**RESPONSES OF ANTIGUA AND BARBUDA**

**to the**

**QUESTIONS OF THE PANEL TO THE PARTIES**

# 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***

**8 December 2006**

**1. USA. The DSB recommended that the U.S. "bring its measures into conformity" with its obligations under the GATS. Does the U.S. consider that it has already brought its measures into conformity, or that it did not need for certain reasons to bring its measures into conformity? If so, what are these reasons?**

**2. ANT, USA. Must "measures taken to comply" with a DSB recommendation, as used in Article 21.5 of the DSU, be more recent than the original proceeding? Please explain in terms of the rule of interpretation in Article 31 and, if appropriate, Article 32 of the Vienna Convention on the Law of Treaties. In particular, please address the following:**

As a general proposition, there must be *some* action subsequent to the adoption of a DSB recommendation in order for there to be a "measure taken to comply" for purposes of Article 21.5 of the DSU. Pursuant to the general rule of interpretation provided for in Article 31 of the Vienna Convention, the terms "measures taken to comply" must be interpreted in accordance with their ordinary meaning, in their context and in the light of the DSU's object and purpose. That context includes, *inter alia*, the DSU's text, its preamble and, above all, the other provisions of Article 21. Article 21 sets out a system for "Surveillance of Implementation of Recommendations and Rulings." The basic rationale underlying the system of Article 21 is clearly set out in its first paragraph: "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure

effective resolution of disputes to the benefit of all Members." Article 21 further contains a number of mechanisms to achieve that objective of compliance:

- If prompt compliance is "impracticable," the implementing Member can request a reasonable period of time pursuant to Article 21.3.

- The DSB keeps the implementation process under surveillance pursuant to Article 21.6, which provides that the implementing Member must report on "its progress in the implementation of the recommendations or rulings."

- If there is disagreement as to the existence or consistency of measures taken to comply, the issue can be addressed via an Article 21.5 proceeding.

The system of "surveillance of implementation" of Article 21 is clearly based on the supposition that the implementing Member must do something, namely, take one or more new measures to comply. If the implementing Member could comply merely by referring to a measure that already existed at the time of the original proceeding, this would make the surveillance procedure of Article 21 meaningless. There would be no need to request a reasonable period of time and there would be no "implementation process" for the DSB to keep under surveillance and "progress" for the implementing Member to report on. Because Article 21.5 of the DSU is part of this surveillance system, the terms "measures taken to comply" must be interpreted in light of their immediate context, which clearly points towards *new* measures, specifically taken to comply with the DSB recommendation.

In this respect it should be noted (pursuant to Article 32 of the Vienna Convention) that the primary objectives of the negotiators of the DSU were (i) to strengthen the dispute settlement process and, (ii), more specifically, "the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations."[1] This confirms that it is a fundamental principle of the DSU that adopted recommendations must be implemented and that the procedure of Article 21.5 is intended to decide on whether or not there has been implementation. The procedure of Article 21.5 is not intended to give a responding party a "second chance" to argue that it was already in compliance at the time of the original proceeding.

This interpretation has been confirmed by the Appellate Body, most notably in *Canada – Aircraft (Article 21.5 – Brazil)* where it said:

> "Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB. In our view, the phrase 'measures taken to comply' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been 'taken to comply with the recommendations and rulings' of the DSB will *not* be the same measure as the

[1] Ministerial "Punta Del Este" Declaration of 20 September 1986.

measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the 'measures taken to comply' which are - or should be - adopted to *implement* those recommendations and rulings."[2]

**(a) Does the word "measures" have the same meaning as when used in Article 4.2 and 4.4, Article 6.2 and elsewhere of the DSU?**

Yes. There is no basis either in the text or otherwise for any difference in the meaning of the word in the various places in which it is used in the DSU. Because a term must be interpreted in light of the text of the treaty of which it forms a part, a term will normally have the same meaning when it is used in different provisions of the same treaty. In Antigua's view that would only be different if the treaty itself clarified that the same term is used with different meanings. In its report in this dispute the Appellate Body clearly stated that "the DSU and the GATS focus on 'measures' as the subject of a challenge in WTO dispute settlement"[3] and that a distinction has to be made between "measures" and their effects.[4] Therefore, when assessing "the existence (…) of measures taken to comply," a compliance panel must focus on the existence of an "instrument containing rules or norms"[5] that was "taken to comply." A compliance panel cannot find the implementing Member to be compliant on the basis of the effect of a measure that already existed at the time of the original proceeding.

**(b) Does the word "taken" imply a positive action? Please note that the Spanish version reads "medidas 'destinadas' a cumplir"**

"Take" is a verb and in virtually every usage in the dictionary involves active, rather than passive, activity.[6] The word "taken" in Article 21.5 of the DSU, interpreted in light of the context of Article 21 as a whole, implies a positive action in that it requires the implementing Member to do something (as explained above). That interpretation is confirmed by the Spanish text which refers to measures intended to achieve compliance. This necessarily implies that the implementing Member takes a measure, following the recommendations of the DSB.

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[2] Appellate Body Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36 (emphasis in original).

[3] Appellate Body Report on *US – Gambling*, para. 123.

[4] *Id.*, para. 122.

[5] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-82, 88.

[6] "Take." Dictionary.com Unabridged (v 1.0.1). Random House, Inc. 05 Dec. 2006. <Dictionary.com http://dictionary.reference.com/browse/take> Of 83 different usages of "take" as a verb with an object in the cited source, just a handful are passive, and generally involve the receipt of information, visually or otherwise, such as "to take at his word" or to "take a joke."

**(c) Does the measure need to be specifically aimed at the issue addressed by the DSB recommendation?**

This would normally be the case. However, it may be possible–although perhaps unlikely–that an implementing Member takes a new measure that (i) is aimed at another issue than the one addressed by the DSB recommendation but (ii) nevertheless has the effect of achieving compliance.

