BEFORE THE

WORLD TRADE ORGANIZATION

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

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

16 October 2006

I. INTRODUCTION

1. The issue in this proceeding under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") is a narrow one. In the underlying proceeding, the adopted Appellate Body report, and the adopted Panel Report as modified by the Appellate Body Report, left only one unsettled issue regarding the many claims raised by Antigua and Barbuda ("Antigua") in the underlying dispute. That issue is whether the United States can show that three facially non-discriminatory U.S. federal criminal statutes, as a matter of statutory interpretation, do not constitute a means of arbitrary or unjustifiable discrimination between countries, within the meaning of the chapeau to Article XIV of the *General Agreement on Trade in Services* ("GATS"), as the result of interaction with a civil statute, the Interstate Horseracing Act ("IHA").

2. In the underlying proceeding, this issue regarding federal criminal statutes and the IHA was a minor one, as compared to the numerous and far-reaching claims originally advanced by Antigua in this dispute. Based on evidence that was "limited," as the Appellate Body described it, the Panel and Appellate Body in the underlying proceeding were not able to conclude that the United States had assumed its burden of meeting the non-discrimination requirement of an affirmative defense under Article XIV of the GATS.

3. In the submission that follows, the United States will show, based on a complete examination of the evidence – including the text of the statutes, the relevant legislative history, and specific principles of statutory construction under U.S. law – that the IHA in no way limits the application of federal criminal statutes. The United States submits that the Panel, once it has considered all the evidence and arguments, will agree with this conclusion. And having done so, the Panel should proceed to find that the U.S. measures at issue are within the scope of the GATS Article XIV exception.

II. STATEMENT OF FACTS

A. DSB Recommendations and Rulings

4. The issue in this dispute under Article 21.5 of the DSU is whether the United States can meet its burden of showing – in light of and notwithstanding the existence of the Interstate Horseracing Act – that the Wire Act, the Travel Act, and the Illegal Gambling Business Act (IGBA) prohibit all forms of remote gambling, and, therefore, that the prohibition embodied in those measures is applied consistently with the requirements of the Article XIV chapeau. The other issues regarding the compliance of U.S. gambling statutes with U.S. obligations under the GATS were decided definitively by the Appellate Body and adopted by the Dispute Settlement Body ("DSB"). The last sections of the Appellate Body report frame the issue:

> "373. For reasons set out in the report, the Appellate Body:
>
> . . .
>
> "(D) with respect to Article XIV of the GATS,
>
> (vi) as regards Article XIV in its entirety,

> (a) modifies the Panel's conclusion in paragraph 7.2(d) of the Panel Report and finds, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures 'necessary to protect public morals or maintain public order', in accordance with paragraph (a) of Article XIV, but that the United States has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, has not established that these measures satisfy the requirements of the chapeau . . . .
>
> "374. 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 as modified by this Report to be inconsistent with the General Agreement on Trade in Services, into conformity with its obligations under that Agreement."[1]

5. The IHA issue was only one of dozens of issues considered by the panel and the Appellate Body. Accordingly, in a report of over 374 paragraphs in length, the discussion of the IHA issue amounts to only four paragraphs:

> "361. We now turn to the United States' Article 11 claim relating to the chapeau. The Panel examined the scope of application of the Interstate Horseracing Act ("IHA"). Before the Panel, Antigua relied on the text of the IHA, which provides that "[a]n interstate off-track wager *may be accepted* by an off-track betting system" where consent is obtained from certain organizations. Antigua referred the Panel in particular to the definition given in the statute of "interstate off-track wager":
>
> > [T]he term ... 'interstate off-track wager' means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutual wagers, where lawful in each State involved, *placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State*, as well as the combination of any pari-mutual wagering pools. (emphasis added)

[1] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005 (hereinafter "Appellate Body Report").

Thus, according to Antigua, the IHA, on its face, authorizes *domestic* service suppliers, but not *foreign* service suppliers, to offer remote betting services in relation to certain horse races. To this extent, in Antigua's view, the IHA "exempts" domestic service suppliers from the prohibitions of the Wire Act, the Travel Act, and the IGBA."

