COMMENTS[1] OF ANTIGUA AND BARBUDA

to the

ANSWERS OF THE UNITED STATES TO QUESTIONS FROM 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

13 December 2006

> **Q1.** 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?*

1. The United States considers that its measures are consistent with its obligations under the GATS, and that the United States has complied with the recommendations and rulings of the DSB by presenting new evidence and arguments during this proceeding which meet the U.S. burden of proof to show that the U.S. measures meet the criteria of the Article XIV chapeau.

---

[1] **The failure of Antigua to provide a comment to any certain United States answer or response should not be taken as acceptance of or agreement with the particular answer or response, in whole or in part. Rather, Antigua considers some of the answers not worthy of comment and others the subject of earlier, extensive discussion that does not require further elaboration.**

A read of this one sentence answer highlights the failure of the United States' efforts to demonstrate compliance with the DSB Rulings, as its "compliance" is dependent upon "presenting new evidence and arguments" and not by any action on its part at all.

With the caveat that Antigua does not believe the United States is entitled to reargue its failed case before this Article 21.5 compliance Panel,[2] it is important to point out that the United States has in fact *not* presented "new evidence and arguments" at all–rather, every argument that have made in this proceeding was made in the original proceeding and rejected by the original Panel and by the Appellate Body.[3] Even the argument that the IHA did not "repeal by implication" the Wire Act was floated and rejected in the original proceeding. All that the United States has done in this proceeding is refer to a number of United States court cases, each easily distinguishable from the situation involving the IHA and the Wire Act,[4] to support its contention that the IHA did not "repeal by implication" the Wire Act. Antigua of course has its own interpretation of how this doctrine should be applied under the circumstances, and a number of cases to support *its* position.[5]

Further, as compared to the recycling by the United States of its old arguments with no further proof or evidence, Antigua has shown in this proceeding:

- **The clear language of the IHA itself (" . . . a legal wager placed or accepted in one State . . . 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 . . .")[6]**

- **The *only* specific legislative history regarding the adoption of the 2000 amendment to the IHA ("I want Members of this body to be aware that [the amendment] would legalize interstate par-mutual gambling over the Internet. Under current interpretation of the [IHA], this type of gambling is illegal, although the Justice Department has not taken steps to enforce it. This**

---

[2] **This very important caveat applies to the comments throughout.**

[3] ***See* AB First Submission, paras. 36-41.**

[4] **None of the cases cited by the United States has a fact pattern like that involved with the IHA and Wire Act–the former statute clearly *permitting a specific activity* done in accordance with its terms that, otherwise, would have come under the more general coverage of the older statute. Further, none of these cases are, in fact, "new." They are old cases that the United States simply failed or chose not to submit to the original panel.**

[5] ***See* AB First Submission, paras. 57-61; AB Second Submission, paras. 37-45.**

[6] ***Id.*, paras. 50, 54.**

provision would codify legality of placing wagers over the telephone or other electronic media like the Internet.")[7]

- **Commentary, including an opinion of a state Attorney General, supporting Antigua's reading of the IHA**[8]

- **Numerous state laws and regulatory schemes endorsing remote gambling under the IHA**[9]

- **Numerous, high profile domestic operators–including operators owned by government entities–openly and continuously offering remote gambling services in the United States**[10]

- **Admitted complete lack of prosecution by the United States of remote gambling operators in the United States offering services under various state regulatory schemes, contrasted with significant prosecution efforts directed towards Antiguan operators**[11]

- **The language of the new federal prohibition law (removing from the definition of "unlawful Internet gambling" "any activity that is allowed under the [IHA].")**[12]

In the face of all of this evidence adduced by Antigua, it would be impossible under any reasonable analysis to conclude that the United States had met its "burden of proof" under the chapeau of Article XIV of the GATS.[13]

---

[7] ***Id.*, para. 55. Note that the United States has *no* legislative history supporting its interpretation at all, relying instead on the *absence* of any express statement by Congress that the amendment was intended to "repeal" the Wire Act–something that was not, in the event, required. *See* US First Submission, paras. 38-40.**

[8] **AB First Submission, para. 57. The United States, however, has supplied *no* independent support for its interpretation.**

[9] ***Id.*, paras. 65-68.**

[10] ***Id.*, paras. 69-103.**

[11] ***Id.*, paras. 104-107. For the admission by the United States, *see* Answers of the United States to Questions from the Panel, *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 (8 December 2006) (the "*US Answers*"), paras. 90-91.**

[12] **AB Second Submission, paras. 55-56.**

[13] **The United States, predictably, takes the position that the Panel can only take *its* evidence with respect to this issue, and not that of Antigua. *See* US Answers, para. 55; US Second Submission,**

2. The language cited in the Panel's question – *"bring its measures into conformity"* – is set out in, and required by, Article 19 of the DSU. It is important to view that language within the context of the entire article:

> "Article 19: Panel and Appellate Body Recommendations
>
> 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.
>
> 2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

3. The language about "bringing a measure into conformity" is in the same sentence, and follows upon, a reference to what the panel or Appellate Body has concluded with regard to the inconsistency found by the Panel or Appellate Body with a covered agreement. The United States submits that what it means in a particular dispute to "bring a measure into conformity" cannot be considered in the abstract, but must depend on the specific circumstances of the dispute, and most importantly the specific findings of the Panel or Appellate Body.

4. As the United States has explained in its written and oral submissions, in this dispute the Appellate Body explicitly noted that it was <u>not</u> making a finding as to whether the IHA provides an exemption from the three federal criminal statutes at issue. Rather, the Appellate Body found that the United States had not met its burden of proving this point, and thus had not met its burden of establishing an affirmative defense. In this context, one option for the United States to bring its measures "into conformity" was to proceed to meet its burden of proof to show that those measures were within the scope of the GATS Article XIV(a) exception.

The United States continues to make much of its assertion that "the Appellate Body explicitly noted that it was not making a finding as to whether the IHA provides and exemption from the three federal criminal statutes at issue." But the United States also continues to ignore that it was not the burden of the Appellate Body or the original panel to come to such a conclusion–rather, the burden of proof was on the United States to convince the original panel and the Appellate Body that the IHA did *not* provide such an exemption. As the United States failed to meet its burden of proof, there was absolutely no need or reason for either the original panel or the Appellate Body to make any further "finding" at all.

> **Q2.** 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*

---

para. 31.

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:

5. As the United States will elaborate in the answers to the subparts below, the United States does not consider that the "measure" in the phrase "measure taken to comply," as used in Article 21.5 of the DSU, must necessarily be more recent than the original proceeding. Article 21.5 does not itself specify a temporal element or limitation on the date that the measure is "taken." Indeed, it is not difficult to conceive of a number of situations in which the measure at issue in an Article 21.5 proceeding is the same as the measure at issue in the original proceeding. Some examples would be:

a) a measure that on its own terms expires or terminates at a certain time or under certain conditions. Where as a result the measure is no longer in existence as of the time of the Article 21.5 proceeding, the measure will no longer be inconsistent with the DSB recommendations and rulings, but that will not be because the measure taken to comply was more recent than the original proceeding.

b) a measure that is brought into consistency not through a change to the measure but due to a change in the underlying explanation or basis for the measure. For example, a sanitary or phytosanitary measure for which the risk assessment was found not to have adequately explained a particular element and is revised to comply with the SPS Agreement or an antidumping duty for which the inconsistency was a lack of adequate explanation for how the administering authority took evidence into account the evidence.

c) a measure that is brought into consistency through an external event, such as a sanitary or phytosanitary measure for which an international standard is adopted after the DSB recommendations and rulings that brings the measure into conformity with the SPS Agreement or an actionable subsidy for which external factors have resulted in there no longer being adverse effects.

Antigua observes that in all three of these examples, *something* has happened subsequent to the original findings that has either directly changed the measure or has changed its effect. In this case, there has been no change at all, at least no change that could arguably have brought the United States into compliance with the DSB Rulings.

6. Article 21.5 must be read together with DSU Article 19, which describes the recommendations and rulings with respect to which the Member concerned must "comply." In particular, Article 19 does not provide that a Member concerned must adopt a new measure in order to achieve compliance. Rather, Article 19.1 states: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned **bring the measure into conformity** with that agreement." To be sure, in many cases the Member concerned will choose to bring its measure into conformity by adopting a new or amended measure. (And in that case, the new or amended measure would be subsequent to the original proceeding.) However, Article 19 leaves open the possibility of bringing a measure into compliance through means other than adopting a new or amended

measure. Whether this option is available to the Member concerned in a particular dispute will depend on the specific findings of the panel and/or Appellate Body and the particular circumstances of the case.

> *(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?*

7. While the DSU does not define the word "measures," the United States is not aware of a basis for believing that the term "measures" in Article 21.5 would have a different meaning than when used in other articles of the DSU.

