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**[THIS IS THE ORIGINAL MEMORANDUM THAT WE PROVIDED THE
ANTIGUAN GOVERNMENT UPON THE RELEASE OF THE APPELLATE
BODY REPORT, UPDATED FOR RECENT DEVELOPMENTS AS OF MARCH
2006]**

M E M O R A N D U M

Re: Report of the Appellate Body of the World Trade Organisation on *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*

The purpose of this Memorandum is to summarise and explain the Report (the "Report") of the Appellate Body (the "Appellate Body") of the World Trade Organisation (the "WTO") in the dispute *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (the "Dispute").

INTRODUCTION

The Report was issued on 7 April 2005 as a result of the decision of the United States to appeal the report dated 10 November 2004 (the "Panel Report") of the WTO panel that had considered the Dispute initially (the "Panel"). In the Panel Report, the Panel had found that a number of United States federal and state laws violated its commitments to Antigua and Barbuda ("Antigua") under the WTO's General Agreement on Trade in Services (the "GATS"). The Panel recommended that the WTO request the United States to bring the applicable laws into compliance with its obligations under GATS, in basic terms requiring the United States to provide market access to Antiguan gambling and betting service providers in order to offer their services to consumers in the United States.

The decision of the Panel was an unqualified victory for Antigua in the Dispute, and clearly took the United States and most gambling experts and commentators by surprise. It should be noted that most American legal experts, including experts that had performed services in the past for Antigua and well-known authors on gambling law in the United States, had completely discounted the Antiguan case from the beginning.

Unfortunately, the Report by the Appellate Body lacks the clarity of the Panel Report, which has led the United States, certain members of the press and a number of gambling experts and commentators to conclude that either the United States “won” the Dispute on appeal or that the Appellate Body had determined that all the United States had to do was “adjust” or “tweak” one of its laws to bring itself into compliance with the GATS. As will be explained below, the United States, the press and the experts and commentators are wrong. Despite the occasionally ambiguous language contained in the Report, the end result is the same as the result of the Panel Report—the United States was found by the Appellate Body to be in violation of its obligations under the GATS.

GENERAL CONSIDERATIONS

When considering the meaning of WTO report it is important to take into account the following:

- WTO dispute settlement reports are virtually always highly technical and legalistic.
- The Panel and the Appellate Body only have to consider factual elements that have been put before them. Factual elements which are not considered by the Panel or Appellate Body remain open for possible determination at a later time.
- The section of the Report which has generated the most controversy is the discussion on the “public morals and public order” exemption of Article XIV of the GATS. This is the first Appellate Body ruling to address this exemption. During the proceedings, however, there was very little factual debate on the United States’ attempt to invoke this exemption. This was due to the fact that the United States only invoked this exemption at a very late stage of the proceedings before the Panel, after all written submissions had been made.

SUMMARY OF THE REPORT

As noted above, the Report of the Appellate Body upholds the Panel Report, although on slightly different and narrower grounds. In the Report, the Appellate Body made four key rulings:

(1) *The United States’ Made Commitments for Betting and Gambling Services*

Certain key obligations of the GATS only apply to the extent that a WTO Member has made “specific commitments” for the service sector or subsector at issue. The Appellate Body ruled that the United States had made commitments to provide “market access” to other WTO members in gambling and betting services in its schedule of specific commitments to the GATS. The United States had contended that it had not made such a commitment and expressly excluded gambling and betting services by its

omission of “sporting services” in its GATS schedule. The Appellate Body disagreed, holding that the commitment was covered by the heading “Other Recreational Services” made in Section 10.D of the United States’ GATS schedule.