"362. The United States disagreed, claiming that the IHA – a civil statute – cannot "repeal" the Wire Act, the Travel Act, or the IGBA – which are criminal statutes – *by implication*, that is, merely by virtue of the IHA's adoption *subsequent* to that of the Wire Act, the Travel Act, and the IGBA. Rather, under principles of statutory interpretation in the United States, such a repeal could be effective only if done *explicitly*, which was not the case with the IHA."

"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."[2]

[2] Appellate Body Report, paras. 361-364 (footnotes omitted; italics in original).

B. Key Statutes at Issue in the Dispute

1. The Wire Act

6. The Wire Act, enacted in 1961, is a key federal criminal statute outlawing certain gambling activities.[3] In particular, the Wire Act, as relevant to bets and wagers, prohibits a person

> "being engaged in the business of betting or wagering [from] knowingly [using] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . on any sporting event or contest."[4]

Violation of this prohibition results in fines and/or imprisonment of not more than 2 years.[5]

7. The Wire Act has different, somewhat more complex provisions addressing the transmission of information assisting in the placing of bets and wagers. On the one hand, the Wire Act prohibits a person

> "being engaged in the business of betting or wagering [from] knowingly [using] a wire communication facility for the transmission in interstate or foreign commerce of . . . information assisting in the placing of bets or wagers on any sporting event or contest."[6]

8. On the other hand, the Wire Act exempts from that prohibition

> the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.[7]

Thus, where the placing of bets and wagers is legal in both the jurisdiction where the event or contest occurs, and in the jurisdiction where the bet is placed, then transmission of information

---

[3] The Wire Act is codified at Section 1084 of Title 18, United States Code (Ex. AB-1).

[4] Wire Act, 18 U.S.C. 1084(a).

[5] Wire Act, 18 U.S.C. 1084(a).

[6] Wire Act, 18 U.S.C. 1084(a).

[7] Wire Act, 18 U.S.C. 1084(b).

regarding the event or contest is lawful. However, the bet or wager itself may not be transmitted between the two jurisdictions.

9. The legislative history of the Wire Act provides an example of how this exemption works.

> "Phrased differently, the transmission of gambling information on a horserace from a State where betting on that horserace is legal to a State where betting on the same horserace is legal is not within the prohibitions of the bill. Since Nevada is the only State which has legalized offtrack betting, this exemption will only be applicable to it. For example, in New York State parimutuel betting at a racetrack is authorized by State law. Only in Nevada is it lawful to make and accept bets on the race held in the State of New York where parimutuel betting at a racetrack is authorized by law. Therefore, the exemption will permit the transmission of information assisting in the placing of bets and wagers from New York to Nevada. On the other hand, it is unlawful to make and accept bets in New York State on a race being run in Nevada. Therefore, the transmission of information assisting in the placing of bets and wagers from Nevada to New York would be contrary to the provisions of the bill. Nothing in the exemption, however, will permit the transmission of bets and wagers or money by wire as a result of a bet or wager from or to any State whether betting is legal in that State or not."[8]

2. The Interstate Horseracing Act

10. The Interstate Horseracing Act is a civil statute that was enacted in 1978. As noted, the transmission in interstate or foreign commerce of information assisting in the placing of bets and wagers had long been lawful under the Wire Act. The IHA was enacted to address a free-rider problem: namely, that a gambling operation in one state could earn profits by accepting bets on a horse race in a different jurisdiction, without sharing any of those profits with the racetrack. In the words of one of its sponsors, "The most important feature of this legislation is that it establishes the proprietary relationship of the horseracing industry: that is, the horsemen and the racetracks, over its own races. Having established that relationship, the bill provides that interstate bets cannot be taken on those races within a particular State without proper compensation to the industry."[9]

11. The statute accomplishes its objective by giving the host State, the host racing association, and the horsemen's group the right to bring a civil action to recover betting revenues from out-of-state betting operators unless those operators had previously entered into a

---

[8] H.R. Rep. No. 87-967, 87th Cong., 1st Sess. at 3 (1961), reprinted in 1961 U.S.C.C.A.N. 2631, 2632-2633 (Ex. US-1).