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

8. The United States understands that the thrust of this question is whether phrase "taken to comply" means something along the lines of "adopted by the Member concerned for the purpose of compliance." The phrase "taken to comply" would include this meaning, but it is not so limited. The Appellate Body in *Softwood Lumber IV* explained its views on the ordinary meaning of the word "taken" as used in DSU Article 21.5:

> "66. In examining the meaning of 'measures taken to comply' in Article 21.5, we begin with the word 'taken'. There is a wide range of dictionary meanings of the word 'taken', which is the past participle of the verb 'take'. The meanings of 'take' include, for example, '[b]ring into a specified position or relation'; '[s]elect or use for a particular purpose.'"

9. The first definition cited by the Appellate Body "bring into a specified position or relation" has a sense, perhaps, of the "positive action" referred to in the Panel's question. But the second meaning – "select or use for a particular purpose" – is not limited to the sense of adopting a new measure for a particular purpose. Under this latter meaning of the verb "take," a pre-existing measure would fit within the meaning of DSU Article 21.5. In other words, under this meaning, the original measure considered in the underlying proceeding would be "selected or used for a particular purpose" – namely, the purpose of showing compliance with the recommendations and rulings.

10. One of the illustrative sentences used in the New Shorter Oxford English Dictionary shows this second meaning of the term taken. That sentence is "That great genius is taken as the standard of perfection." Here, the "great genius" is not in any sense actively adopted, or moved from one place to another. Rather, the person who is the "great genius" is used for a particular purpose, which is to establish a "standard of perfection." Similarly, in the context of the current dispute, the original measure has not been newly adopted for the purpose of compliance, but rather is being used for the particular purpose of establishing compliance with the DSB recommendations and rulings.

11. The DSU used the word "taken," rather than more limiting phrases such as "measure adopted for the purpose of achieving compliance." In fact, "take" appears to be one of the

broadest verbs in the English language, with 9 major categories of definitions, plus dozens of shades of meaning within those categories. If the drafters of the DSU wished to have a more limited definition of the phrase "measures taken to comply," they would have used language that more precisely limited the measures to be considered under Article 21.5.

12. Moreover, as the United States has explained above and in its prior oral and written submissions, the context of the phrase "measures taken to comply" must include the rest of the DSU, including Article 3.2 and Article 19.2. First, both of those articles provide that the recommendations and rulings of the DSB cannot add to or diminish rights and obligations under the covered agreements. Those rights include the right to adopt measures that fall within the scope of the GATS Article XIV exception. To be consistent with Article 3.2 and Article 19.2, a finding that a measure **may or may not fall** within GATS Article XIV cannot require a Member to abolish or amend such a measure. In this context, the only sensible way to read "measure taken to comply" in Article 21.5 is for such a "measure" to include the measure examined in the original proceeding that may, or may not be, within the scope of GATS Article XIV.

Again, the United States overstates what was found by the Appellate Body. What was found was that the three federal statutes at issue were inconsistent with the GATS and the United States had not established that the statutes fell within the exception contained in Article XIV of the GATS. There was *not* a "finding that a measure may or may not fall within GATS Article XIV."

13. In addition, Article 21.5 must be read in the context of DSU Article 19.1, which describes the recommendations and rulings with respect to which the Member concerned must "comply." Article 19.1, however, does not provide that a Member concerned must adopt a new measure in order to achieve compliance. Rather, the Member concerned must **bring the measure into conformity** with that agreement." Article 19.1 does not necessarily require that a new measure be adopted in order to bring the pre-existing measure into conformity.

14. Finally, the United States notes Article 3.2 of the DSU:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

15. The dispute settlement system would not be providing "security and predictability" to the multilateral trading system if Members were foreclosed for procedural reasons from establishing in an Article 21.5 proceeding that the measures subject to the recommendations and rulings are in fact consistent with the covered agreements. Furthermore, such an interpretation of Article 21.5 would not serve to "preserve the rights and obligations under the covered agreements." Rather, it could, as would be the case if Antigua prevailed on its procedural argument in this dispute, "add to" the obligations of a Member by requiring it to replace or modify a measure

even when that measure is already consistent with the covered agreements, and would "diminish" the right of a Member to maintain a measure that in fact is in accordance with the covered agreements.

Again, the United States would apply cherry-picked provisions of the DSU only to itself, in essence saying that it will not be obtaining "security and predictability" and its "rights and obligations under the covered agreements" are being "added to" or "diminished" because, apparently, the United States believes that its laws are WTO consistent.

What the United States is really expressing is dissatisfaction with the result of the original proceeding. Antigua shares in the disappointment in a number of respects, such as the Appellate Body's failure to consider Antigua's extensive evidence on reasonable alternatives; the Appellate Body's finding that the Wire Act, the Travel Act and the IGBA are not facially discriminatory despite the clear text of the statutes themselves and Antigua's efforts throughout the original proceeding to make it clear that none of the statutes applies to intra-state remote gambling; and the Appellate Body's determination that the United States had met its burden of proof with respect to the "necessary" prong of the Article XIV defence, despite the complete lack of independent evidence supporting the claims of the United States.

The difference is that Antigua understands that it must accept the results, flawed as they may be, because that is what the rules governing the resolution of disputes in the WTO require of it. Antigua feels very much that some of these unwarranted determinations in the original proceeding have "diminished" its rights under the covered agreements. But unfortunately for Antigua, but of necessity for any dispute resolution system to function, Antigua is not the final arbitrator–the Appellate Body is.

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

16. As explained above, the United States does not consider that the measure taken to comply must be newly and specifically adopted for the purpose of compliance. Rather, under the ordinary meaning of Article 21.5, in context, and in light of the object and purpose of the DSU, the original measure may be used for the purpose of establishing compliance with the recommendations and rulings of the DSB.

17. Moreover, the United States notes that the Appellate Body in *Softwood Lumber IV* expressly found that a measure plainly <u>not</u> aimed at compliance nonetheless fell within the scope of a "measure taken to comply" under DSU Article 21. The Appellate Body noted that: "The fact that Article 21.5 mandates a panel to assess 'existence' and 'consistency' tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of*, or *have the objective of achieving*, compliance."

> **Q3.** USA *Can you further elaborate on the relevance of US – Shrimp for our deliberation with respect to "measures taken to comply"?*

18. The United States respectfully refers the Panel to the U.S. answer to Question 16 below.

Q4. 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)*

19. The United States submits that no "special" justification is required. Instead, the United States submits that this is allowed for under the DSU, and whether or not the original measure is the measure "taken to comply" will depend on the specific facts and circumstances of a particular dispute. The United States provides examples of such circumstances in paragraph 5 above.

Q5. 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?*

20. The United States is relying on the original measure in dispute as its "measure taken to comply" under Article 21.5. The new evidence and arguments in the U.S. written and oral submissions are not "measures," but instead are the means chosen by the United States to bring its measures into compliance by clarifying the relationship between the IHA and the three federal criminal statutes.

Q6. 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?*

21. Indeed, the United States is relying in this proceeding on the finality of the Appellate Body report adopted by the DSB in the original proceeding. The Appellate Body expressly noted that due to the limited factual record, neither the Panel nor the Appellate Body was able to determine whether or not the challenged U.S. measures met the requirements of the Article XIV chapeau. The United States is not asking the Panel to revisit this finding. Rather, the United States is requesting that the Panel proceed to examine the issues under the Article XIV chapeau based on new evidence and arguments not previously available to the Panel or Appellate Body.

This response–("*The Appellate Body expressly noted that due to the limited factual record, neither the Panel nor the Appellate Body was able to determine whether or not the challenged U.S. measures met the requirements of the Article XIV chapeau*")–highlights a consistent tactic of the United States throughout the course of this proceeding–to repeat something over and over again in hopes that by sheer repetition it will gain acceptance.

What *was* found was the only finding *required* to be found with respect to the chapeau–that the United States failed to meet its burden of proof.

In its answers to the Panel's questions alone, the United States uses this phrase or something much like it, in at least ten different places.[14]

> **Q7.** 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?*

22. The question of whether or not a Member has complied with the recommendations and rulings in a particular dispute depends on the specific facts and circumstances of that dispute. Accordingly, the reasoning and findings of the panel or Appellate Body must be examined closely. Where, as here, the Appellate Body notes that an affirmative defense may or may not be available when examined under a more complete factual record, the sensible means to achieve a resolution of the dispute is for the panel in the Article 21.5 proceeding to examine the affirmative defense under the complete factual record.

***See* Comment to paragraph 21 above.**

23. This dispute does not present a situation in which a defense was rejected outright. It would not be appropriate for the United States to speculate in the abstract on a hypothetical situation where a defense is rejected outright, but certainly it could make a difference, for example, if the DSB were to have ruled that a measure did not fall within the policy purpose of "necessary to protect human, animal or plant life or health." Again, whether the Member concerned had complied would turn on the specific facts and circumstances of the dispute.