**3. USA. Can you further elaborate on the relevance of US - Shrimp for our deliberation with respect to "measures taken to comply"?**

**4. USA. What other circumstances, apart from the "unusual" situation in this dispute, could justify treating the same measures in the original dispute as the "measures taken to comply"? (US oral statement, paras. 5 and 9)**

**5. USA. Do you argue that new evidence, the presentation of new evidence or re-arguing a defence constitute your "measure taken to comply" for the purposes of Article 21.5 of the DSU in this dispute?**

**6. ANT, USA. Article 17 of the DSU grants an opportunity for a respondent to obtain review of aspects of a Panel report by means of an appeal. If that appeal does not succeed, aren't the findings in the Appellate Body report then final in accordance with Article 17.14?**

Once a panel report or an Appellate Body report is adopted by the DSB, under Article 17.14 of the DSU, the report is "unconditionally accepted by the parties to the dispute." This rule has been consistently interpreted by the Appellate Body to provide for the finality of Appellate Body reports, as well as the finality of panel reports that are not appealed. Although the doctrine has been articulated on a number of occasions,[7] it has been most comprehensively delineated in *EC – Bed Linen (Article 21.5 – India)*,[8] which has been discussed in written submissions by Antigua[9] as well

[7] *See, e.g.*, Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 89-96; Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 78-79.

[8] Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, paras. 90-97.

[9] First 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 DSU by Antigua and Barbuda*, WT/DS285 (25 September 2006) (the "AB First Submission"), para. 32; Rebuttal 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 DSU by Antigua and Barbuda*, WT/DS285 (30 October 2006) (the "AB Second Submission"), paras. 24-28.

as the European Communities[10] and Japan.[11] This doctrine has never been rejected and continues to be relied upon by panels operating under Article 21.5 of the DSU.[12]

As a general proposition, all judicial or other dispute resolution systems require a concept of finality of the process at some stage. For example, under United States law, a dispute in the federal court system is finally resolved upon determination of the United States Supreme Court.[13] Under the legal system of Antigua, a decision of the Judicial Committee of the Privy Council marks the final end of a dispute.[14] The need for finality in any system is without real question. Article 17.14 of the DSU incorporates this concept into dispute resolution at the WTO.

**7. ANT, USA. Does it make any difference to a DSB recommendation whether a defence is rejected outright or is simply not established for lack of evidence? Is the result the same, i.e. the defence fails?**

This issue has been definitively resolved by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* as well, where the question was taken square on. The Appellate Body held that there was no difference whether a claim failed for failure to establish a *prima facie* case or whether it was rejected after a full hearing.[15]

**8. USA. The U.S. is arguing that even if a respondent fails to establish an affirmative defence in the original proceeding the respondent has a right to maintain the measure that has been found to be inconsistent with an obligation. Where does such a right stem from? How could any right exist when the respondent has failed to establish a justification for such measure? (US oral statement, para. 29)**

**9. USA. Does the U.S. consider that measures consistent with covered agreements can be required to be brought into compliance?**

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[10] 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), paras. 42-47.

[11] 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. 7-15.

[12] *See, e.g.* Panel Report on *United States – Oil Country Sunset Reviews (Article 21.5 – Argentina*), paras. 7.93-7.94.

[13] U.S. CONST. art. III; L. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 160 (1960).

[14] Antigua and Barbuda Constitution Order 1981, Chapter IX, Section 122, Para. 1.

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

**10. USA. The U.S. refers to a situation where a complaining party could not expect the responding party to adopt any substantively different measure, "because the original measure was already in compliance". (US FWS §46) Who would have made the determination that the original measure was already in compliance?**

**11. ANT, USA. Is the rule in Article 17.14 of the DSU, that an adopted Appellate Body report "shall be unconditionally accepted by the parties", absolute? For example, would it apply where a recommendation was inconsistent with Article 19.2 of the DSU? Or where a report exceeded the scope set out in Article 17.6 of the DSU?**

Antigua agrees with the comments in this regard made by the representative of China at the Panel's session with the Third Parties held on 28 November 2006. At that meeting, China indicated in the context of Article 19.2 of the DSU that the provision should be viewed as a directive aimed at the Appellate Body in conducting its review and making its determinations, rather than some stand-alone doctrine. Article 17.6 of the DSU is best viewed in that light as well, although Article 17.6 can also be seen as a directive to the parties to an appeal themselves.

The real problem with any other approach is that *who* is to make a "determination" that (i) "a recommendation with inconsistent with Article 19.2" or (ii) "a report exceeded the scope set out in Article 17.6?" To the extent that such a determination *can* be made at all, under the DSU, this function can only be exercised by the DSB pursuant to Article 17.14. Obviously, it cannot be for a party to a dispute to *unilaterally* determine whether a report of the Appellate Body that has been adopted by the DSB has been determined correctly and in compliance with the DSU.

In a case of an Appellate Body report that was clearly wrong to such a material respect that a party to a dispute felt the report should not be adopted by the DSB, Article 17.14 of the DSU would appear to give the party the ability to address the DSB on the issue and to convince the DSB not to adopt the offending report by consensus. Although Antigua is unaware of this ever occurring since the inception of the WTO in 1995, it *does* appear to be possible under a literal reading of Article 17.14.