[9] 124 Cong. Rec. 31553 (1978)(statement of Sen. Magnuson) (Ex. US-2).

contractual revenue-sharing agreement with the track.[10] The IHA is not a criminal statute, and in fact provides no role for the Federal government to enforce the revenue-sharing purpose of the statutory scheme.

12. Moreover, the IHA makes no reference to federal criminal law. And, more broadly, no provision of the statute states that the existence of an IHA contractual arrangement serves as an exemption to any sort of federal or state law, civil or criminal – except, of course, with respect to the IHA's own civil liability provisions.[11]

C. Basic Principles of U.S. Statutory Construction

13. Although U.S. law contains a number of principles and rules for statutory construction, three of the most basic of those principles should be stated at the outset.

14. First, the beginning point of statutory construction is the plain language of the statute. Richardson v. United States, 526 U.S. 813, 818 (1999) (Ex. US-3) ("when interpreting a statute, we look first to the language.").

15. Second, *only* when there is ambiguity does one need to resort to examining the legislative history of a statute. E.g., McGraw v. Barnhart, 450 F.3d 493 (10th Cir. 2006) (Ex. US-4) (holding that if statutory ambiguity is found, a court may seek guidance from congressional intent, a task aided by reviewing the legislative history.).

16. Third, under the *Skidmore* doctrine, U.S. courts give a level of deference to an agency's interpretation of the statute it administers. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (Ex. AB-16) ("[w]e consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

III. THE PROHIBITION EMBODIED IN THE WIRE ACT, THE TRAVEL ACT, AND THE IGBA IS APPLIED CONSISTENTLY WITH THE REQUIREMENTS OF THE CHAPEAU OF GATS ARTICLE XIV

17. On their face, the Wire Act, the Travel Act, and the Illegal Gambling Business Act ("IGBA") meet the requirements of the chapeau of GATS Article XIV. In particular, the statutes

---

[10] 15 U.S.C. 3004-3006 (Ex. AB-4).

[11] In Part III below, the United States will expand on the point that the IHA on its face provides no exceptions to any other U.S. laws.

facially meet the requirement that "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail." The absence of any facial discrimination in these statutes is clear: nowhere in the text of those laws are there provisions that discriminate between countries. Antigua does not argue otherwise, nor did the Appellate Body find any such discrimination in the text of the Wire Act, Travel Act, or IGBA.

18. Rather, the issue of "discrimination" in this dispute turns on whether, as Antigua argues, the IHA exempts certain domestic – but not foreign – remote gambling from the scope of the Wire Act. If the IHA indeed provides such an exemption, then – Antigua argues – the result would be an application of the Wire Act, the Travel Act, and the IGBA that would constitute a means of arbitrary or unjustifiable discrimination.

19. In the following sections, the United States will show that, in fact, under fundamental principles of U.S. law, the IHA does not provide an exemption from these three federal statutes. Before turning to this analysis, the United States notes that the focus of this issue of alleged discrimination is necessarily on the Wire Act, as opposed to the Travel Act or the IGBA. Of these three laws, it is only the Wire Act that defines – without reference to any other criminal statutes – which gambling activities are illegal. The other two statutes (the Travel Act and IGBA) criminalize certain gambling-related activities *only if* such activities are tied to other illegal activities under other Federal or States laws.[12] As the United States understands it, Antigua's claims regarding the Travel Act and IGBA are thus subsidiary to the claims regarding the Wire Act. In other words, the argument seems to be that the IHA creates discrimination in the application of the Wire Act, and that this discrimination then extends to the other statutes because they incorporate the Wire Act's criminal prohibitions.