> **Q8.** 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)*

24. The obligations of WTO Members (and consequently the rights of other WTO Members) are set out in the applicable covered agreements. A Member is free to maintain any measure that is not inconsistent with its obligations under the covered agreements - it does not need an affirmative "right" to be provided in the covered agreements for it to maintain that measure. In this case, Article XIV of the GATS makes clear that the United States may maintain measures necessary to protect public morals or to maintain public order. Articles 3.2 and 19.2 explicitly provide that neither recommendations and rulings of the DSB, nor findings of panels or the Appellate Body, can "add to or diminish the rights and obligations provided in the covered agreements."

25. In this case, the United States is arguing that it does not need to modify a measure that is already consistent with the covered agreements. The United States does not believe that there is a right to maintain measures that are inconsistent with a covered agreement. Rather, this case

---

[14] ***See* US Answers, paras. 4, 12, 21, 22, 25, 28, 31, 37, 38, 46.**

involves findings by the Appellate Body that explicitly note that the measure may, or may not be, consistent with a covered agreement, and that the factual record was not sufficient to make such a determination.

***See* Comment to paragraph 21 above.**

> **Q9.** USA *Does the U.S. consider that measures consistent with covered agreements can be required to be brought into compliance?*

26. Where the DSB recommendations and rulings require that a Member establish the applicability of an affirmative defense, the Member needs to do so in order to demonstrate that, by virtue of that affirmative defense, its measure is not inconsistent with the relevant provisions of the covered agreements. The Interstate Horseracing Act never provided any carve outs from the three criminal laws at issue, and thus the U.S. measures fell within the scope of Article XIV of the GATS. The United States has complied with the DSB recommendations and rulings by making a factual showing in this proceeding that in fact the U.S. statutes at issue meet the requirements of Article XIV.

> **Q10.** 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?*

27. As an initial matter, the United States notes that this sentence would be better phrased as "because the original measure was already consistent with the covered agreements." This phrasing avoids confusion between the substantive obligations set out in the covered agreements, and the provisions of the DSU that call for compliance with DSB recommendations and rulings.

28. Turning to the Panel's question, the United States is not asserting that there was any special, formal "determination" that the measure is consistent with a covered agreement. Rather, in this case, the United States – as for most WTO Members with respect to most of their measures – believes its criminal gambling laws to be consistent with U.S. obligations under the GATS. In this case, the Appellate Body found that the United States did not sufficiently establish an affirmative defense under Article XIV of the GATS, but the Appellate Body did not find that the criminal laws, if considered under a full factual record, failed to meet the requirements of Article XIV.

***See* Comment to paragraph 21 above.**

29. Furthermore, it is essential to emphasize that the failure of the United States to establish in the initial proceeding an affirmative defense did **not turn on a disputed issue of interpretation of the WTO Agreement**. Rather, the availability of the affirmative defense depended on the proper interpretation of U.S. domestic law.

The "availability of the affirmative defence" does not depend on the "proper interpretation of U.S. domestic law," but rather (at least with respect to the chapeau) whether the United

States *applies* its laws in a non-discriminatory fashion. As the Appellate Body actually *did* observe in its report:

> **"The focus of the chapeau, by its express terms, is on the *application* of a measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the paragraphs of Article XIV. By requiring that the measure be *applied* in a manner that does not constitute 'arbitrary' or 'unjustifiable' discrimination, or a 'disguised restriction on trade in services', the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded other Members by the substantive rules of the GATS."[15]**

What Antigua has clearly shown in this proceeding is that in *application* and by their express language as well, the three federal statutes are trade discriminatory.

> **Q11.** 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?*

30. The United States would hope that the DSB would not agree to adopt an Appellate Body report under the circumstances described. Although it would not be appropriate for the United States to comment on these hypothetical situations, the United States agrees that it would be important to bear in mind the limitations in the DSU. It is doubtful that Members intended the language in Article 17.14 to be read to override those express limitations, particularly since Members were careful in Article 3.2 of the DSU to specify that DSB recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements." In any event, the United States in this proceeding is **not** requesting that the Panel reconsider any factual or legal findings made by the Appellate Body in this dispute.

Antigua takes issue with the last sentence in this answer. The United States *is* clearly asking the Panel to reconsider the factual and legal findings of the Appellate Body that the United States had not established that its GATS-inconsistent measures qualified for the special exception under Article XIV of the GATS.

> **Q12.** 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?*

---

[15] **AB Report, para. 339 (emphasis in original).**

31. The United States notes that this question contains a number of premises that are not presented by the circumstances of this dispute. The Panel and Appellate Body reports cannot be said to result in a “final settlement”, because as the Appellate Body noted, it was not able to determine whether or not the U.S. measures met the requirements of the Article XIV chapeau. Moreover, nothing in this case presents an endless cycle of litigation. To the contrary, under the procedural agreement entered into by the United States and Antigua, should Antigua prevail in this 21.5 proceeding, it may proceed to request authorization to suspend concessions under Article 22.2.

***See* Comment to paragraph 21 above.**

32. The United States is not aware of any basis for asserting that, as a general matter, a WTO Member cannot present new evidence when it previously failed to establish a claim due to a lack of evidence. In fact, the 21.5 proceedings in the *Canada-Dairy* dispute illustrate otherwise. In that case, the complaining parties' initial recourse to Article 21.5 failed due to a lack of evidence on the cost of production of the products at issue. The complaining parties proceeded to a second recourse to Article 21.5, during which they proceeded to support their claims through new evidence not submitted in the first proceeding. The complaining parties prevailed in the second recourse to Article 21.5, and the Appellate Body upheld the finding. Thus, the *Canada-Dairy* dispute shows that there is no basis for viewing the Appellate Body reasoning in *EC - Bed Linen* or Article 17.14 as providing some general principle precluding the introduction of new evidence when a claim previously failed due to an absence of evidence.

33. As the United States explained in its second written submission, *EC - Bed Linen* addresses a specific question regarding the claims that a complaining party may reargue in a 21.5 proceeding. The Appellate Body's finding turned on the limited scope of a 21.5 proceeding, and not on any purported general rule that parties are foreclosed from presenting new evidence when a claim previously failed for lack of evidence. Indeed, nothing would have prevented India from bringing a new regular proceeding against the measure at issue. *EC - Bed Linen* simply provided that the special, expedited procedures of Article 21.5 were not available for those claims. As a result, neither *EC - Bed Linen* nor Article 17.14 would stand for a principle of preventing additional litigation.

> ***Q13.*** *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?*

> ***Q14.*** *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?

34. The United States is not challenging these findings. These findings refer to "ambiguity" in the federal statues; the findings do not include any statement – explicit or implicit – that such ambiguity results in an inconsistency with the GATS. Indeed, some statutory ambiguity is inevitable in any legal system, and few measures would escape scrutiny if ambiguity resulted in *per se* violation of obligations under the WTO Agreement. And, despite this ambiguity, there is in fact a right or wrong answer to the question of whether or not the IHA provides a carve out from federal criminal laws.

35. The Panel and Appellate Body noted the ambiguity in the context of finding that the United States – on the basis of the record available in the original proceeding – had failed to meet its burden of proving an affirmative defense. And again, this is a finding that the United States does not dispute in this proceeding. Rather, in this proceeding the United States submits that it has now shown, based on a more complete factual record, that the right answer to the ambiguous issue is that the IHA provides no carve outs from the criminal laws at issue, and thus that it has successfully established its affirmative defense under GATS Article XIV. Nothing in the U.S. position in any way disturbs the finality of the findings by the Panel and Appellate Body regarding statutory ambiguity.

Far from having "now shown" that the IHA does not permit remote gambling, the United States has completely failed. *See* Comment to paragraph 1 above.

Q15. 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?

36. The United States does not believe that this is a correct understanding of the Appellate Body findings. In fact, the Appellate Body did not give deference to the U.S. understanding of its own statute. To the contrary, the Appellate Body gave deference to the findings of the Panel in its fact-finding under DSU Article 11.

