raised in this proceeding. First, while we of course believe there is no place in an Article 21.5 proceeding to give any party a "second chance," we also believe that once a decision to give "second chances" is made, then that decision should apply to all parties, equally. It is well established in WTO law that there is no distinction in the burden necessary to establish a complainant's proof and that of a responding party asserting an affirmative defence.

42. Antigua believes that there are a number of issues in the original proceeding in which the margin of our "loss" was at least as thin as that of the United States on the chapeau. Now we know what the Appellate Body expects in the way of proof on some of the groundbreaking issues in our case, it would be relatively easy for Antigua to meet its own failed burdens of proof. For example, now that we know precisely how much proof is required to establish the existence and effect of any "measure," we will have no difficulty in establishing the inconsistency of the dozens of American state prohibition laws with Article 16 of the GATS.

43. In particular, while the *panel* did not make this mistake, the Appellate Body plainly failed to consider the substantial evidence and discussion submitted by us in the original proceeding with respect to "reasonably available alternatives." Although we drew the attention of the Appellate Body to these discussions in our appeal submissions, for whatever reason all of this evidence was completely overlooked by the Appellate Body. This evidence all relates specifically to the affirmative defence of the United States, which it insists is "the only unsettled issue."

44. If the United States is to get its "second chance," then the Panel should revisit the issue of reasonably available alternatives. As we have pointed out, in addition to those things that we asserted in the original proceeding–such as our own regulatory scheme, the regulatory schemes of other countries and the willingness of our operators to use agents such as those used by lotteries in the United States to sign up and qualify consumers–there are other alternatives to consider, including:

•Existing state regulatory schemes for remote gambling under the IHA;

•Other analogous regulatory schemes such as those for sales of alcoholic beverages; and

•New age, identity and location technologies that are available and in use.

The new federal law and the Panel's terms of reference . . .

45. With respect to whether the new United States legislation is within the Panel's terms of reference, one need only look as far as WTO jurisprudence–such as the panel decision in *Australia – Salmon*–to conclude that it is. We did our best to anticipate whatever form the anticipated American legislation might take. We monitored the legislation throughout the process, referring to whatever was then pending or adopted in our request for consultations, in our Panel request and then, in some detail, in our

first submission in this proceeding. And, of course, in our second submission we discussed the legislation as finally adopted and approved.

46. This situation is almost identical to the Tasmanian legislation involved in the *Australia – Salmon* case. And, the language of the Appellate Body in the recent *US – Softwood Lumber IV* case, expressly approving the panel's approach in *Salmon*, is just as relevant to the situation facing us here:

> "[O]ur interpretation of Article 21.5 of the DSU confirms that a panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be 'taken to comply.' Such a declaration will always be relevant, but there are additional criteria, identified above, that should be applied by a panel to determine whether or not it may also examine other measures. Some measures with a particularly close relationship to the declared 'measure taken to comply,' and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared 'measure taken to comply' is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one 'taken to comply' and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding."

47. As the final legislation adopted by the American Congress, following a number of introduced bills and permutations; as the *only* legislation adopted by the Congress dealing expressly with remote gambling since the adoption of the DSB rulings; and as it is patently trade discriminatory, the new legislation fits squarely within the doctrine so ably elucidated by the panel in *Australia – Salmon*.

48. It should go with out saying that the cynical attempt of the United States to upbraid Antigua for not referring to this precise legislation as finally adopted in our Panel request should get no consideration here at all.

49. While it is obvious why the United States wants to exclude this regressive legislation from the ambit of the Panel, it is very relevant, and very helpful, in an analysis of the status of American compliance with the DSB rulings. For if it does nothing else, this new legislation serves well to highlight the trade discriminatory approach of the United States when it comes to the remote supply of gambling and betting services.

CONCLUSIONS

50. Mr Chairman and honourable Panel members, as we reach the end of this phase of our presentation, we come back to where we started–with the "big picture." The United States has done nothing to come into compliance with the DSB rulings. It has used, arguably abused, the WTO dispute resolution system to gain time and advantage in a manner and under circumstances most certainly not anticipated nor contemplated by the DSU–or consistent with the fair and prompt resolution of trade disputes. In the meantime, it has aggressively been prosecuting and persecuting licensed Antiguan operators and working hard to destroy the non-domestic industry.

51. What a terrible precedent it would set were the United States approach to prevail. Every losing party seeking delay and advantage would simply wait for a 21.5 proceeding to re-litigate its case. Although the United States may not like the DSB

rulings in our case, the fact is that they are what they are. What good is a system where a loser decides on its own which judgements are correct and which are not? Neither the United States nor any other implementing Member can cherry-pick the good from the bad. All of us, the United States included, need to bear the responsibilities associated with a fair and transparent dispute resolution process.

52. We respectfully ask, Mr Chairman and members of the Panel, that you find the United States has not complied with the recommendations and rulings of the DSB in this matter, that you find that the federal statutes at issue remain in violation of Article 16 of the GATS without meeting the requirements of Article 14 and that you recommend that the DSB request the United States to bring its laws into conformity with its obligations under the covered agreements. Thank you very much.