(2) *Antigua Established The Existence of Offending Measures*

The Appellate Body ruled that the United States had adopted “measures” that interfered with its obligation to provide market access to Antiguan gambling and betting service operators. Specifically, the Appellate Body ruled that Antigua established the existence of three federal laws which prohibited Antigua’s gambling services (i) the Wire Act of 1961, 18 U.S.C. §1084 (the “Wire Act”); (ii) the Travel Act, 18 U.S.C. §1952 (the “Travel Act”); and the Illegal Gambling Business Act, 18 U.S.C. §1955 (the “IGBA”). Antigua had sought to have additional federal and state laws considered “measures” that violate the United States’s GATS commitment and had listed a large number of these other federal and state laws that it contended to be measures in the Dispute. Antigua also contended that the United States maintained a “total prohibition” against the supply of gambling services from Antigua, and that this “total prohibition” was itself a measure. The Appellate Body disagreed with these arguments, finding that the other list of federal and state laws were not discussed in sufficient detail by Antigua in its submissions and that a “total prohibition” cannot serve as a measure by itself. Thus, the Appellate Body limited the offending “measures” in this matter to the three federal statutes listed above. This is *not* because the Appellate Body found that the other federal and state prohibition laws do not violate GATS. Rather, the Appellate Body made no substantive ruling with respect to the other federal and state laws, so Antigua could, if necessary, raise the other laws as offending measures in future WTO proceedings.

(3) *Antigua Established That The Measures Violate Article XVI of the GATS*

The Appellate Body found that the measures established by Antigua –the three federal statutes–violated Article XVI of the GATS. Article XVI:2(a) and (c) of the GATS concern “market access” for services and prohibit a WTO member country from maintaining “numerical quotas” and other limitations on service suppliers or service operations. The Appellate Body agreed with Antigua that a law prohibiting the supply of a service or prohibiting the use of one or more means of delivery (such as the Internet) violates Article XVI:2(a) and (c). On that basis, the Appellate Body found that the United States’ offending measures limited the number of service providers from Antigua in such a way as to violate the “market access” obligations of the United States under Article XVI.

This finding is crucial, as with the finding that a law prohibiting the provision of cross-border gambling and betting services violates Article XVI of the GATS, clearly *all* United States laws that have this effect are in breach of the United States’ commitments under the GATS.

(4) *The Appellate Body Rejected the United States' Moral Defence Under Article XIV of the GATS*

The Appellate Body found that the United States could *not* use a “moral defence” to nullify its violation of the GATS. Article XIV(a) of the GATS provides an exemption allowing a WTO member to maintain measures that otherwise violate the GATS, for reasons related to public morals and public order. In order to establish the exemption, the United States was required to meet both prongs of a two-part test. First, a measure must be “necessary” to protect public morals and public order. Second, a measure must satisfy the requirements of the so-called “chapeau” of Article XIV, that is the measure must not be applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination.”

(a) *The first prong: the “necessary” analysis*

The “necessary” prong of an Article XIV defence primarily rests on the determination whether there exists a “reasonably available WTO consistent alternative” to the offending measure. The key question on necessity in the Dispute was therefore whether the United States could protect its public morals by regulating remote gambling rather than by simply prohibiting it.

The Report articulates for the very first time precisely how the burden of proof shifts back and forth between the party raising the defence and the party asserting the complaint. Under this “burden-shifting” framework:

- (i) the defending party must first establish a *prima facie* case that its measure is “necessary” to protect public morals and public order;
- (ii) the complaining party must then put forward regulatory alternatives; and
- (iii) finally, the defending party must then demonstrate that this proposed regulatory alternative is not “reasonably available.”

The Appellate Body determined that the three federal statutes were necessary to protect public morals or maintain public order in connection with alleged threats posed to Americans by what the United States called “remote” gambling. In reaching this determination, the Appellate Body concluded that the United States had established a *prima facie* case of necessity, yet Antigua did not provide sufficient rebuttal evidence of regulatory alternatives. Antigua had actually provided a significant amount of evidence and detailed discussion of its successful regulatory measures, as well as a number of other alternatives to address the United States’ concerns, but the Appellate Body simply chose to ignore this evidence for reasons that are not explained. It is important to note that the Appellate Body did not find that there are no reasonably available alternatives to address public morality and public order concerns related to remote gambling. In the Appellate Body’s view, there has in fact not been a discussion on alternatives and that debate remains entirely open. It is now clear, however, that if a WTO Member such as Antigua *does* put forward alternatives to prohibition, the United States can continue to invoke Article XIV only if it demonstrates that these

alternatives do not work to address the identified concerns ostensibly associated with remote gambling.