37. Moreover, the Appellate Body's reasoning explictly notes that it could make no definitive finding on the U.S. law due to the limited factual record:

> 363. Thus, the Panel had before it conflicting evidence as to the relationship between the IHA, on the one hand, and the measures at issue, on the other. We have already referred to the discretion accorded to panels, as fact-finders, in the

> assessment of the evidence. As the Appellate Body has observed on previous occasions, "not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts."
>
> 364. In our view, this aspect of the United States' appeal essentially challenges the Panel's failure to accord sufficient weight to the evidence submitted by the United States with respect to the relationship under United States law between the IHA and the measures at issue. The Panel had limited evidence before it, as submitted by the parties, on which to base its conclusion. This limitation, however, could not absolve the Panel of its responsibility to arrive at a conclusion as to the relationship between the IHA and the prohibitions in the Wire Act, the Travel Act, and the IGBA. The Panel found that the evidence provided by the United States was not sufficiently persuasive to conclude that, as regards wagering on horseracing, the remote supply of such services by domestic firms continues to be prohibited notwithstanding the plain language of the IHA. In this light, we are not persuaded that the Panel failed to make an objective assessment of the facts.

***See* Comment to paragraph 21 above.**

38. Furthermore, in its conclusion, the Appellate Body reiterated that it was not making a definitive finding on the correct interpretation of U.S. law: "In this respect, 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."

> *(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?*

***See* Comment to paragraph 21 above.**

39. As the United States explained in its response to Question 14, a finding of ambiguity is **not** equivalent to a finding that the IHA does in fact provide a carve out from the criminal laws at issue. There is a right answer and wrong answer to that question under U.S. law. The United States submits that it has shown in this proceeding that the right answer is that no carve outs exist, and thus that the U.S. measures do not result in discrimination under the chapeau of GATS Article XIV.

The United States' answer to Question 15 again invites the Panel to focus on the argument that the Appellate Body did not find that the IHA provided a "carve out" to the three federal statutes. Antigua would repeat that the Appellate Body did not need to come to this determination, as it was the burden of the United States to prove that the IHA *did not* provide such a carve out. Given the evidence submitted by Antigua in this proceeding, there can be

little doubt now that the IHA indeed provides a "carve out," both expressly in its language and practically in its application.[16]

> **Q16.** 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?*

40. As the United States explained at the hearing, the United States submits that it would be a misplaced focus to treat the phrase "invitation" (used in the first U.S. submission) as some special test, principle, or procedure that must be analyzed and evaluated. In using this phrase, the United States was not intending to imply that the Appellate Body was making a specific recommendation with respect to how the United States should bring its measures into compliance. We note that Article 19.1 of the DSU provides that panels or the Appellate Body "may" make suggestions on implementation; we are not suggesting that the Appellate Body has done so in this case.

41. Rather, the United States was using "invitation" as a shorthand for the following type of reasoning commonly used in Article 21.5 proceedings: where the Appellate Body (or panel) finds a particular aspect of a measure to be inconsistent with a covered agreement, the other side of such a finding may provide specific guidance on how the responding Member may bring its measure into compliance.

42. The *Shrimp* dispute (referred to in Question 3 above) is an instructive example. In that dispute, like the current one, the Appellate Body agreed with the responding party that the measure provisionally fell under an exception – GATT Article XX(g) in *Shrimp*. However, the Appellate Body, as in this case, found that in certain specific ways, the requirements of the chapeau were not met with respect to "arbitrary or unjustifiable discrimination."

43. In *Shrimp,* one aspect of this discrimination was that the Appellate Body found that the United States had entered into negotiations with some countries, but not with the complaining parties in the dispute. The United States looked carefully at this finding: the other side of the finding, and thus a means of compliance, was for the United States to enter into negotiations with the complaining parties. The United States proceeded to enter into such negotiations during the compliance period. These negotiations were not "measures" and so they were not "measures taken to comply."

44. The Appellate Body in *Shrimp* also found that the United States, in implementing its shrimp import ban, did not provide due process to the complaining parties. The United States looked carefully at this finding, and proceeded to adopt new implementing guidelines that remedied the defects in due process identified by the Appellate Body.

---

[16] ***See*** **Comment to answer of Question 1 above.**

45. Based on the specific Appellate Body findings, the United States believed that such steps would bring its measure into compliance, and that no changes would be required in the statute subject to the DSB recommendations and rulings. A complaining party in *Shrimp* was not satisfied with the U.S. implementation; it argued in an Article 21.5 proceeding that the United States must amend or repeal its statute and lift the import prohibition. The Appellate Body agreed with the United States, finding that the United States had complied with the DSB recommendations and rulings – without amending the U.S. statute – by addressing the specific aspects of discrimination previously found by the Appellate Body in the Article XX chapeau.

46. The United States believes that the same approach for compliance applies to the current dispute. Here, the Appellate Body explicitly noted both (1) that the United States did not establish or show that the IHA does not exempt domestic suppliers from providing certain remote betting activities prohibited under three federal criminal statutes, but (2) that the Appellate Body could not determine from the factual record whether or not the IHA in fact provided such an exemption. In this case, the other side of the Appellate Body finding is that the United States may comply with the DSB recommendations and rulings by showing that the IHA in fact does not provide an exemption from the federal criminal statutes. This kind of reasoning is what the United States intended by the statement that the Appellate Body "invited" the United States to demonstrate that the measures met the requirement of the Article XIV chapeau.

***See* Comment to paragraph 21 above.**

The facts and circumstances in *Shrimp* are materially different than those present in this case. In *Shrimp*, the United States defence under Article XX of the GATT failed for the same basic reason it did in this case–the United States failed to meet its burden of proof under the chapeau. However, contrary to this case, in *Shrimp* the United States actually did a number of things subsequent to the adoption of the DSB recommendations and rulings. It not only adopted revised guidelines for the implementation of the measure at issue,[17] but also took a number of serious, good faith proactive steps to address the criticism of the panel and the Appellate Body over the United States' failure to engage Malaysia in discussions to resolve their difficulties.[18]

In *this* case, the United States did nothing.

It should also be noted that the *Shrimp* case is an excellent example of what an Article 21.5 compliance panel should in fact do when reviewing the status of compliance–it is particularly useful given the similarities between the results of the original proceedings in the two cases. Contrary to the repeated assertions of the United States in this case that the Panel must restrict its enquiry to the letter of the recommendations and rulings of the DSB in the case,[19]

---

[17] **Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 3-7.**

[18] ***Id.*, paras. 131-133.**

[19] ***See, e.g.* US First Submission, para. 42.**

the *Shrimp* report makes it clear that a wide, re-examination of the entire Article XIV defence is required in order to properly assess the status of compliance.[20]

Were the Panel to allow the United States a "second chance" in this proceeding, then it would be required under the *Shrimp* principles–recently reaffirmed by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*[21]–to determine whether the United States, in light of all circumstances, has met its entire burden of proof under Article XIV of the GATS. Not only does the United States fail to meet its burden of proof with respect to the chapeau, but also, in light of all evidence before the Panel, the United States has also failed to satisfy the first prong of the Article XIV defence–"necessity."

Antigua has proven in this proceeding, and the United States has not contradicted, the existence of a number of state regulatory schemes for remote gambling services in the United States.[22] Under the reasoning adopted by the Appellate Body in the original proceeding,[23] Antigua having identified reasonable alternatives, the burden has shifted to the United States to demonstrate why those alternatives are not reasonably available to it. This it has completely failed to do. Of course, it would be impossible for the United States to argue that a regulatory scheme such as that used by a number of states would not be "reasonably available" when such schemes are actively being used by governmental entities in the United States today.

> **Q17.** 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?*

47. The United States submits that it has shown in this proceeding that the U.S. criminal laws fall within the scope of GATS Article XIV, and are thus not inconsistent with the obligations of the United States under the GATS. The United States is not aware of any past dispute in which a WTO-consistent measure has been found in an Article 21.5 proceeding to be not in compliance with DSB recommendations and rulings. Thus, although this question is phrased in terms of "any respondent," the United States submits that the circumstances presented by this dispute are indeed unusual.

48. As the United States explained in its past submissions, this unusual situation arose due to Antigua's choices in presenting its claim. In particular, because Antigua was unable or

---

[20] Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 100-106.

[21] Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 61-77.

[22] As Antigua demonstrated, a number of these regulatory schemes are quite similar to Antigua's own regulatory scheme for remote gambling services. *See* AB First Submission, paras. 139-140.

[23] Appellate Body Report on *US – Gambling*, para. 311.

unwilling to specify the statutes at issue, neither the Panel nor the United States were able to identify the measures at issue until the case had reached the Interim Review stage. Consequently, neither the parties nor the Panel were in a position to develop fully the factual record and the argumentation with respect to how each measure that might possibly be covered in the dispute would fit within each of the criteria set out in GATS Article XIV.

Antigua finds it incredible that the United States would shoulder *Antigua* with the responsibility for the United States failing to meet its burden of proof under Article XIV. It was the United States, and it alone, that chose to delay its assertion of the Article XIV defence, despite Antigua having raised the possibility of such a defence in Antigua's very first submission. Nonetheless, it is clear from the record that the United States resisted raising Article XIV throughout the proceeding, discussing Article XIV issues only in its final written submission to the original panel. Despite its discussion of Article XIV in that submission, the United States continued to resist conceding that it was raising the defence at all. Antigua recalls that at the last session of the original panel, a panel member had to repeatedly ask the representative of the United States whether the defence was indeed being raised–as the representative could not seem to bring himself to answer the question directly.