A. The IHA Does Not "Allow" Any Particular Gambling Activity

20. The IHA's plain text – which is the starting point of statutory construction under U.S. law – makes clear that it was not intended to serve as an across-the-board permission for gambling on horse racing. To be sure, Antigua vigorously asserts that the IHA "allows" certain activities.[13] Remarkably, however, Antigua never cites the specific text of the IHA which supposedly accomplishes such an exemption from other civil or criminal laws. In fact, the IHA says no such thing.

21. Perhaps Antigua is attempting to rely on section 4 of the IHA (15 U.S.C. 3003). That provision states: "No person may accept an interstate off-track wager except as provided in this Act." On its face, this language does not indicate any intent to exempt betting on horse races from provisions of law outside of the IHA. And in the context of the other provisions of the

---

[12] See Appellate Body Report, paras. 260, 262 (quoting Travel Act and IGBA).

[13] See, e.g., *First Submission of Antigua and Barbuda*, 25 September 2006, para. 50 ("The IHA allows interstate wagers . . . .") (hereinafter "Antigua 21.5 Submission").

IHA, the meaning of this language is quite clear. IHA Section 5 (15 U.S.C. 3004) requires the gambling operator to enter into a revenue-sharing arrangement with the horse track, and Section 6 (15 U.S.C. 3005) gives the State or racetrack the right to bring a civil action to recover lost revenue in the event the gambling operator fails to enter into the contractual arrangement. Thus, in context, what section 4 of the IHA means is that "no person may accept an interstate off-track wager without exposure to civil liability under section 6 unless the person meets the revenue-sharing requirements of section 5."

22. Antigua's argument, to the extent based on section 4 of the IHA, appears to be that section 4 means "Any person may accept any interstate off-track wager, notwithstanding any other state or federal laws, so long as it meets the requirements in this chapter." But this notion – that the IHA grants an across-the-board allowance or permission *vis a vis* all other U.S. laws – is nowhere contained in the words of the statute.

23. Similarly, IHA Section 5 (15 U.S.C. 3004) is not expressed in terms of providing an exemption from criminal or civil statutes outside the scope of the IHA itself. Section 5 starts out "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 concerning the revenue-sharing arrangement with the horse track. As written, and in its context within the IHA, Section 5 specifies the requirements noted more generally in Section 4.

24. If IHA Section 5 were actually intended to provide a broad exemption from other legal requirements, Congress would have used language such as: "An interstate off-track wager may be accepted by an off-track betting system, notwithstanding any other state or federal laws, so long as consent is obtained from the horse racing association." But again, this type of language is contained nowhere in the statute.

25. In sum, the IHA on its face does not indicate any intent to create exemptions from any state or federal criminal laws, or from any other state or federal civil laws. For this reason, the United States submits that it has met its burden of showing that the IHA does not exempt gambling on horse racing from the criminal prohibitions of the Wire Act. Nonetheless, although a legal analysis under U.S. law need go no further, the United States will proceed to address the additional principles of statutory construction that would apply if, as Antigua argues, there were ambiguity in the interaction between the IHA and the Wire Act.

B. The IHA Does Not Accomplish a "Repeal by Implication" of the Wire Act

26. U.S. principles of statutory construction include a doctrine under which a subsequent statute, even in the absence of explicit statutory language referencing an earlier statute, may be deemed to accomplish a "repeal by implication" of the earlier statute. Such "repeals by implication," however, are extraordinary, and nothing in the IHA could amount to a repeal by implication of the Wire Act. Repeals by implication are disfavored and the intent of the

legislation to do so must be clear and unambiguous. As the United States Supreme Court explained in United States v. Borden, 308 U.S. 188, 198 (1939) (Ex. US-5):