(b) *The second prong: the chapeau/discrimination analysis*

With respect to the second required element of the United States' Article XIV defence, the Appellate Body ruled that the United States could not establish the chapeau because the United States either sanctioned or permitted "remote" gambling in the United States in the form of off-track account wagering on horse races under the authority of the United States Interstate Horseracing Act ("IHA"). Specifically, the Appellate Body found that the IHA either allows or appears to allow remote betting on horse races across state borders, only for domestic service suppliers and not for foreign service suppliers. This is impermissible discrimination. In view of the existence of remote horse wagering under the IHA, the Appellate Body ruled that the United States did *not* prove that its laws were not non-discriminatory or a disguised restriction on trade. Because the United States had not met its burden under the chapeau—a requirement of establishing a successful Article XIV defence—the United States could not prevail on its morals defense and thus the decisions in favour of Antigua remained intact.

UNDERSTANDING THE APPELLATE BODY DECISION

(1) *The Application of the Chapeau*

Claims by the United States that it had "won" the Dispute and interpretations by putative gambling law "experts" more or less agreeing with the United States' assessment have led to real confusion as to the consequences of the Report. There is no doubt that for whatever reason, the Appellate Body contributed to this ambiguity by the language used in the Report. Simply stated, whatever the nature of the discussion used by the Appellate Body, it is clear that it determined that the United States had not met its burden of proof under the "chapeau." Because meeting the chapeau is a requirement of an Article XIV defence, *the defence in its entirety failed*. To properly assess the result of the decision, it is important to note a number of key points.

First, the Appellate Body observed with respect to the chapeau in paragraph 350 of the Report that:

The United States based its defence under the chapeau of Article XIV on the assertion that the measures at issue prohibit the remote supply of gambling and betting services by *any supplier*, whether domestic or foreign. In other words, the United States sought to justify the Wire Act, the Travel Act, and the IGBA on the basis that there is *no discrimination* in the manner in which the three federal statutes are applied to the remote supply of gambling and betting services.

The Appellate Body further pointed out in paragraph 351 of the Report that:

The Panel determined that Antigua had rebutted the United States' claim of no discrimination *at all* by showing that domestic service suppliers are permitted to provide remote gambling services in situations where foreign service suppliers are not so permitted. We see no error in the Panel's approach.

In other words, the United States attempted to establish its compliance with the chapeau by asserting that it did not discriminate against foreign suppliers with respect to "remote" gambling—that is, the United States claimed that *all remote gambling is illegal in the United States*. Antigua submitted evidence of a large variety of "remote" gambling in the United States to rebut this assertion. The Panel literally ignored most of this evidence in its chapeau assessment, finding only that the United States could not establish the chapeau for two reasons—the tolerance and non-prosecution of certain domestic remote gambling service providers such as Youbet.com and CapitalOTB.com and the existence of the IHA.

In reviewing what the Panel had decided in its discussion under the chapeau, the Appellate Body disagreed with the finding of the Panel in respect of Antigua's claim that the United States permitted a number of domestic "remote" gambling services but it agreed with the Panel on the subject of the IHA. Accordingly, even though the Appellate Body repeatedly stated that its decision was based *solely* upon the evidence before it of the IHA, the Appellate Body made it clear that the United States had failed to establish compliance with the chapeau:

. . . *our* conclusion—that the Panel did not err in finding that the United States has not shown that its measures satisfy the requirements of the chapeau . . . We *find*, rather, that the United States has not demonstrated that . . . the Wire Act, the Travel Act, and the IGBA are applied consistently with the requirements of the chapeau. (paragraph 369).

. . . we *find* that the United States has not established that these measures satisfy the requirements of the chapeau. (paragraph 372).

. . . the United States has not demonstrated that . . . the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the chapeau . . . (paragraph 373(D)(v)(c)).

. . . the United States has not . . . established that these measures satisfy the requirements of the chapeau . . . (paragraph 373(D)(vi)(a)).

In the last paragraph of the Report, the Appellate Body made its final recommendation:

The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the

Panel Report to be inconsistent with the *General Agreement on Trade in Services*, into conformity with its obligations under that Agreement.