With respect to the claim that the United States raised the issue so late only because it was unclear what "measures" it was defending, the assertion is absurd. Antigua cited the Wire Act, the Travel Act and the IGBA in virtually every submission and statement it made in the original proceeding, from the original request for consultations all the way to Antigua's comments to the United States' responses to the second questions of the original panel. More precisely, those statutes were raised in the first submission of Antigua to the original panel, and in Antigua's comments to the United States' request for preliminary rulings it was clear beyond dispute that all three of the federal statutes were alleged to prohibit the cross-border supply of gambling and betting services.[24]

> **Q18.** 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)*

49. As discussed in the response to Question 17, there were particular, unusual circumstances in this dispute that prevented the United States from presenting the same level of argument and evidence on Article XIV with respect to these measures. These circumstances should be taken into account; they would be unlikely to occur in other disputes (unless of course it were established that a complaining party benefitted from the same type of lack of specificity in its claims and arguments as were present in the original proceeding).

---

[24] For a thorough discussion of this issue, *see* Appellee Submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, AB-2005-1 (1 February 2005), paras. 21-28.

See **Response to paragraph 48 above.**

50. It is also important to bear in mind that there is a fundamental difference in the situations of a complaining and responding party concerning findings that a party has failed to make a full showing to meet its burden of proof. Where a complaining party fails to present evidence and argument sufficient to meet its burden of proof, that complaining party has the ability to bring a new dispute and have an opportunity to present additional evidence and argumentation. The situation is different for a responding party. The responding party is unable to bring a new proceeding and so would be denied the opportunity to present additional evidence and argumentation to meet its burden of proof for an affirmative defense, unless the responding party may make this fuller showing in a compliance proceeding.

As Antigua observed in its responses to the Panel's Questions, such an aggrieved responding party would have the opportunity to bring a new dispute of its own under Article 22.8 of the DSU.[25] Even if one were to accept the baseless argument of the United States that it alone as a responding party should be entitled to reassert its failed case, there is no logical reason why the entire failed defence should not be reconsidered *in toto*. If the United States laments the "limited" discussion and evidence regarding Article XIV of the GATS in the original proceeding, then no doubt it would best for the entire issue to be thoroughly discussed and considered.

51. The United States understands that in the context of this question, "systemic implications" refers to the prospect that responding Members would, as a tactical matter, decide in future cases to withhold factual information in support of affirmative defenses until the Article 21.5 proceeding. The United States submits that there is no basis for believing that such "systemic implications" would arise.

52. The reason is simple: The responding Member would obtain no benefit of purposely saving evidence in support of an affirmative defense until the Article 21.5 proceeding. To the contrary, the responding party has a strong interest in obtaining during the original proceeding a definitive finding as to the validity of an affirmative defense. If the finding is affirmative (i.e., if the defense applies), the responding Member would not be subject to future proceedings. If the finding is negative, the responding Member would be entitled to a reasonable period of time for compliance during which it could address the problems identified with respect to its affirmative defense.

If the United States were to prevail in its argument, it would indeed have obtained a very significant benefit from its purposeful delay in asserting the Article XIV defence. As Antigua has stated, the late assertion of the defence placed Antigua in a very difficult situation where

---

[25] **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 DSU by Antigua and Barbuda*, WT/DS285 (8 December 2006) (the "*AB Responses*"), Response to Question 20.**

it had to either (i) prolong the length of the original proceeding and ask the original panel for further time to properly respond to the defence in writing or (ii) continue on the basis of an incomplete and unclear record in, as happened in the original proceeding, the belief that the panel or the Appellate Body would agree that the defence was either raised so late, or so incompletely, that the defence would fail.[26] If the responding party were allowed the sole ability to reassert and present evidence on its failed defence in what is supposed to be a compliance assessment under Article 21.5 of the DSU, the complaining party would be very much at a material disadvantage.

53. In contrast, a responding Member who waited until the Article 21.5 proceeding to present a full affirmative defense is in a far worse position. Even if it prevails on the defense, it will have subjected itself to an additional proceeding. And, moreover, if it fails to establish the affirmative defense, it faces the prospect of an immediate request for authorization to suspend concessions, without any further reasonable period of time for compliance.

> **Q19**. 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?*

54. As in other proceedings under the DSU, the Article 21.5 panel should base its findings on the evidence and arguments presented by the disputing parties. To the extent that evidence introduced in the original proceeding remained relevant, the disputing parties are of course free to incorporate or to refer to such evidence.

> **Q20.** 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?*

> **Q21.** *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?*

> **Q22.** 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?*

55. As the United States explained in detail in paragraphs 28 to 31 of its second submission, the scope of an Article 21.5 proceeding is limited. The DSB recommendations and rulings serve as the instructions to the Member concerned for the steps it is required to take during the

---

[26] **AB Responses, Response to Question 38(b), fn. 39.**

reasonable period of time in order to comply with those recommendations and rulings. If a complaining party were entitled to reargue claims that were considered and rejected in the original proceeding, the Member concerned could be in the untenable position of being found out of compliance even though it had relied on and complied with the findings of the Panel and/or Appellate Body. This is the basis for the Appellate Body's finding in *Bed Linen* that complaining parties cannot reargue failed claims in an Article 21.5 proceeding.

Antigua asserts there is no basis for what the United States says in this response. However, it should be pointed out that many of Antigua's claims in the original proceeding were not "considered and rejected," but, as with the Article XIV defence, found to have suffered from the failure to make a *prima facie* showing. In particular, the Appellate Body, having for the first time in the *US – Gambling* case assigned the burden of proof on the complaining party to establish "reasonably available alternatives" in the context of an Article XIV defence, held that Antigua had "raised no other measure that . . . could be considered an alternative to the prohibitions on remote gambling contained in the Wire Act, the Travel Act, and the IGBA."[27] Because this "failure" on the part of Antigua to raise an alternative was not a "rejected" claim, there is nothing to distinguish this "failure" from the failure of the United States to meet its burden of proof under the chapeau. If the Article XIV defence is to be reconsidered, it should be reconsidered in whole.

> **Q23.** 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.*
>
> **Q24.** 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?*

56. As the United States explained during the hearing, the United States respectfully disagrees with the arbitrator's characterization of the U.S. views on the possible means of implementation. First, neither the U.S. written submission, nor its presentations during the arbitration hearing (as reflected in the transcript) support this characterization. Second, it is important to understand the context of the arbitrator's statement within the discussions held during the arbitration. The United States sought a reasonable period of time that would allow for implementation through the adoption of new legislation. Antigua agreed that the United States

---

[27] **AB Report, para. 326. This conclusion is simply incorrect.**

should adopt legislation, but also argued that partial compliance with respect to "non-sports betting" could be achieved by Executive Order. The United States responded that even if an Executive Order were a legally available possibility, this hypothetical, partial means of compliance was not relevant because – as both parties agreed – the arbitrator still needed to determine the reasonable period of time to adopt legislation. In other words, when the United States discussed the need for legislation, this was in response to Antigua's claim that the United States should get a shorter reasonable period of time because (according to Antigua) partial compliance could be achieved by Executive Order.

The entire discussion of the United States in response to Question 24 is so patently untrue it bears but little comment–the record on this issue speaks for itself. Antigua would, however, like to point out that this assertion that the United States "discussed the need for legislation" only in response to Antigua's arguments in the Article 21.3 proceeding is particularly disingenuous, given that both parties' submissions to the Arbitrator were due and made on the same day.

57. Moreover, there was no discussion during the Article 21.3 arbitration of a legislative means of compliance in the context of a discussion of which alternative means of compliance were available to the United States (except partial compliance through an Executive Order). Thus, to the extent the arbitrator's statement is read as suggesting that there had been a discussion of various alternative means of compliance, and that during this discussion the United States had dismissed all alternatives except legislation, this is clearly a misreading. Finally, nowhere in the record of the arbitration does the United States ever assert or imply that a full factual showing based on legislative history and relevant case law would be insufficient to meet the U.S. burden of showing that the IHA does not create carve outs from criminal statutes.

58. With respect to the first two specific statements cited in the question ("legislation is required" and "we need legislation"), the record of the arbitration clearly shows the context described above.

59. The starting point is Antigua's written submission, which lays out Antigua's idea about differing periods of compliance for sports and non-sports betting:

> "11. Antigua submits that it is possible for the United States to comply with the DSB recommendations and rulings (i) immediately via presidential executive order with respect to the provision of non-sports related and horse racing gambling and betting services and (ii) with respect to the provision of other sports gambling and betting services, within six months of the adoption of the Report and the Panel Report by the DSB via either an amendment to each of the Wire Act, the Travel Act and the Illegal Gambling Business Act or the passage of new legislation that would either repeal or supersede the Federal Trio with respect to the provision of these services from Antiguan operators."