**12. USA. Please refer to Article 17.14 of the DSU and the Appellate Body's decision in EC - Bed Linen. In your view, are these expressions of a principle that at some point disputes should be treated as finally settled so that potentially endless cycles of litigation are avoided not only with respect to claims but also with respect to defences and specific issues considered in disputes, and both with respect to arguments that are rejected and those that fail for lack of evidence?**

**13. ANT. Please refer to Articles 19 and 21 of the DSU. In your view, do these provisions grant a special status to the implementing Member? For example, do DSB recommendations and the procedures for surveillance of their implementation focus on the respondent rather than the complainant, so that the respondent knows what aspects of a measure it is required to modify to comply with a DSB recommendation, and protect the respondent from having to face a second claim with respect to the same aspect?**

Antigua does not believe that any of these provisions (or any other DSU provision, for that matter) accord an implementing Member any "special status." As the complaining party, and the party entitled to the benefit of compliance, if any party is entitled to "special status" logically it would be the complaining party. One of the main concerns of the drafters of the DSU was to ensure effective implementation (see the response to Question 2 above). It is *that* concern that is at the basis of provisions of Articles 19 and 21. Not some desire to protect the implementing Member.

That being said, there are clearly certain provisions that *focus* on the implementing Member, such as Article 19.1 of the DSU and Article 21.3. Because it is the implementing Member that must do the complying, it follows that it will be the subject of some focus during the compliance process. As far as knowing "what aspects of a measure it is required to modify to comply with a DSB recommendation," under Article 19.1 of the DSU a panel or the Appellate Body may make a direct suggestion as to how recommendations may be implemented. In practice, such suggestions are the exception,[16] and in the rare instances where given, the panel or the Appellate Body are clear and specific on what the recommendations are.[17]

In the vast majority of cases, implementing Members are generally left to determine themselves how to comply with a recommendation.[18] However, as a general proposition when a measure is found to be contrary to a Member's obligations under a covered agreement, the offending measure is expected to be withdrawn:

> "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."[19]

This should not be difficult in most cases where a measure is found inconsistent with a covered agreement, as both the measure and the nature of its inconsistency will be identified and determined in the course of the proceeding, just as was the case in the original proceeding in this matter.

Antigua does not see anything in the DSU, nor in any related jurisprudence, that is directed towards protecting an implementing Member from "from having to face a second claim with respect to the same aspect," and, were that to be the case, there is nothing in this proceeding to which such a doctrine might be relevant.

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[16] Panel Report on *Korea – Certain Paper*, paras. 9.1-9.4.

[17] *See, e.g.*, Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, , paras. 6.155-6.158; Panel Report on *Guatemala – Cement I*, para. 8.6; Panel Report on *US – Cotton Yarn*, para. 8.5.

[18] Panel Report on *US – Steel Plate*, para. 8.8.

[19] DSU Article 3.7. *See also* Panel Report on *US – FSC II (Article 21.5 – EC)*, para. 7.26; Panel Report on *Dominican Republic – Import and Sale of Cigarettes*, fn. 381.

**14. USA. Please refer to the following passages in the Panel and Appellate Body reports:**

- **para. 6.599 of the Panel report, which states that:**

  **"there is ambiguity as to the relationship between, on the one hand, the amendment to the IHA and, on the other, the Wire Act, the Travel Act and the Illegal Gambling Business Act";**

- **para. 6.607 of the Panel report, which contains the following reference:**

  **"in light of the ambiguity relating to the Interstate Horseracing Act";**

- **and para. 368 of the Appellate Body report which states that:**

  **"The second instance found by the Panel was based on 'the ambiguity relating to' the scope of application of the IHA and its relationship to the measures at issue. We have upheld this finding."**

**Why are these findings not final?**

**15. USA. Please refer to para. 371 of the Appellate Body report, last sentence, which states that:**

> **"we wish to clarify that the Panel did not, and we do not, make a finding as to whether the IHA does, in fact, permit domestic suppliers to provide certain remote betting services that would otherwise be prohibited by the Wire Act, the Travel Act, and/or the IGBA":**

**(a) Was this simply an expression of deference, indicating that the Appellate Body did not presume to know the meaning of a Member's domestic law better than the Member itself?**

**(b) Does this sentence, clarifying what the Panel and Appellate Body did not find, affect what the Panel did find regarding "'the ambiguity relating to' the scope of application of the IHA and its relationship to the measures at issue", which was upheld by the Appellate Body?**

**16. ANT, USA. What authority does the DSU grant the Appellate Body to extend an invitation to a Member to demonstrate a point after the conclusion of an appeal? (US FWS §44) How would such an invitation affect the recommendation by the DSB? Why did the Appellate Body not expressly suggest ways in which the U.S. could implement the recommendations?**

Antigua submits that the DSU does not grant any such authority. Nor did the Appellate Body extend such an "invitation" to the United States in this matter. To do so would be contrary to Article 17.14 of the DSU, as that article clearly anticipates that the adoption of a final report by the DSB will result in the end of the matter–and the DSU itself does not provide for any further level of appeal, or remand procedure, that would provide any forum for such a "demonstration." Such an invitation would be illogical.

While the Appellate Body (or the panel, for that matter) could have suggested one or more methods of compliance pursuant to Article 19.1 of the DSU, neither chose to do so for reasons that Antigua has no knowledge of.

> **17. USA. The U.S. refers to a respondent required to adopt new measures when it is already in compliance with its obligations. (US FWS §45) Is this not true of any respondent whose measures may well satisfy an exception but who fails to raise that exception before a Panel? Or a respondent who does not succeed in demonstrating that its measure satisfies an exception?**
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> **18. USA. Does the U.S. consider that any responding party that has a valid affirmative defence that did not succeed only because of a lack of a full factual showing in the original proceeding has a right to make a full factual showing of the same defence in a compliance proceeding? What would be the systemic implications of such a view? What incentive would a respondent have to fully argue its affirmative defence before the original panel? (US oral statement, para. 31)**
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> **19. ANT, USA. If a respondent were entitled to a "second chance" to make out a defence would the compliance panel make its assessment on the basis of evidence presented in the compliance proceeding only, or the evidence presented in the original proceeding as well?**

This is a particularly hypothetical question, as no WTO dispute resolution case has ever allowed a "second chance" to a respondent or to a complainant on *any* issue. That being said, Antigua can see no reason why evidence from the "original go-round" should not be up for consideration as well as new evidence under such a circumstance.