It is important to realise that the “measures . . . inconsistent” with the GATS are the three federal laws at issue—the Wire Act, the Travel Act and the IGBA. The measures do *not* include the IHA, which was before the Panel and the Appellate Body only as evidence of United States discrimination over foreign service suppliers. The Appellate Body did not ask the United States to “tweak” the IHA. The Appellate Body did not find that the only discrimination in the United States against foreign “remote” service providers was under the IHA. It simply found that, based upon the IHA itself, the United States had not proved that the three federal measures were not applied by it in a discriminatory fashion. So the Antiguan win holds, despite the finding in favour of the United States on the first prong of the Article XIV defence.

(2) *Important Rules of Law*

A very important point that most commentators have missed is that the Appellate Body Report expressed certain principles and rules of law that have important applications for the future. Like appellate courts in most legal systems, the Appellate Body considers each dispute with a certain set of facts and either makes or interprets rules of law that apply to those facts. Those rules of law that are established or interpreted then influence conduct, fact patterns and resolution of disputes going forward. For example, if the United States Supreme Court rules in a case that discrimination in the workplace based upon gender violates the American Constitution, then that rule of law applies in the future to all effected workplaces without the need for each possible employee bringing a case to the courts to establish its own entitlement to rely on the rules established in the decision.

In the Dispute, the Appellate Body established three crucial rules of law that are of great importance going forward:

- The United States made full and unrestricted commitments to the cross-border provision of gambling and betting services in its GATS schedule
- A United States law that has the effect of prohibiting the cross-border of gambling and betting services violates Article XVI of the GATS
- The United States may not discriminate against foreign service providers in the provision of remote gambling services

If the United States wants to follow the rules laid out by the decision, it will have to do one of two things—grant Antiguan service providers market access or prohibit all remote gambling within the United States in addition to remote gambling provided from other countries.

CERTAIN FEATURES REGARDING THE REPORT

The Report has certain hallmarks of a political decision. It can be viewed as if the Appellate Body decided that Antigua deserved the win under the law, but wanted to make the win as thin and ambiguous as it could under the circumstances. As did the Panel, the Appellate Body simply ignored a large amount of the Antiguan factual evidence, as if it did not exist. In a few instances, the Appellate Body made some statements about the Antiguan case that are just not true. The most egregious instance of which occurred in paragraph 326 of the Report where the Appellate Body stated:

Antigua raised no other measure that, in the view of the Panel, could be considered an alternative to the prohibitions on remote gambling contained in the Wire Act, the Travel Act, and the IGBA. In our opinion, therefore, the record before us reveals no reasonably available alternative measure proposed by Antigua or examined by the Panel that would establish that the three federal statutes are not “necessary” within the meaning of Article XIV(a). Because the United States made its prima facie case of “necessity,” and Antigua failed to identify a reasonably available alternative measure, we conclude that the United States demonstrated that its statutes are “necessary,” and therefore justified, under paragraph (a) of Article XIV.

The very important conclusion in the paragraph that Antigua presented no “alternative” measures for consideration is clearly false. It is also not true for the Appellate Body to say that the Panel did not identify any alternatives raised by Antigua. During the Panel proceedings, Antigua discussed at great length the Antiguan regulatory scheme, how it works and what the results have been with respect to the areas of concern identified by the United States. The Panel expressly acknowledged this and discussed it in the context of an “alternative” to prohibition. Yet the Appellate Body expressly denied that all of that evidence and discussion had been put forward and discussed.

During the Panel process Antigua also identified other jurisdictions that had been able to regulate or supervise Internet gaming to their satisfaction, including the Republic of Ireland and the United Kingdom. Antigua also pointed out United States legislation with respect to pornography which the United States Congress had determined was sufficient to address the threats of on-line pornography to children. Antigua further presented to the Panel that Antiguan suppliers could have accounts opened in the United States via contractual agreement with a third party service provider that could verify factual matters with respect to prospective punters to the exact same extent United States domestic service providers could determine, if not indeed better. The Panel having noted several of the alternatives Antigua had set forth, Antigua expressly cited to certain of these alternatives in its submissions to the Appellate Body, yet the Appellate Body still said “Antigua failed to identify a reasonably available alternative . . .” This is too important of a point to have been inadvertently missed.

THE WTO PROCESS GOING FORWARD

On 20 April 2005, the Dispute Settlement Body of the WTO (the “DSB”) met to adopt the Report. The Report was adopted, and at the DSB meeting scheduled of 19 May 2005, the United States expressed its intention to comply with the recommendations and rulings of the DSB based upon the Report, without expressly how it was going to do so.