60. During the arbitration hearing, the arbitrator asks about this distinction:

> "In your submission you draw a distinction between 'on-sports related and hoseracing gambling and betting services' on the one hand and 'other sports gambling and betting services' on the other. What is the basis for that distinction if one looks at the Panel and Appellate Body reports and what they have said?"

61. Antigua then describes its view of the distinction, without immediately tying the distinction back to Antigua's idea of a shorter RPT for non-sports betting:

> "In neither report do they really consider the different types of gambling. . . .
>
> We referred to a number of discussions in our submissions that that [the distinction between sports and non-sports gambling] is a pretty widely held belief by gambling law commentators throughout the United States."

62. The United States proceeds to respond to Antigua's argument, both with respect to the purported distinction between various types of gambling under federal criminal law, and with respect to the effect that such distinction should have on the calculation of the RPT:

> "I guess there are two ways of responding. The first is that which we took in our statement – that at the end of the day even if there were such a distinction, and we disagree that there is, it is not []relevant to the ultimate decision here since <u>legislation is required</u> and legislation does not really relate to any purported distinction between sports and non-sports betting."

63. In this context, the phrase "legislation is required" is used to rebut Antigua's claim that the RPT is somehow affected by an alleged ability of the United States to address non-sports betting with an Executive Order. As shown above, Antigua expected the United States to adopt legislation to address sports betting, and the above statement simply means that the RPT for legislation is not affected by a purported ability to address non-sports betting through an Executive Order. In context, this statement cannot possibly be read as an overarching assertion that the only means of compliance available to the United States was through legislation.

64. The second phrase ("we need legislation") cited in the question is also made in this same context. Antigua first asserts that the United States can come into compliance through some sort of administrative action with respect to non-sports betting.

> "We are saying here that under the United States law as it actually exists there really is no need to amend these other statutes with respect to non sports betting because it simply is an administrative position of the United States government that these types of services are prohibited as well."

65. The United States then responds, with a similar point as previously made.

> "Again, I think our first response would be that in the end you do not have to reach the issue [of the RPT required to adopt an Executive Order or other administrative action addressed to non sports betting] because <u>Antigua acknowledges</u> that the actions it is requesting us to take with regard to non sports [] betting will not by

> themselves bring us into compliance, we need legislation on other matters, and therefore, given that the actions they are requesting we take with regard to [] non sports betting would require less time than the legislation, the legislation ultimately is what is driving the determination of the reasonable period of time, so it is an issue that need not even be reached."

66. Again, the U.S. statement cannot be read as making a point about legislation versus every other possible means of compliance. Rather, it is simply a response to Antigua's argument that the purported option of adopting administrative action on non-sports betting could somehow reduce the reasonable period of time.

67. Finally, the question requests that the U.S. clarify why it referred on pages 59-60, 60-61 and 72-73 of the transcript to action by Congress. As explained above, the United States sought a reasonable period of time that would allow for the adoption of a legislative clarification. Accordingly, much of the arbitral proceeding focused on the question of how long it would take to obtain the passage of such legislation. Nowhere in the cited passages (nor elsewhere in the U.S. presentations to the arbitrator), however, does the United States assert that legislation was the only means of compliance.

> **Q25.** 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?*

68. H.R. 4777 was a bill sponsored by Representative Goodlatte. This bill would have amended 18 U.S.C. 1084 and would have prohibited the acceptance of certain forms of payment for certain gambling activities over the Internet. H.R. 4411 was a bill sponsored by Representative Leach. As introduced, H.R. 4411 also prohibited the acceptance of certain forms of payment for unlawful Internet gambling.

69. H.R. 4411 was merged with H.R. 4777 to include the revisions to 18 U.S.C. § 1084 and the merged bill was passed by the House of Representatives and sent to the Senate for its consideration. The House and Senate, in conference, revised the provisions of the merged bill and incorporated portions of it into the Safe Port Act, Public Law 109-347, which was signed into law by the President in October 2006.

70. The Internet gambling provisions in the Safe Port Act are referred to as the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), Title VIII of Public Law 109-347, and they pertain only to the acceptance of payments for unlawful Internet gambling. Those provisions are similar to the prohibitions contained in H.R. 4411 as introduced. This statute does not amend Section 1084. The provisions pertaining to horse racing are similar to those contained in H.R. 4411 as the bill was passed by the House of Representatives and sent to the Senate.

71. The horse racing provisions in H.R. 4411 (which, as noted, was an amendment to the Wire Act) address the issue of the relationship between the IHA and the Wire Act, but the legislation as adopted by the House did not clarify the relationship. If the Executive Branch had achieved its goal of obtaining a legislative clarification, this language would have been modified to achieve the clarification. Although the United States is aware that various formulations of the horse racing provisions were discussed, it is not aware of any formally-introduced amendment other than those described above.

H.R. 4411, as adopted by the United House of Representatives, took much the same approach as the final legislation did, saying that "[n]othing in this Act may be construed to prohibit any activity that is allowed under [the IHA] . . .."[28] This would not have "clarified" the matter in the way the United States would, apparently, have desired in the context of this dispute.

> **Q26.** 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?*

72. Article 21.3(c) has a particular, limited purpose, and as numerous arbitrators have explained, their role is not to discuss the particulars of a Member's implementation. The weight accorded to statements made in the context of Article 21.3(c) proceedings should take into account the specific, limited purpose of those proceedings. Furthermore, there is no basis for assigning any special weight to statements made by a party during an Article 21.3 proceeding, as compared to, for example, public statements by a party or statements made by a party to WTO committees.

73. The United States notes that statements of a party could have evidentiary value in interpreting the factual question of the meaning or existence of a party's measure. However, it is hard to see how such statements might arise in an Article 21.3 proceeding. And in the circumstances of this case, the United States had no call to make any statements regarding the substantive, factual issue of the relationship between the IHA and the three criminal statutes. Rather, the Article 21.3 proceeding addressed an entirely different issue, namely, the amount of time required to obtain a legislative clarification of that relationship.

> **Q27.** 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)?*

74. A wager placed in one state, but not transmitted to another state, with respect to the outcome of a race taking place in another state is a "bet or wager" which may be legal if authorized by the laws of the state in which it is placed. A "pari-mutual wager . . . placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in . . . another State" is the transmission of a "bet or wager" and is a

---

[28] **HR 4411, § 105. *See* AB First Submission, paras. 62-64.**

violation of the Wire Act. The transmission of information relating to the formation of a wagering pool is "information assisting in the placement of bet[s] or wager[s]" so long as a wager itself is not transmitted by wire communication in interstate or foreign commerce.

> **Q28.** 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)*

75. As the United States explained in paragraphs 20-25 of its first written submission, the IHA contains no "language of permission" relating to criminal liability under United States law. To the extent that the IHA includes any "language of permission," it relates only to the allowance of the receipt of certain bets without being subject to civil liability under the IHA itself. It has nothing to do with what is allowed under the criminal law of the United States. Section 4 of the IHA, 15 U.S.C. § 3003, contains the general rule imposing liability for the acceptance of interstate off track wagers not in accordance with the IHA. Section 5 of the IHA, 15 U.S.C. § 3004, specifies those limited circumstances in which wagers may be accepted on horse races. Section 6 of the IHA, 15 U.S.C. § 3005, imposes civil liability on persons accepting wagers on horse races without complying with Section 5's requirements of various agreements with affected parties. Section 7, 15 U.S.C. § 3006, sets forth the parameters of any civil action for damages for non-compliance with the IHA. The IHA must be read as a whole, and nothing in that act grants permission to transmit wagers using wire communication facilities in interstate or foreign commerce, or provides an exception to the criminal law prohibiting such transmission.

> **Q29.** 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.*

76. If a person living in one state transmits, by wire communication, a wager on a horse race to an off-track betting facility located in another state and the host racing association and the off-track betting facility have the agreements required by the IHA in place, then the host racing association will not have a basis to file an IHA law suit against the off-track betting facility. However, the off-track betting facility would still be subject to prosecution for violating the Wire Act. What the IHA does is to merely protect the right of the entity staging a horse race to enjoy the receipt of all of the revenue from their product, that is, the horse race. What the Wire Act does is punish any person who, being in the business of betting or wagering, uses a wire communication facility for the transmission of bets or wagers in interstate or foreign commerce or for the transmission of information assisting in the placement of bets or wagers on a sporting event or contest. However, if certain conditions which are outlined in subsection (b) of the Wire Act exist, a person can be protected with respect to the transmission of information assisting in the placement of bets or wagers on a sporting event or contest, but he or she still may not use a wire communication facility for the transmission of the bets or wagers themselves.