> **20. ANT. If a respondent had sufficient evidence to demonstrate in a compliance proceeding that its measures were consistent with a general exception provision but the compliance panel denied it a "second chance" to make out such a defence, what action would this require a respondent to take, in view of Article 3.2 of the DSU?**

Antigua would expect a Member under such circumstances to have raised the issue with the DSB at the time of the adoption of the applicable Appellate Body report. In the absence of such an action, once a report is adopted by the DSB, it has to be implemented. In the absence of implementation, the complainant must be allowed to suspend concessions pursuant to Article 22 of the DSU. Any "new" or "sufficient" evidence cannot lead to a modification of the original report. Therefore, such evidence can play no role in proceedings under Article 21 or 22 of the DSU because these are

exclusively related to the implementation of the DSB recommendations resulting from the original panel and Appellate Body proceedings.

If the non-implementing Member takes the view that (i) it has collected better evidence or (ii) circumstances have changed, and it now meets the conditions of the general exception clause, it can discuss this with the complainant. If the complainant agrees with that analysis, it should withdraw its suspension measures in accordance with Article 22.8 of the DSU. If the complainant does not agree and keeps its suspension measures in place, the respondent in the original proceeding can start a new dispute settlement case against the original complainant for violation of Article 22.8 of the DSU (as has happened in *EC - Hormones*). The "new evidence" or the "new circumstances" can then be assessed in this new dispute settlement case. This approach is fully compatible with Article 17.14 of the DSU.

**21. ANT. If a respondent were not entitled to a "second chance", would this be reasonable in a hypothetical case after a complex original dispute that presented numerous novel issues, especially if the dispute involved an under-resourced respondent who was unfamiliar with WTO dispute settlement?**

As a general proposition, dispute settlement has developed in a more formalistic way than Antigua (and probably many other developing countries) would like to see. A good example from *this* case is the fact that the original panel and the Appellate Body insisted that Antigua not just identify but also comprehensively discuss hundreds of specific United States "measures" in a very complex and opaque federal system of government, despite the fact that the United States had confirmed on numerous occasions–including in front of the DSB– that it prohibited the cross-border supply of gambling and betting services from Antigua to consumers in the United States. Another example is the fact it was only in the report of the Appellate Body that it was clarified that, when a respondent invokes a general exemption clause, it is the *complainant* that has to put forward less restrictive alternatives. As a minimum, parties to a legal proceeding should be told the rules on evidence before or during a procedure–and not afterwards. These remarks have, however, no immediate bearing on this compliance proceeding. Rather, Antigua makes these points to demonstrate that the problem of the capability of under-resourced developing countries is a much broader one than the issue of giving them a "second chance" in a compliance proceeding.

That being said, Antigua agrees with the European Communities in this respect, and expects that each party to a dispute advance its best possible case and bear the consequences. That is truly a hallmark of virtually every legal system, where the participants themselves bear the responsibility for the quality and prosecution of their cases. If, as no doubt happens frequently, such a result ends in injustice or a faulty result it is unfortunate, but to distort the dispute resolution process itself to accommodate such a circumstance would be appalling. If a need exists to change the system, then that is for the Members to decide and to remedy as a systemic issue.

Just as it is clear from Article 17.14 of the DSU that an Appellate Body report adopted by the DSB is final and binding on the parties, it is just as clear in Article 21.5 that the role of a compliance panel is limited to–notwithstanding how broad may be their scope of examination in the process–compliance with the recommendations and rulings of the DSB. To do otherwise, including

to give the implementing Member a "second chance" to establish their case-in-chief, would be manifestly outside the scope of the compliance panel's authority.

**22. USA. If the U.S. is permitted to demonstrate that its measures satisfy the requirements of the Article XIV chapeau, what is Antigua entitled to demonstrate? What would limit the Panel's assessment to the IHA? Could the Panel's assessment include any issue as to whether the Federal criminal statutes satisfy the requirements of the Article XIV chapeau, such as whether they are non-discriminatory on their face?**

**23. ANT. How does Antigua's case concerning the Interstate Horseracing Act relate specifically to the Illegal Gambling Business Act? Please note that the IGBA refers to State laws but not to other federal laws, such as the Wire Act.**

Antigua's "case" on the Interstate Horseracing Act is simply that it permits domestic interstate remote gambling on horse racing in the United States, as well as regulating certain aspects of *intrastate* remote gambling on horse racing when the applicable race takes place in another state. By the express terms of the IHA, the activity must be lawful in each state where it takes place, so *per se* the IGBA would not come into play with respect to activity coming within the scope of the IHA. Operators who offer horse racing services under the auspices of the state laws and regulations of the state in which they operate are immune from IGBA prosecutions, because, to establish an IGBA violation, the government must establish as a "predicate offence" that the defendant has violated state gambling law. In simple terms, the IHA is an integral component of United States federal and state law that collectively permit domestic remote gambling operators to offer services without risk of criminal prosecution under the IGBA. Antiguan operators who offer the same services, on the other hand, are generally subject to prosecution under the IGBA due to the IHA's discriminatory treatment of foreign operators.