> "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. United States v. Tynen, 11 Wall. 88, 92, 20 L.Ed. 153; Henderson's Tobacco, 11 Wall. 652, 657, 20 L.Ed. 235; General Motors Acceptance Corporation v. United States, 286 U.S. 49, 61, 62, 52 S.Ct. 468, 472, 76 L.Ed. 971, 82 A.L.R. 600. The intention of the legislature to repeal `must be clear and manifest'. Red Rock v. Henry, 106 U.S. 596, 601, 602, 1 S.Ct. 434, 439, 27 L.Ed. 251. It is not sufficient as was said by Mr. Justice Story in Wood v. United States, 16 Pet. 342, 362, 363, 10 L.Ed. 987, `to establish that subsequent laws covered some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary'. There must be `a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication, only, pro tanto, to the extent of the repugnancy." See, also, Posadas v. National City Bank, 296 U.S. 497, 504, 56 S.Ct. 349, 352, 80 L.Ed. 351."

27. In Annex I, the United States has provided detailed descriptions of four federal court cases that illustrate how U.S. courts consider claims of repeal by implication. Each of the cases in Annex I are instructive to the issue in this dispute. In each case, the court considered regulatory schemes with some degree of overlap, and found that effect should be given to both schemes and that the later-in-time statute did not result in a repeal by implication of the earlier statute.

28. An application of U.S. "repeal by implication" principles to the Wire Act and IHA cannot result in a finding that the IHA resulted in a repeal by implication of the Wire Act. In particular, there is no clear and unequivocal intent of repeal by implication because there is (1) no repugnancy between the statutes, and (2) no subsequent statute that covers the field of an earlier one.

29. *Repugnancy between the statutes:* First, there is an absence of any repugnancy between the two statutes. To the contrary, as explained above, the original legislative history of the Wire Act noted that a gambling operation in one state could offer betting on horse races held in another state (so long as the bet or wager did not cross state lines.) And, as noted, the IHA fits with the Wire Act by creating a civil liability scheme to address the free-rider problem created by this type of interstate gambling on horse racing. Each scheme has its own purpose and effect, and there is no repugnancy between the statutes.

30. *Covering the field of the earlier statute.* In no way could the IHA be considered to cover the entire field occupied by the Wire Act. The Wire Act is far broader in scope than the IHA

because the Wire Act is applicable to many forms of gambling, not just wagering on horse races.[14]

31. In sum, the IHA does not even approach a repeal by implication of the Wire Act. Antigua's main argument to the contrary concerns a legislative change in 2000 to a single definition in the IHA;[15] the United States responds to this argument in the following section.[16]

C. The 2000 IHA Amendment Did Not Result in a Repeal by Implication of the Wire Act

32. In December 2000, Congress amended Section 3 of the IHA (15 U.S.C. 3003(3)) to revise the definition of the term "interstate off-track wager." As amended, the term "interstate off-track wager" is defined as "a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutual wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutual wagering pools." Antigua claims that this amendment "clarifies" that the IHA "permits" interstate wagering on horse racing despite the Wire Act's criminal prohibition.

33. Once again, Antigua's argument fails to cite any language of "permission" in the IHA. As explained above, no such language exists. The IHA imposes civil liability on certain

---

[14] See United States v. Brien, 617 F.2d 299, 310 (1st Cir. 1980) (Ex. US-6) (finding that the Commodities Futures Trading Act (CFTA), 7 U.S.C. § 60, which prohibits only interstate communication in commodities fraud, did not cover the entire ground occupied by 18 U.S.C. §§ 1341 and 1343 (mail and wire fraud statutes) and thus, there was no implied repeal of the mail and wire fraud statutes by CFTA).

[15] Antigua argues that *Sterling Suffolk Racecourse Limited Partnership* v. *Burrillville Racing Association, Inc.*, 989 F.2d 1266 (1st Cir. 1993) [Exhibit AB-30] holds that "Congress intended to take conduct in violation of the IHA out of the criminal coverage of the Wire Act." Antigua 21.5 Submission, para. 61. *Sterling*, however, holds no such thing. This was a civil case involving private parties. The plaintiff attempted to invoke the RICO statute, which allows a private plaintiff to plead a criminal violation as part of a civil RICO claim. The court held that the defendant's conduct did not violate the Wire Act. In an attempt to salvage its RICO claim, the plaintiff argued that the defendant's noncompliance with the IHA somehow resulted in a criminal violation. The court properly denied this argument: "Appellant tells us that the IHA makes a dispositive difference. But, we do not understand how this can be true. All available evidence indicates that Congress intended the IHA to have purely civil consequences." *Sterling,* 989 F.2d at 1273. Rather than supporting Antigua's argument, *Sterling* supports the point that Congress intended the civil IHA and federal criminal laws to operate in separate spheres, thus undermining any claim of implied repeal by implication.