The United States and Antigua had to use good faith efforts to agree on a “reasonable period of time” in which the United States would comply with the recommendations of the DSB, but as the United States suggested an unreasonable period of time, the determination of the period went to binding arbitration under WTO procedures. After a lengthy period during which the WTO had to select an arbitrator, both parties had to make written submissions to the selected arbitrator and an oral hearing was conducted, the decision of the arbitrator was rendered on 19 August 2005. The arbitrator gave the United States until 3 April 2006 to come into compliance with the rulings and recommendations of the DSB.

The “reasonable period of time” will have expired literally days before the Costa Rica conference. No doubt there will be much to discuss at that time.

OTHER DEVELOPMENTS

(1) *The Goodlatte and Leach Bills*

On 16 February 2006, Rep. Goodlatte of Virginia introduced into the Congress his “Internet Gambling Prohibition Act.” In response to that bill and the earlier legislation introduced by Rep. Leach, Antigua sent the following letter to the USTR.

16 February 2006

H.E. Mr. Rob Portman
United States Trade Representative
Executive Office of the President
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Excellency,

I have the honour to address you and to convey the concern of my government over the legislation introduced into the United States Congress on 16 February 2006 entitled the “Internet Gambling Prohibition Act” (the “Goodlatte Bill”), as well as the legislation introduced on 18 November 2005 as H.R. 4411, cited as the “Unlawful Internet Gambling Enforcement Act of 2005” (the “Leach Bill” and, collectively with the Goodlatte Bill, the “Bills”). Each of the Bills is in key respects expressly contrary to the rulings and recommendations of the Dispute Settlement Body (the “DSB”) of the World Trade Organisation (the “WTO”) in the dispute between Antigua and Barbuda and the United States, *United States –Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285, commonly referred to as the “US – Gambling” matter.

Each Bill is not only non-responsive to the rulings and recommendations of the DSB, but as noted above each is directly contrary to the DSB rulings in our dispute in several key respects. We note first that the Goodlatte Bill is cast as an amendment to the federal criminal statute known as the “Wire Act,” designed to expand the coverage of the Wire Act to most types of gambling services offered over the Internet, whereas the Leach Bill does not expressly purport to prohibit any class of remote gambling and betting or further criminalise remote betting *per se*. Rather, the Leach Bill seeks to criminalise facilitation of or participation in certain financial transactions associated with what the legislation defines as “unlawful Internet gambling.” The Goodlatte Bill also includes prohibitions on certain financial transactions similar to those contained in the Leach Bill in its proposed amendments to the Wire Act.

Although addressed in slightly different ways, both the Goodlatte Bill and the Leach Bill contain three significant exceptions from their coverage. *First*, both of the Bills exclude from their coverage transactions made in accordance with the Interstate Horseracing Act of 1978, as amended (the “IHA”), effectively removing remote betting and gambling in accordance with the IHA from the scope of the legislation. *Second*, both of the Bills specifically exclude from their coverage transactions that the Leach Bill frankly calls “intrastate transactions,” effectively allowing remote gambling that occurs wholly within the borders of an American state. *Third*, both of the Bills exclude from their coverage remote gambling conducted by Native American tribes in accordance with existing federal legislation applicable to Native American gaming. Neither of the Bills provide Antiguan gambling and betting service operators with any access to consumers in the United States or are in any way responsive to the recommendations and rulings of the DSB in our case.

The defence of the United States in US – Gambling under Article XIV of the GATS was predicated on the notion that “remote” gambling—which the United States defined as gambling in which the bettor and the gambling service provider or an agent are not physically in the presence of each other when a wager is made—presents certain “risks” that are either not present or not present to a similar extent than when gambling is not “remote.” Although gambling over the Internet can be remote it is not the exclusive mode of remote gambling. As we repeatedly asserted during the course of our dispute, none of the federal laws that Antigua and Barbuda challenged prohibit *remote* gambling. What they prohibit are certain forms of *cross-border* gambling. And, of course, it was never alleged by the United States nor was it found by the WTO that *cross-border* gambling presents any special “risks” that could come within the scope of Article XIV of the GATS. Thus, while “cross-border” gambling may in most cases be “remote” it does not however hold true that all “remote” gambling is “cross-border.” Although the Appellate Body decided that the United States had established the three federal statutes in question as “necessary” to protect against “risks” associated with remote gambling, the failure of the United States to meet its burden of proof under the chapeau of Article XIV resulted in the overall failure of the Article XIV defence. The three exceptions to the coverage of the Goodlatte Bill and the Leach Bill mentioned above only serve to highlight the chapeau failure and the discriminatory and trade restrictive application of the United States laws by your government.