**24. USA. Please refer to the Award of the Arbitrator pursuant to Article 21.3(c) of the DSU which states that "the United States emphasizes that the only means of implementation that will achieve the necessary clarification is legislative means" (para. 37) and that "implementation will occur by legislative means" (para. 64). Can these statements in the Award be reconciled with the US submission that "[l]egislation to clarify the interaction between the IHA and Wire Act was a possible means - but not the only means - for compliance"? (US FWS §55) If the U.S. disagrees with the statements in the Award of the Arbitrator, could it please comment on the statements attributed to it in the transcript of the Arbitrator's oral hearing on pages 31-32 ("legislation is required") and page 34 ("we need legislation")? Could the U.S. clarify why it referred on pages 59-60, 60-61 and 72-73 to action by Congress - what could it have contemplated there if not legislation?**

**25. USA. The U.S. has referred to Bill HR 4777. Antigua has referred to Bill HR 4411. What was the relationship between these Bills and the internet gambling law that was passed in October 2006? Was there ever legislation pending that would have brought the U.S. into compliance with the DSB recommendations in this dispute? (US**

**SWS §38) Is there anything in writing to demonstrate that such legislation was under consideration in the Congress?**

**26. ANT, USA. Does the fact that statements are made in the context of Article 21.3(c) of the DSU require that they be given different weight from that accorded to any other statements of a party concerning an issue in dispute?**

The fact that express representations were made by the United States to the WTO-appointed arbitrator, as well as to Antigua, during the course of the arbitration in this matter under Article 21.3 of the DSU should be accorded substantial weight by this Panel in assessing the United States' compliance with the recommendations and rulings of the DSB (the "DSB Rulings"). In particular, Articles 21.3 and 21.5 are both part of the implementation surveillance system of the DSU and accordingly, statements made in the Article 21.3 context should be given special weight. These are not just statements made in a random context–rather, they are statements made in the very specific context of the implementation surveillance system. If a WTO Member were able to change its position randomly or without justification when going through the implementation surveillance process, this would make the entire process a futile exercise.

With this in mind, the representations should be accorded substantial weight in assessing the claim of the United States that its original measures have been in compliance from the beginning of the process, without need for any further action on the part of the United States. As the United States had conceded, as well as argued, that legislative action of some type was necessary for the United States to comply with the DSB Rulings, the fact that it now comes before this Panel having done nothing but nonetheless asserting compliance should serve as probative evidence that the United States is *not* in compliance.

The statements should be accorded substantial weight by virtue of being made, and repeated, by the United States during the course of dispute resolution proceedings. As the panel in *United States – Sections 301-310 of the Trade Act of 1974* concluded in assessing the consequence of representations regarding domestic law made by the United States to the panel during the course of the dispute:

> "We are equally satisfied, as a matter of fact, that the statements made to us were intended to be part of the record in the full knowledge and understanding that they could, as any other official submission, be made part of our Report; that they were made *with the intention not only that we rely on them but also that the EC and the third parties to the dispute as well as all Members of the DSB – effectively all WTO Members – place reliance on them*."[20]

Antigua agrees with the European Communities that such solemn representations by a party to a dispute cannot for ever be held to them, but if a party is to change its position it must provide a reasonable explanation to all concerned as to why its position has changed and what its justification is. Again, Antigua agrees with the European Communities that the American argument that it has been in compliance all along is *per se* unreasonable.

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[20] Panel Report on *US – Section 301*, para. 7.124 (emphasis added).

**27. USA. The U.S. has referred to the "safe harbor" provision that is available for the transmission of information assisting in the placing of wagers (US FWS §§7-10; SWS §19) Is an "interstate off-track wager", as defined in the IHA, a "bet or wager" or "information assisting in the placing of wagers" within the meaning of 18 U.S.C. 1084(a)?**

**28. USA. The U.S. submits that no language of permission exists in the IHA. (US FWS §33) Can this be reconciled with the following language of Section 5 IHA, cited in the Appellate Body report at para. 361:**

> **"An interstate off-track wager may be accepted by an off-track betting system only if consent is obtained from - the horse racing association" [followed by extensive conditions and provisos] (emphasis added)**

**29. USA. The U.S. has explained that the IHA and the Wire Act have separate effects with respect to wagering that breaches both Acts. (US FWS §35) Please explain the separate effects of the two Acts with respect to wagering conducted in accordance with Section 5 of the IHA but not in accordance with the Wire Act.**

**30. USA. If there were a positive repugnancy between the IHA and the Wire Act (which the U.S. does not concede), would the U.S. disagree with the rules of statutory construction that allow more recently enacted and specific statutes to control or prevail to the extent of a conflict, as described by Antigua? (Antigua FWS §§58-59)**

**31. USA. Please refer to the Unlawful Internet Gambling Enforcement Act of 2006 (Exhibit AB-113).**

**(a) Even if this Act is not within the terms of reference of this Panel, do you consider that it can constitute evidence relevant to the matter before the Panel?**

**(b) Why does 31 U.S.C. 5362(10)(D)(i) provide that the term "unlawful Internet gambling" shall not include any activity that is allowed under the Interstate Horseracing Act of 1978? What activities are allowed under the IHA that would otherwise fall within the definition of the term "unlawful Internet gambling"?**

**(c) What are the "existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes" referred to in 31 U.S.C. 5362(10)(D)(iii)? Whom are the disagreements between? Can such disagreements be reconciled with the US submission to this Panel that under fundamental principles of US law, the IHA does not provide an exemption from the three Federal statutes? Does this indicate ambiguity in the relationship between these laws?**

**(d) If the US Congress does not wish to resolve any existing disagreements over this question of interpretation at this stage, is the US delegation to this Panel entitled under US law to take a definitive view on it? Is the US delegation asking the Panel to take a**

**definitive view on a question of interpretation that the US Congress has chosen not to resolve?**

**(e) Can the U.S. comment on the statements by the National Thoroughbred Racing Association that "[t]he legislation contained language that recognizes the ability of the horse racing industry to offer account wagering under the Interstate Horseracing Act of 1978 as amended" (Exhibit AB-118) and by Youbet.com that the "legislation ... exempts Youbet.com and other advanced deposit wagering companies in the horse racing industry from internet gaming prohibitions"? (Exhibit AB-120)**