[16] Antigua also argues that legislation (HR 4411) then under consideration in Congress supports Antigua's view that the IHA provides an exemption from the Wire Act. Antigua Art. 21.5 Submission, paras. 108-114. Pending legislation, however, is not a measure, nor is it instructive regarding the proper interpretation of existing measures, such as the Wire Act. Similarly, Antigua argues that a handful of commentators have stated positions regarding the IHA similar to those advocated by Antigua. Antigua Art. 21.5 Submission, para. 57 & nn. 99-101. Under the U.S. legal system, however, it is only the courts and Executive Branch, not commentators, that can issue authoritative statements on statutory interpretation.

gambling operators that fail to enter into revenue-sharing arrangements with horse tracks, and no language in the IHA provides any permissions or exemptions with regard to any state or federal laws except the IHA itself. This congressional amendment to a definition in no way provides any exemption to other criminal or civil laws.

34. Also, the amendment to this one definition does not change that the IHA does not repeal the Wire Act under principles of repeal by implication.

35. First, neither the amendment itself, nor the IHA as amended, is "repugnant" to the Wire Act. In fact, the amendment can be seen as closing a loophole in the implementation of the IHA's goal of enforcing revenue-sharing between betting operators and racetracks. Before the amended definition, racetracks could bring civil enforcement suits against betting operators that failed to engage in revenue sharing, but the IHA arguably was not clear with regard to whether the horse tracks retained this right when the betting operators committed the additional wrong of using a wire communication facility to transmit wagers in interstate commerce. The IHA amendment clarifies the definition of "interstate off-track wager" in such a way that racetracks will not lose their civil enforcement rights when betting operators transmit wagers across state lines. In short, both the Wire Act and the IHA can continue to have their separate effects, and there is no repugnancy between the Wire Act and the IHA as amended in 2000.

36. Second, the 2000 amendment does not make the IHA cover the field occupied by the Wire Act. The Wire Act continues to regulate a much broader range of gambling activities than just gambling on horse racing.

37. The 2000 IHA amendment triggers another principle of repeal by implication. Namely, the rule that repeal by implication is disfavored "applies with even greater force when the claimed repeal rests solely in an Appropriations Act." Environmental Defense Center v. Babbitt, 73 F.3d 867, 871 (9th Cir. 1995) (Ex. US-7). The 2000 amendment was one part of a lengthy appropriations bill that provided funding for several Federal agencies and the District of Columbia. No other part of the statute was aimed at the regulation of gambling or horse racing.

38. The United States submits that the text of the legislation is clear, and thus that there is no need to resort to legislative history. Nonetheless, the legislative history does not support Antigua's view. The report of the committee that drafted the statutory language is considered one of the primary sources that is examined to determine Congressional intent.[17] The relevant committee reports for the 2000 IHA amendment indicate no intention (as Antigua argues) to "allow" new types of remote gambling, nor to amend or repeal any criminal statutes.

[17] Pierpoint v. Barnes, 94 F.3d 813, 817 (2d Cir. 1996) (Ex. US-14) ("A committee report, representing a collective statement by the drafters about the intended purpose of proposed legislation, is considered a particularly good indicator of congressional intent when it is otherwise difficult to ascertain.").