As Antigua and Barbuda has repeatedly argued, the three federal statutes have in fact nothing to do with the alleged “risks” of “remote” gambling, and everything to do with the federalist concept in the United States—that is, allowing states to by and large deal with gambling within their own borders as they see fit. All three of the proposed exceptions in the Bills are consistent with our position. With respect to the IHA, by its terms it excludes participation by non-domestic service providers. Currently, considerable gambling takes place in the United States under the authority of the IHA which is by any definition “remote.” Each Bill would continue this favoured status for domestic remote gambling on horseracing.

The proposed exceptions in each Bill for “intrastate transactions” are both problematic and illuminating. These exceptions confirm what we have long claimed—that under current United States

law, including the three federal statutes at issue in *US – Gambling*, the 50 states are free to offer virtually unrestricted Internet and other forms of remote gambling within their own borders. At the same time, Antiguan service providers are unable to provide any gambling and betting services into those same states, simply due to the *cross-border* nature of the services. These particular provisions of both of the Bills would only serve to entrench and solidify what can only be described as the existing barriers to trade that the three federal statutes have erected.

We further observe that the “intrastate transactions” exceptions in the Bills implicitly recognise another point we made throughout the process—that means exist to verify the age, identity and location of persons using remote gambling services. Ironically, the provisions are solely focused on verification of age and location and identify none of the other “risks” that the United States argued before the WTO were prevalent in remote gambling.

As of today, with less than two months remaining on an 11 month and two week compliance period, to our knowledge no legislation has been introduced into the Congress that would seek to bring the United States into compliance with the DSB recommendations. Further, your government has given no indication to Antigua and Barbuda as to how the United States intends to effect such compliance. The only legislative efforts so far, the Goodlatte Bill and the Leach Bill, are baldly contrary to the rulings and recommendations of the DSB. We can only assume that this legislation was neither sponsored by nor enjoys the support of the USTR and the current American administration.

However, the existence of this legislation and the apparent lack of movement by the United States to comply with the rulings and recommendations of the DSB lead our government to be extremely concerned with the intentions of the United States in this matter. When we decided to bring this action against the United States one of the most consistent criticisms of our efforts was that the United States would simply fail to respect a decision if it were to be adverse. In response to this, we have maintained not only that the United States has a record of observing the determinations of the DSB, but it also has a vested interest in providing developing country members of the WTO with assurances that the WTO dispute resolution system is indeed a “two-way street” that provides a level and fair playing field for *all* members.

We trust that our confidence in the United States has not been misplaced, and we look forward to full and prompt compliance by your government with the rulings in *US – Gambling* within the reasonable period of time applicable to compliance, which will expire on 3 April 2006.

Please do not hesitate to contact me if you have any questions.

Accept, Excellency, the assurances of my highest consideration.

H.E. Dr. John W. Ashe
Ambassador/Permanent Representative to the WTO

(2) Action at the WTO

At the meeting of the DSB of the WTO held on 17 March 2006, the United States was required to give a status report of its progress in complying with the rulings and recommendations of the DSB in the case. After the USTR representative simply stated that it was “working with Congress” on the matter, the Antiguan Ambassador to the WTO delivered the following statement to the assembled delegates:

Mr Chairman,
WTO members,

My delegation wishes to make a few comments in connection with the statement by the honourable representative of the United States regarding the status of his country's compliance with the recommendations and rulings of the DSB in this matter.

As we had anticipated, the statement provides little in the way of useful information to this body and to our country as to when and how the United States will come into compliance with the recommendations and rulings of the DSB. With an implementation deadline approaching on 3 April 2006, less than three weeks from now, we might be forgiven, Sir, for having some anxiety at a complete lack of information from the United States on this most important matter facing the small and delicate economy of Antigua and Barbuda.