**32. Please refer to the States' laws and regulations on account wagering "under the auspices of the IHA" provided by Antigua (Exhibits AB-34 to AB-51), as well as State licences to specific operators among the information on particular operators (Exhibits AB-65 to AB-73).**

**(a) ANT. Do these laws and licences purport to permit wagering under certain conditions that would otherwise violate the Wire Act, the Travel Act or the Interstate Gambling Business Act? If so, how is this related to the operation of the IHA?**

This question illustrates the difficulty in separating United States law from practice that Antigua has (by and large unsuccessfully) raised throughout the course of this dispute. Indeed, this difficulty is one of the primary reasons why Antigua argued that the United States' own admission as to its prohibition on the cross-border supply of gambling and betting services such as those provided from Antigua–combined with its enforcement efforts in that regard–should of itself have been capable of assessment by the original panel in the underlying proceeding. The reality is that the text of the United States' laws do not necessarily support the United States government's interpretations of them, nor are the laws of the various states consistent in their reference or interaction with federal law.

To the extent that these state laws authorise remote gambling within state boundaries, they are not contrary to the Wire Act or any of the other federal legislation. To the extent that they permit remote gambling that crosses a state border, then they arguably might violate either the Wire Act, the Travel Act, the IGBA or two or more of them. With respect to the Wire Act, the United States takes the position that the Wire Act prohibits all betting that crosses a state or international border, regardless of whether the betting is otherwise legal in both jurisdictions, and that Section 1084(b) of the Wire Act applies only to "information" pertaining to betting and not to actual bets or wagers themselves.[21] Outside the context of the IHA, this position is consistent with the decision of the United States federal appellate court in the *United States v. Cohen* case.[22]

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[21] 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 DSU by Antigua and Barbuda*, WT/DS285 (16 October 2006), para. 8.

[22] *United States of America v. Jay Cohen*, 260 F.3d 68 (2nd Cir. 2001), *cert. denied*, 536 U.S. 922 (2002).

Thus, to the extent any of these state laws allow a bet to cross a state line, that law would be contrary to the Wire Act under the reading given it by the United States, *but for* the application of the IHA. Of the 18 states that currently allow remote gambling on horse racing, the laws of eight of them expressly permit remote wagering under certain circumstances where the punter is located in a state other than that in which the gambling service provider is located.[23]

Under the view that the IHA permits interstate remote wagering as long as the conduct is legal in both states, neither the Travel Act nor the IGBA would have application, as the conduct would not violate state law, nor would it (in the context of the Travel Act) violate any federal law.

**(b) ANT. Some of these laws and regulations do not refer to the IHA, some relate to wagering not only on horseracing but also on other sports such as greyhound racing, some allow wagers placed from foreign jurisdictions, and all apply to intrastate wagering. To what extent then do these laws depend on some authority granted by the IHA?**

As noted above, to the extent they sanction wholly-intrastate remote gambling, the state statutes do not need the IHA to be lawful. Under the United States' reading of the Wire Act, all rely on the IHA to the extent they permit the remote wagers to cross state borders. Interestingly, some of the state laws appear to be structured to attempt to bring themselves within the scope of Section 1084(b) of the Wire Act, notwithstanding the position of the United States and the decision of the court in the *Cohen* case. For example, the California advance deposit wagering statute clearly appears to be viewed this way, with the "entity holding the account" of the punter be considered to be making the wager "pursuant to wagering instructions issued by the owner of the funds communicated by telephone call or through other electronic media."[24] Under this approach, the IHA would arguably not be necessary to legitimise the conduct and the wagering would not necessarily have to be limited to horse racing contests.

**(c) USA. Many of these State laws appear to authorize account wagering by telephone and other electronic means. How does this relate to the prohibition in the Wire Act?**

**(d) USA. Why do some of these State laws refer to the Interstate Horseracing Act 1978?**

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[23] These states are California, Idaho, Kentucky, Louisiana, Maryland, Nevada, Oregon and Wyoming. WEST'S ANN.CAL.BUS. & PROF.CODE § 19604 ***[Exhibit AB-34]***; IDAHO CODE § 54-2512 ***[Exhibit AB-36]***; KY. REV. STAT. ANN. §§ 230.777(2) ***[Exhibit AB-37]***; LA. ADMIN. CODE tit. 35, pt. XIII, § 12003(A) ***[Exhibit AB-38]***; MD. REGS. CODE tit. 09, § 10.04.24(C)(2) ***[Exhibit AB-39]***; NEV. GAM. REG. 26C.160 ***[Exhibit AB-41]***; OR. ADMIN. R. 462-210-0020 to -0030 ***[Exhibit AB-47]***; WYO. RULES & REG. DEP'T COMMERCE, PC Ch. 9, § 2 ***[Exhibit AB-51]***.

[24] WEST'S ANN. CAL. BUS. & PROF. CODE § 19604(b). *See* ***Exhibit AB-34***.

**33. ANT, USA. Does the IHA only allow domestic suppliers to operate wagering services on horseracing, or can foreign suppliers in some way operate under its auspices? If Antiguan operators entered into revenue-sharing arrangements with racetracks, would they still be liable to prosecution?**

As Antigua pointed out in its first submission,[25] the express language of the IHA permits cross-border wagering only between states–thus, Antigua could not qualify under its terms regardless of whether its operators entered into agreements with the tracks or not.