Q30. 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)*

77. The United States agrees that U.S. law includes a judicially-created doctrine of repeal by implication. However, the United States does not agree with Antigua's characterization of that doctrine. A more accurate summary of the doctrine is contained in paragraphs 26-31 and Annex I of the first U.S. submission.

Q31. 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?

78. The United States believes that Panels are not barred from considering evidence (including the fact that a new measure was adopted) that comes into existence after the initiation of panel proceedings. The United States submits, however, that the UIGEA does not shed light on the issues in this dispute, because the law does not amend or alter any statutes at issue, and instead establishes a separate enforcement mechanism aimed at particular activities already unlawful under federal or state law.

(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?

79. On September 29, 2006, Representative Leach, one of the original sponsors of the legislation, submitted a statement on the Internet gambling provisions of the Unlawful Internet Gambling Enforcement Act of 2006 into the Congressional Record. That statement, which is part of the legislative history of the Act, provides that Section 5362(10)(D)(I) "addresses transactions complying with the Interstate Horseracing Act (IHA) which will not be considered unlawful because the IHA only regulates legal transactions that are lawful in each state involved." Importantly, the statute does not change what types of betting operations are "legal transactions." In order to be a "legal transaction," the wager must be made in compliance with both state and federal law. Since the IHA did not repeal Section 1084, the wager must also comply with the provisions of Section 1084.

(b) [continued] What activities are allowed under the IHA that would otherwise fall within the definition of the term "unlawful Internet gambling"?

80. None. The transmission in interstate or foreign commerce of bets or wagers on horse races using wire communication facilities, even if the specific agreements required by the IHA are in place, would constitute "unlawful Internet gambling" because such transmission would violate the Wire Act, may possibly violate other provisions of federal and state law, would

therefore not constitute a "legal wager" as required by the IHA, and thus could not be in compliance with the IHA.

> *(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?*

81. The disagreement referred to in this "sense of Congress" provision concerns whether the Interstate Horseracing Act repealed by implication pre-existing criminal statutes, thereby allowing the interstate transmission of bets on horse races. The Department of Justice has publicly stated that it does not believe that the IHA amended or repealed pre-existing criminal statutes, while the horse racing industry believes that the IHA removes the criminal prohibitions relating to the interstate transmission for bets on horse races. The disagreements are between the Department of Justice and those interests that wish to profit on interstate gambling on horseracing.

In reality, the "disagreements" are between the United States Department of Justice, on one side, and just about everyone else (including at least 18 state governments), on the other.

82. The "sense of Congress provision" is entirely consistent with U.S. statements concerning the proper interpretation of U.S. criminal statutes. The language simply notes the disagreement, it does not take a position as to how a court would in fact construe the relationship between federal criminal laws and the IHA.

83. A disagreement does not necessarily indicate an "ambiguity." Indeed, in almost every WTO dispute there is a disagreement among Members as to how to interpret particular provisions of the covered agreements, but this does not establish that there is an ambiguity in the drafting of those provisions. However, as the Panel notes, the Appellate Body did not disturb the original Panel's finding of an "ambiguity," and the United States is not disputing that ambiguity in this proceeding. Rather, the United States has explained that despite any ambiguity, there is a right and wrong answer to the question of the relationship between the IHA and the three federal criminal laws at issue. And, based on the evidence and arguments presented in this proceeding, the United States has met its burden of showing that the IHA does not provide exemptions from federal criminal laws.

Franz Kafka would appreciate this answer. Despite mounds of evidence to the contrary and despite the express refusal of the United States Congress–the actual law-making authority in the United States–to clarify the matter in favour of the DOJ interpretation, the United States nonetheless asserts that it "has met its burden of showing that the IHA does not provide exemptions from federal criminal 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?

84. The United States delegation is entitled under U.S. law to take a definitive view on the disagreement. The official position of the Department of Justice -- the agency which is responsible for applying federal criminal law -- is that the IHA provides no exemptions from federal criminal laws. The United States delegation submits that it has shown in this proceeding that the DOJ view of U.S. criminal statutes is correct under fundamental principles of U.S. statutory construction.

85. The United States is not asking the Panel to take any "definitive view" on questions of domestic U.S. law that might have any domestic effect within the United States. To the contrary, the role of this Panel is to resolve the legal and factual issues in this dispute. The key factual issue in this dispute is whether the United States has met its burden of showing that the IHA does not result in discriminatory carve outs from federal criminal statutes, and thus has met its burden of showing that the U.S. measures meet the criteria of the Article XIV chapeau. A Panel finding on this factual issue has no effect on domestic U.S. law.

(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)

86. The UIGEA made no amendments to the Wire Act or any other federal criminal law, and thus simply could not have the effect claimed in the above statement. As noted, however, horseracing interests contend that the IHA provides carve outs from federal criminal law, and it is not surprising that they would make this type of baseless claim about the UIGEA.

Q32. *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?*

(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?

(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?*

87. Even if a state laws would appear to authorize account wagering by telephone or other electronic means, they cannot override the Wire Act to the extent that they authorize transmission of wagers by means of a wire communication facility in interstate or foreign commerce. Account wagering, itself, is not a violation of the Wire Act or other federal law to the extent that the state does not authorize the transmission by means of a wire communication facility in interstate or foreign commerce of bets or wagers. If a business is accepting bets or wagers by means of a wire communication in interstate or foreign commerce, the business is violating the Wire Act.

The United States' answer to this question expressly confirms the argument Antigua has made from the beginning of this dispute–that the federal prohibitions contained in the Wire Act, the Travel Act and the IGBA only apply if the "remote" gambling crosses a state or international border, and do not apply to wholly-intrastate remote gambling. As Antigua observed to the panel in the original proceeding:

> **"32. In this respect the Panel should also note that, contrary to what the United States suggests, the laws comprising the federal ban on interstate and cross-border supply of gambling and betting services were not put in place because interstate and cross-border supply of gambling and betting services was considered a greater health risk than the local supply of gambling services. The federal ban on interstate and cross-border supply is merely intended to safeguard the states' ability to regulate gambling as they see fit within their borders.**
>
> **33. It is particularly important to realise what United States federal law does not do. For example:**
>
> - **Federal law does not require states to regulate gambling within their borders at all**
> - **Federal law does not require states to prohibit gambling within their borders at all**
> - **Federal law does not prohibit telephonic, electronic, Internet or any other forms of remote gambling from occurring within the borders of any state at all**
>
> **34. Thus, ironically (and somewhat difficult to reconcile with the position of the United States that cross-border supply of gambling and betting services poses**

significant health, law enforcement and other social issues that justify the United States total prohibition), under current federal law every state in the United States, if it so chose, could offer completely unregulated Internet gambling to every person located within the borders of the state. Yet Antigua would still be unable to provide any gambling and betting services-regulated or not-into the United States on a cross-border basis."[29]

The federal laws at issue do not prohibit remote gambling at all, just cross-border gambling. Because Antigua can only provide remote gambling on a cross-border basis, each of those statutes is facially discriminatory, as well as discriminatory in application.

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

88. The various states of the United States, being sovereign, maintain their own statutory schemes subject only to those matters expressly reserved to the Federal Government by the Constitution. Federal authorities are not in a position to speculate on the reasons state laws are written in any particular way. However, a state would naturally want to require compliance with the IHA for legal off-track account wagering on horse races, that is, account wagering occurring wholly within the state itself that does not involve the transmission in interstate or foreign commerce of the bets or wagers.

The last sentence of this answer is compelling evidence of the discriminatory effect of United States law–"account wagering occurring wholly within the state itself that does not involve the transmission in interstate or foreign commerce of the bets or wagers." As the United States has based its Article XIV defence on the basis that it prohibits *all* remote gambling and betting services,[30] the concession made by the United States in this answer–which is supported by the language of the statutes themselves and legal precedent–is enough to show why the United States cannot justify its WTO-inconsistent laws under Article XIV of the GATS.

Q33. 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?*

89. So far as we can determine, Antiguan gambling operators, or gambling operators from any other country, would be legally able to enter into the relevant agreements specified in the IHA in the United States so that they could accept wagers on those horse races without fear of being held civilly liable for the payment of damages to the host racing association and others under the provisions of the IHA. However, both domestic and foreign gambling operators would be subject to prosecution for violating the Wire Act if they, being in the business of betting or wagering,

---

[29] **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. 32-34.**

[30] **AB Report, para. 350.**

knowingly used a wire communication facility in interstate or foreign commerce for the transmission of bets or wagers.