This is our first experience with dispute resolution at the WTO, but we had perhaps naively expected that the United States would wish to engage with our government on devising an equitable solution to our dispute that would take into account the benefits accorded Antigua under the recommendations and rulings, but also reasonably and comprehensively address the concerns raised by the United States during the course of the dispute as its justification for prohibiting the provision of services from Antigua to American consumers. To our great disappointment and in spite of numerous attempts on our part, the United States has shown absolutely no interest in engaging with us in this regard.

Mr. Chairman,

The official silence from Washington on this matter is deeply troubling. What is equally troubling is what has actually been happening in the United States since we won our hard-fought and costly dispute. Legislation has indeed been introduced in the United States Congress addressing the difficult topic of remote and Internet gambling.¹ In fact, two bills have been introduced separately in the Congress which are substantively quite similar. This legislation, one bill entitled the "Unlawful Internet Gambling Enforcement Act of 2005" and another entitled the "Internet Gambling Prohibition Act," is the *only* legislation introduced into the Congress since the determination of the "reasonable period of time" in our case. Unfortunately, each proposal is about as directly contrary to the recommendations and rulings of the DSB as could possibly be imagined. Not only do these bills do nothing to provide Antiguan operators with any access whatsoever to the vast American gambling market, but in fact each would further entrench the anti-GATS nature of United States gambling law by expressly exempting from its application domestic Internet gambling on horse racing, Internet gambling conducted by Native American tribes and, most significant of all, Internet gambling that occurs entirely within the border of a particular state. We have maintained all along that the American prohibition was really based upon the *cross-border* nature of the services rather than any true "evils" associated with "remote" gambling—and this pending legislation emphatically confirms we were correct.

In addition to this legislation, members of the body should know that the ubiquitous American-based money transfer service—Western Union—this January ceased providing money transfer services to and from Antigua and Barbuda. Ironically then, our country, with a strong, tightly regulated and overseen financial services sector, an enviable record of mutual assistance in cooperating with other countries around the globe to detect, deter and prevent financial crimes—and the only country to confront the United States over its anti-competitive gaming practices—is one of the very, very few countries in the entire world to which you cannot send or from which you cannot receive funds via Western Union.

¹ H.R. 4411; H.R. 4777.

And finally, we all know of the difficult questions facing many countries—particularly developing countries—when considering the costs and benefits of signing on to a multi-national trade organisation such as the WTO. In Antigua, we have voluntarily complied with the demands of trading partners, including particularly the United States, based upon our commitments to our trading partners under the various WTO trade agreements. Some of these things have clearly had an adverse impact on our own efforts to enrich and achieve some autonomy in our small economy. But we have been encouraged by the dominant economies on this planet that this multi-lateral set of agreements would accrue to the benefit of all of us. That we could compete with larger economies and, in the case of a dispute, achieve a fair and balanced hearing which would provide us with a meaningful remedy despite our limited global economic consequence.

Mr. Chairman,

It is with considerable concern that we learn that the United States Trade Representative has used our weakness as an express reason why gaming and other interests in the United States should not be concerned about our victory at the WTO. As reported on a website of an interest group in the United States, the USTR assured the participants at a conference held late last year that “as they see it, the most Antigua can do is to levy tariffs on US imports equal to the ‘damage’ done by the US failure to comply with the WTO ruling. Antigua is a tiny economy and imports little from the US. Imposing additional duties would simply make American goods more expensive there.”² Further, at the same meeting, USTR representatives were quoted as saying that “if the WTO does not agree [with American compliance efforts], the issue will likely be litigated for at least another year.”³

We believe that the time has come for the United States to demonstrate whether it is willing to be a *responsible stakeholder* in the WTO—whether the WTO agreements are to work for all of us, equally, or whether the WTO is indeed a “one-way street” for the large economies to further enrich themselves at the expense of lesser ones. It is one thing to play by the rules on a purely literal basis, and quite another to play by the rules in order to attain the objectives the rules were designed to achieve.

I thank you Mr Chairman.

² “An Overview of the WTO and Online Gambling,” Carl Bechtold, 12 October 2006 (<http://www.ncalg.org/WTO%20Threat.htm>, visited 30 October 2005).

³ *Id.*