**34. USA. Has the U.S. ever prosecuted under the Wire Act wagering on horseracing conducted in accordance with the IHA? If not, why not?**

**35. Regarding Youbet.com, TVG, XpressBet.com, Capital OTB and the other U.S. domestic operations described by Antigua (Exhibits AB-65 to AB-73):**

**(a) ANT. Do they engage in any form of wagering other than pari-mutuel wagering on horseracing?**

To Antigua's knowledge, of the referenced companies, only one–"US Off-Track"–allows betting on a sport other than horse racing.[26] While the favouritism shown horse racing may be curious, it is in the end irrelevant to the dispute in this case, where the focus is *solely* on the distinction between "remote" and "non-remote" gambling and betting services. The United States has acknowledged that the precise nature of the betting is not relevant.[27]

**(b) ANT. Do these operators knowingly use a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or communications entitling persons to receive money or credit as a result of bets or wagers? Or do they only transmit information assisting in the placing of bets or wagers that falls within the safe harbour provision of 18 U.S.C. 1084(b)?**

Antigua does not know the answer to this question, but suspects that most of the operators "knowingly use a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers" under the view that the IHA exempts their activities from the scope of Wire Act

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[25] AB First Submission, paras. 50-51.

[26] Antigua has pointed out in this proceeding that there are operators, such as Stations Casino in Nevada, that offer telephone and online remote account wagering on professional and amateur sporting events [***Exhibit AB-80***]. The Stations Casino remote betting sports book service is sanctioned by Nevada law. Moreover, like the horse race wagering companies listed in ***Exhibits AB-65 to AB-73***, it has not been threatened with or prosecuted for violations of federal or state criminal laws.

[27] Award of the Arbitrator, WT/DS285/13 (19 August 2005), para. 9.

coverage.[28] Given the reaction of the horse racing industry to the passage of the new United States prohibition law, this would appear to be the case.[29]

**(c) ANT. What is Antigua's view of the legality of wagering covered by the Wire Act that falls outside the scope of the IHA, such as wire transmission of non-horse-racing sports betting, and non-sports betting? Is it illegal?**

Antigua believes that the Wire Act does not apply to non-sports gambling, and thus from a federal law perspective, cross-border gambling on non-sports betting is not *de jure* prohibited. This view is supported by federal case law. In 2002, a United States federal appellate court ruled that the Wire Act does not apply to online casino gambling.[30] In that particular case, the plaintiffs filed a civil suit to avoid credit card debts incurred as gambling losses at online casinos. To establish their claim, the plaintiffs sought to establish that the online casino gambling violated the criminal provisions of the Wire Act. The federal appellate court held that the Wire Act concerns only gambling on sporting events or contests, and did not apply to casino gaming.[31] The United States Department of Justice disagrees with this ruling and is of the view that the Wire Act applies to the remote provision of non-sports gambling and betting services as well.

**(d) ANT. If the U.S. has not prosecuted these operators, why is this due to the existence of the IHA and not due to other factors, such as a liberal interpretation of the safe harbor provision in the Wire Act, or the nature of what these operators actually transmit by wire? How does the alleged non-prosecution of these operators differ from the rates and patterns of prosecution of other potential offenders under the Wire Act?**

Antigua is uncertain as to why the United States has not prosecuted domestic operators offering services under the auspices of the IHA. It is certainly not because of the "nature of what these operators actually transmit by wire," because as Antigua demonstrated in its first submission[32] and

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[28] YouBet.com Frequently Asked Questions [***Exhibit AB-65***] ("Youbet.com® is in full compliance with all applicable state and federal laws."); *see also* YouBet.com 2005 Form 10-K (13 March 2006), p. 8 [***Exhibit AB-65***] ("We also accept pari-mutuel wagers from subscribers in other states where existing state laws purport to prohibit or restrict our ability to accept pari-mutuel wagers from such states. However, we believe accepting such wagers is permitted pursuant to the Interstate Horseracing Act of 1978, as amended, state laws, and certain other laws and legal principles and doctrines, including those contained in the U.S. Constitution."); Magna Entertainment Corp 2005 Form 10-K (16 March 2006), p. 42 [***Exhibit AB-67***] ("In December 2000, legislation was enacted in the United States that amends the Interstate Horseracing Act of 1978. We believe that this amendment clarifies that inter-track simulcasting, off-track betting and account wagering, as currently conducted by the U.S. horse racing industry, are authorized under U.S. federal law.").

[29] *See* AB Second Submission, para. 56, fn. 101.

[30] *In Re Mastercard International Inc.*, 313 F.3d 257 (5th Cir. 2002).

[31] 313 F.3d at 262.

[32] AB First Submission, paras. 89-103; Schedule 2.

as is apparent from accessing these sites, they operate in all material respects like a typical Antiguan operator.

The non-prosecution of these operators has been offered in this proceeding by Antigua to support its contention that the IHA authorises domestic remote gambling in the United States. Taking collectively (i) the language of the IHA; (ii) the interpretation given to it by legal authorities and commentators; (iii) the language in the new United States prohibition legislation with respect to "activity allowed by the IHA"; (iv) the numerous state legislative and regulatory schemes for remote gambling on horse racing, a number of which expressly reference the IHA; (v) the extent of current sanctioned remote gambling in the United States on horse racing; and (vi) the complete lack of prosecutions of these operators, Antigua believes it is impossible for the United States to meet any burden of proof that the IHA does not permit domestic remote gambling.