Because Antigua does not come within the IHA's definition of a "State" and both the punter and the operator have to be in a "State" in order to make and accept a legal remote bet or wager under the IHA, Antigua cannot possibly come under its coverage–whether on an intrastate or a cross-border basis.[31] Once again, however, this answer confirms that a remote wager placed on an *intrastate* basis would not be prohibited.

> **Q34.** USA *Has the U.S. ever prosecuted under the Wire Act wagering on horseracing conducted in accordance with the IHA? If not, why not?*

90. None of the federal indictments concerning Internet gambling of which we are aware concern wagering on horseracing that was conducted in accordance with the IHA. There is no reporting requirement for gambling indictments and the statistics maintained by the Executive Office for United States Attorneys only track the number of prosecutions brought under the statute but do not specify the types of bets or wagers. The decision of whether to bring charges in any particular case rests on a variety of factors within the discretion of the prosecutor, such as the availability of resources, and prosecutorial priorities. To our knowledge, no defendant has ever raised compliance with the IHA as a defense to a prosecution for a violation of any federal gambling statute. If such a defense were raised, the Department of Justice believes such a defense would be legally unsuccessful.

> **Q35.** *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-mutual wagering on horseracing?*
>
> *(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)?*
>
> *(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?*
>
> *(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*

---

[31] ***See* AB First Submission, paras. 50-51.**

differ from the rates and patterns of prosecution of other potential offenders under the Wire Act?

(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)?

91. The Department of Justice is unable to comment on the pendency of proceedings which are not otherwise public. The Department is not aware of any public pending prosecution of Youbet.com or the other entities listed above.

Q36. USA *Do the recent prosecutions of foreign operators listed in Antigua's first written submission at paras. 106-107 concern the provision of pari-mutual wagering on horseracing or other wagering services or both?*

92. The prosecutions listed in paragraphs 106 and 107 of Antigua's first written submission are the May 2006 indictment United States v. William Scott, et al., No CR 05-122 (D.D.C) and the July 2006 indictment United States v. BETONSPORTS PLC, et al., No. 4:06 CR00337 CEJ (E.D. Missouri). The Scott indictment alleged in paragraph 6 that the defendants "unlawfully engaged in illegal internet casino gambling and accepts information to facilitate betting as well as accepting bets and wagers from persons in the United States who place bets on baseball, basketball, football, hockey and other sports through the internet and telephone."

93. The BETONSPORTS PLC indictment alleged that the defendants accepted "sports wagers from gamblers in the United States" (paragraph 1), "offered gamblers in the United States illegal wagering on professional and college football and basketball, as well as many other professional and amateur sporting events and contests." (paragraph 2). The overt acts allege that the company "accepted a sports bet" but does not provide any further information on the type of sporting event. The Section 1084 counts in the indictment allege the transmission of bets but do not specify the type of bet. While the indictment does not specifically mention pari-mutual wagering, the defendants did accept pari-mutual wagers, and such wagers are included in the indictment's reference to "other . . . sporting events and contests."

94. The United States has recently brought several more prosecutions of illegal gambling businesses that took bets on horse races as well as a variety of other sporting events. In United States v. Arthur Gianelli, et al., (District of Massachusetts), and United States v. Herbert David Meyers, et al., (District of Maryland), United States-based gambling operations employed the services of foreign gambling businesses to receive, record, and tabulate wagers from the United States on various sporting events, including horse racing. In United States v. Gerard Uvari, et al., (Southern District of New York), United States bookmakers transmitted numerous illegal wagers on horse races interstate. None of the defendants in these cases entered into the agreements required by the IHA or otherwise conformed their conduct to the IHA's provisions.

Q37. 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)?

95. Yes, this is the same statement.

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

96. The civil investigation is still pending. Beyond that the Department of Justice is unable to make any statement about any matter which is not public.

(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?

97. The Department of Justice is unable to make any specific statement concerning the investigation. The decision to proceed criminally or civilly is, under United States legal practice, committed to the sound discretion of the prosecutor based on a variety of considerations. A civil injunctive suit would be relevant to the application of the criminal statutes because such an injunctive action would require, among other things, a demonstration that the federal criminal statutes at issue were, or were about to be, violated, and that such violation would continue into the future.

(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?

98. As set forth in response to question 34, we are not aware of any federal prosecutions concerning Internet gambling concerning the transmission of wagers conducted in accordance with the IHA. With regard to the second half of this question, the Appellate Body in the original proceeding found that the Panel had erred in relying on evidence of a lack of prosecution in support of an interpretation of the federal criminal statutes.

This finding of the Appellate Body was based upon its opinion that there was insufficient evidence presented in the original proceeding to place evidence of lack of prosecutions in proper context.[32] In this "re-evaluation" of its Article XIV defence demanded by the United States, Antigua has put this evidence clearly in context. There have been *no* prosecutions of remote gambling and betting service providers operating under the auspices of the IHA and state regulatory schemes. But there have been prosecutions by the United States government–including two high-profile prosecutions this very year–against remote gambling and betting service providers operating under the *Antiguan* regulatory scheme.

[32] **AB Report, para. 356.**

(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?

99. As the United States understands the original panel findings, the Panel found that the Presidential signing statement was not sufficient to meet the U.S. burden of establishing an affirmative defense. However, the signing statement and the testimony of Mr. Ohr are official statements regarding the interpretation of U.S. criminal statutes, and are cumulative evidence in support of the U.S. position. Moreover, under the *Skidmore* doctrine discussed in the first U.S. submission, such statements would be considered by U.S. courts on the issue of statutory interpretation that the Panel is examining in this dispute.

(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?

100. The 2000 Amendment to the Interstate Horseracing Act was inserted at the last minute by Congress in an appropriations bill providing funding for the Department of Justice and other agencies of government. The Department of Justice did not learn that this amendment had been inserted until after the bill had been passed by both houses of Congress and transmitted to the President for signature. In sum, the Department of Justice was not afforded an opportunity to comment on the amendment until after it had already been adopted by Congress. However, the Department's position on the effect of the amendment with respect to federal criminal laws was made clear in the Presidential signing statement.

Q38. *With respect to the question whether the three Federal criminal statutes at issue are, on their face, non-discriminatory.*

(a) ANT, USA 38. 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)?

101. Yes, the Appellate Body had competence to make this finding. In doing so, the Appellate Body was attempting to complete the analysis in the dispute, after the Appellate Body had vacated certain Panel findings regarding the application of the Article XIV chapeau to the facts of this case. The wording of the statutes was not in dispute, and the Appellate Body acted properly in applying the legal criteria of the GATS to the undisputed facts concerning the content of the statutory language.

Although the Appellate Body may have had the competence to make the finding, unfortunately the finding was clearly in error.

(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)

(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)

102. The source of federal jurisdiction for the federal gambling statutes at issue is the Commerce Clause of the United States Constitution, which allows Congress to pass laws only where there is an effect on interstate or foreign commerce. The reference to interstate or foreign commerce in the Wire Act is an example of the jurisdictional requirement imposed by the Constitution, and does not define the class of individuals who may be prosecuted under the statute. Once this requisite effect on interstate or foreign commerce is satisfied, the criminal prohibitions are applied equally to anyone, without discrimination, regardless of nationality or country of origin, that violates the statute.

103. Thus, the fact that the statutes do not address intrastate commerce reflects no "discrimination" in the operation of U.S. federal laws, it simply reflects the U.S. constitutional scheme governing federal regulation of commerce. Moreover, the absence of a federal prohibition on intrastate activity in no way indicates that state gambling statutes (which do govern intrastate commerce) are discriminatory. For these reasons, the Appellate Body was correct in finding that the federal statutes were non-discriminatory on their face.

Both the GATS and the DSU are clear that they apply on a Member-to-Member basis and that the obligations and commitments undertaken apply within the applicable territories of the Members without consideration of internal or domestic governmental distinctions.[33] Thus, from Antigua's perspective, how the United States chooses to distribute authority between the central and regional or state governments is not relevant. What *is* relevant is whether Antiguan service providers are prohibited by United States law from offering their services remotely to consumers in the United States. And this, by virtue of the Wire Act alone, they clearly are. Yet the Wire Act–as the United States has conceded–does *not* prohibit the remote provision of these services on an intrastate basis. And, as Antigua has demonstrated, a number of states have decided to allow gambling and betting services in one form or another to be provided on a remote basis within (and in a number of cases, without as well) their borders.[34]

Further, because of the Wire Act, even if every state were to pass legislation directly authorising foreign service providers to offer services on a remote basis to their states (which

---

[33] GATS, Article I:2; Article I:3(a); DSU, Article 19.9.

[34] *See* AB First Submission, paras. 65-129.

of course none have done), the services would nonetheless be illegal because they would constitute "interstate or foreign commerce," within the meaning of the Wire Act. So, regardless of what state law provides, the Wire Act ensures discriminatory treatment of foreign service providers.