39. The conference report, H.R. Rep. No. 106-1005, 106th Cong. 2d Sess. (2000), contained two relevant statements concerning the IHA amendment. The first statement sets forth the text of the bill as determined by the conference agreement made by the managers from the House and the Senate, and explains as follows "SEC. 629. Section 3(3) of the Interstate Horseracing Act of 1978 (15 U.S.C. 3002(3)) is amended by inserting `and includes pari-mutual wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutual wagering pools' after `another State'". H. R. Rep. No. 106-1005 at 151.[18] The second relevant statement in the conference report was contained in the explanatory language section of the report, which explained as follows: "Sec. 629.–The conference agreement includes a new section 629, to clarify the Interstate Horseracing Act regarding certain pari-mutual wagers." H.R. Rep. No.106-1005 at 317.[19] In sum, the committee language simply describes the change in the definition, without any stated intention of amending or repealing the Wire Act or any laws other than the IHA itself.

40. Antigua's sole argument to the contrary is based on a single floor statement by one Member of Congress who was not a drafter of the IHA amendment, and who opposed its adoption.[20] For purposes of statutory interpretation, isolated statements of individual members of Congress do not express the intent of Congress as a whole. Such statements are therefore weak evidence of congressional intent. European Community v. RJR Nabisco, Inc., 355 F.3d 123, 135 (2d Cir. 2004) (Ex. US-9). Given that the statements of the committee that drafted the IHA amendment expressed no similar interpretation, the legislative history cannot be said to support the view that Congress as a whole had the "clear and unambiguous" intent to accomplish a repeal by implication.

IV. THE UNITED STATES HAS SATISFIED THE DSU ARTICLE 21.5 REQUIREMENT OF THE EXISTENCE OF MEASURES TAKEN TO COMPLY

41. Antigua presents several related arguments in support of its position that "the United States has done nothing responsive to the DSB rulings." Each of these arguments are without merit, and will be addressed separately.

42. Before doing so, however, the overarching point is that compliance with the DSB recommendations and rulings must depend on the specific findings of the Appellate Body in this

[18] This section of the conference report appeared in the Congressional Record on Oct. 25, 2000. 146 Cong. Rec. H11141 (daily ed. Oct. 25, 2000) (Ex. AB-19).

[19] This section of the conference report appeared in the Congressional Record on Oct. 25, 2000, 146 Cong. Rec. H 11187 (daily ed. Oct. 25, 2000), and Dec. 15, 2000. 146 Cong. Rec. H12481 (daily ed. Dec. 15, 2000) (Ex. US-8).

[20] Antigua 21.5 Submission, para. 55.

dispute.[21] In particular, the Appellate Body noted that neither the Panel nor the Appellate Body itself had found that the U.S measures were out of compliance. Instead, the Appellate Body noted that it would not overturn under DSU Article 11 review the Panel's finding that the United States "had not shown" or "had not demonstrated" or "did not establish" that its measures met the requirements of the Article XIV chapeau, and thus did not establish that the measures were entitled to an affirmative defense. The Appellate Body explained there was only a "possibility" of non-compliance based on a finding by the panel that the IHA does "appear" to permit certain betting activities. The Appellate Body emphasized these points again and again:

> "369. Thus, 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 – relates solely to ***the possibility*** that the IHA exempts only domestic suppliers of remote betting services for horse racing from the prohibitions in the Wire Act, the Travel Act, and the IGBA. In contrast, the Panel's overall conclusion under the chapeau was broader in scope. As a result of our reversal of one of the two findings on which the Panel relied for its conclusion in paragraph 6.607 of the Panel Report, we must modify that conclusion. We find, rather, that the United States ***has not demonstrated*** that – in the light of the existence of the IHA – the Wire Act, the Travel Act, and the IGBA are applied consistently with the requirements of the chapeau."
>
> "371. We have found instead that those measures satisfy the "necessity" requirement. We have also upheld, but only in part, the Panel's finding under the chapeau. ***We explained that the only inconsistency that the Panel could have found with the requirements of the chapeau stems from the fact that the United States did not demonstrate that the prohibition embodied in the measures at issue applies to both foreign and domestic suppliers of remote gambling services,*** notwithstanding the IHA – which, ***according to the Panel, "does appear, on its face, to permit"*** domestic service suppliers to supply remote betting services for horse racing. In other words, ***the United States did not establish*** that the IHA does not alter the scope of application of the challenged measures, particularly vis-à-vis domestic suppliers of a specific type of remote gambling services. ***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.***"