Further, as the language of the new federal prohibition law has demonstrated, it should now be clear that the Wire Act does not prohibit wholly-intrastate remote gambling. As Antigua demonstrated in its first submission,[33] the State of Nevada has in place a regulatory scheme for intrastate remote gambling on sports and other contests and at least one operator is currently in business and utilising this scheme.[34] Additionally, there is significant, state-sanctioned remote gaming in lotteries in the United States.[35]

Because the United States took the position with respect to the chapeau of Article XIV of the GATS that the United States permitted *no* remote gambling at all, Antigua does not believe that the legal basis for the remote gambling is as important with respect to the chapeau as is the *fact* of the domestic remote gambling. In particular, Article XIV is concerned primarily about the *application* of measures–Antigua's point is that in actual application, the Wire Act, the Travel Act and the IGBA are *applied* in a discriminatory manner because domestic, sanctioned remote gambling exists in the United States. Thus, whatever it is that the federal statutes say, by prohibiting services from Antigua and allowing domestic industry, the United States cannot possibly demonstrate compliance with the chapeau of Article XIV.

**(e) USA. Has the U.S. launched a criminal prosecution against any of these operators? What is the current status of the prosecution proceedings against Youbet.com that were pending at the time of the original dispute (WT/DS285/R, para. 6.588)?**

**36. USA. Do the recent prosecutions of foreign operators listed in Antigua's first written submission at paras. 106-107 concern the provision of pari-mutuel wagering on horseracing or other wagering services or both?**

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[33] *Id.*, paras. 118-122.

[34] *Id.* *See* ***Exhibit AB-80***.

[35] *Id.*, paras. 123-129. *See* ***Exhibit AB-83***.

**37. USA. Please refer to the Statement of Bruce G. Ohr of the US Department of Justice as set out in Exhibit AB-32.**

**(a) Can the U.S. confirm that this is the statement referred to in the US April 2006 status report to the DSB (WT/DS285/15/Add.1)?**

**(b) What is the current status of "the civil investigation relating to a potential violation of law" to which Mr. Ohr referred?**

**(c) What was the law potentially violated? Why was it a civil, rather than a criminal, investigation? How is it relevant to the question of how the three Federal criminal statutes at issue are applied?**

**(d) Has the US Department of Justice ever initiated a criminal prosecution of the interstate transmission of wagers conducted in accordance with the IHA? Can this pattern of prosecution be taken into account in ascertaining the Department's interpretation of the statute that it administers?**

**(e) Hasn't the original Panel already considered the interpretation of the US Department of Justice of the IHA as amended, as expressed in the Presidential signing statement, and found it unpersuasive? (Panel report, paras. 6.597 and 6.600) Is the interpretation given in Mr. Ohr's statement any different from that expressed in the Presidential signing statement?**

**(f) Did the US Department of Justice strongly object to the 2000 amendment to the IHA? If so, does this affect the weight to be given now to its interpretation of the relationship between that Act, as amended, and the Federal criminal statutes at issue?**

**38. With respect to the question whether the three Federal criminal statutes at issue are, on their face, non-discriminatory.**

**(a) ANT, USA. Did the Appellate Body have competence to make the finding at paras. 354 and 357 of its report when this was not covered in the Panel report or a legal interpretation developed by the Panel, and it was contested by Antigua (original first oral statement, para. 92; original second written submission, paras. 33-34)?**

As a practical matter, in light of Article 17.14 of the DSU it probably does not much matter. However, there is no question that the panel itself made no finding that either the Wire Act, the Travel Act or the IGBA were facially non-discriminatory[36] but that the Appellate Body did so determine.[37] Arguably, as there was no such legal finding by the panel, under Article 17.6 the Appellate Body did not have jurisdiction to make the conclusion on its own. However, there is also

[36] *See* Panel Report on *US – Gambling*, paras. 6.360-3.380.

[37] Appellate Body Report on *US – Gambling*, para. 354.

authority to the effect that the Appellate Body has the power and authority to review such legal matters and make such legal determinations as is necessary in order to fulfill its mandate with respect to a matter before it.[38]

**(b) ANT. Does Antigua challenge the evidence that the original Panel considered relevant to the chapeau of Article XIV of GATS in paras. 6.584 and following of its report - which does not include the wording of the three Federal criminal statutes on their face? Why did Antigua not raise this point at the interim review stage? Did Antigua raise it on appeal? (Antigua SWS §9)**

In Antigua's view the original panel should not have developed such an extensive discussion on Article XIV in the absence of a full debate on the issue. A full debate on this complex factual matter was the only way in which the panel could have made a fully informed decision. In the absence of such a full debate, Antigua believes that the original panel should have limited its assessment of Article XIV to those issues that were specifically discussed by the parties. These were indeed very limited, but the limited nature of the debate was entirely attributable to the fact that the United States chose not to develop its Article XIV defence in the original proceeding. Having only raised the Article XIV defence in its final submission–after Antigua's final submission had been made as well, the United States precluded the panel from making a coherent analysis of the purported defence.[39] In that respect, Antigua fundamentally disagreed with the approach adopted by the original panel. Such a fundamental disagreement could not, in Antigua's opinion, be fruitfully resolved at the interim review stage. Antigua appealed *this* issue to the Appellate Body but its appeal was rejected.

Antigua did not of course raise the issue regarding the three federal criminal statutes on appeal because the Panel had not made a finding with respect to them being facially discriminatory or not.

**(c) USA. Without prejudice to whether the Panel should review this issue, can the U.S. elaborate on its view that the text of those laws does not contain provisions that discriminate between countries, when the Wire Act refers to "interstate or foreign commerce", but not to intrastate commerce? (US FWS §17)**

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[38] Appellate Body Report on *EC– Hormones (Canada)*, para. 132; Appellate Body Report on *US – Gasoline*, pages 22-29; Appellate Body Report on *Canada – Periodicals*, pages 20-23.

[39] Antigua also strongly disagrees with the proposition apparently advanced by the Appellate Body that Antigua should have requested an extension of the original proceedings in order to adequately address the Article XIV issues. Appellate Body Report on *US – Gambling*, paras. 274-276. A complaining party should not be forced into a Hobson's choice late during the course of a proceeding by a respondent's litigation tactic.