[21] As the Appellate Body has recently observed, "[i]t is important to note that the text of Article 21.5 expressly links the 'measures taken to comply' with the recommendations and rulings of the DSB." Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 14 March 2006. The relevant measures are thus those "that have a bearing on compliance with the recommendations and rulings of the DSB." *Id.*

"372. Therefore, we modify the Panel's conclusion in paragraph 7.2(d) of the Panel Report. We find, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the IGBA fall within the scope of paragraph (a) of Article XIV, but that it ***has not shown***, in the light of the IHA, that the prohibitions embodied in these measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing. For this reason alone, we find that the United States ***has not established*** that these measures satisfy the requirements of the chapeau. Here, too, we uphold the Panel, but only in part.

"373(D)(v)

(c) modifies the Panel's conclusion in paragraph 6.607 of the Panel Report and finds, rather, that the United States ***has not demonstrated*** that – in the light of the existence of the Interstate Horseracing Act – the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the chapeau;

(vi) as regards Article XIV in its entirety,

(a) modifies the Panel's conclusion in paragraph 7.2(d) of the Panel Report and finds, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures "necessary to protect public morals or maintain public order", in accordance with paragraph (a) of Article XIV, but that the United States ***has not shown***, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, ***has not established*** that these measures satisfy the requirements of the chapeau; and"

. . .

"374. 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 as modified by this Report to be inconsistent with the General Agreement on Trade in Services, into conformity with its obligations under that Agreement."[22]

[22] Appellate Body Report, para. 369-374 (excerpts, emphasis added).

A. In the Circumstances of this Case, the Measures Taken to Comply Are the Statutes at Issue in the Dispute

43. Antigua appears to argue that, as a matter of "common sense", the United States must be considered not to have met the requirement of Article 21.5 for the "existence . . . of measures taken to comply."[23] The United States submits, to the contrary, that in the particular circumstances of this case – where the responding party in the original proceeding did not meet its burden of showing that the measures at issue satisfy the requirements of an affirmative defense – the only sensible way to apply the DSU is to allow the statutes at issue (in this case, the Wire Act, Travel Act, and IGBA) to be the "measures taken to comply."

44. The U.S. statutes are indeed measures. And as the United States has demonstrated – at the explicit invitation of the Appellate Body – these measures do in fact meet the requirements of the Article XIV exception of the GATS. Thus, these measures "comply" with the recommendations and rulings of the DSB. The only remaining issue is whether the measures are "taken to" comply. The phrase "taken to" is neither explicit nor self-defining. In the circumstances of this case, this phrase must be construed to allow for the measures at issue to be the "measures taken to comply"; if not, the application of the DSU to such circumstances could lead to absurd results.

45. The problem is that unless the measures in dispute are the "measures taken to comply," the responding party would be required under DSU Article 21 to enact new measures when it was already in compliance with its obligations. The new measures could even be substantively *identical* measures, which the responding party would then proceed to defend successfully by making the showing that the measures met the affirmative defense. In short, the responding party would be forced to take meaningless, additional action for no other purpose.

46. Similarly, the complaining party would gain nothing. The complaining party could not expect the responding party to adopt any substantively different measure, because the original measure was already in compliance. Nor would the complaining party be entitled to suspend concessions. Under Article 22, the level of suspension of concessions must be equivalent to the level of nullification or impairment. Since the measures in dispute would already be in compliance with the responding party's obligations under the agreement, the level of nullification or impairment would necessarily be zero. Thus, where the responding party has a valid affirmative defense that did not succeed only because of a lack of a full showing in the original proceeding, the only sensible result is to construe "measure taken to comply" such that the responding party can proceed to make that showing in an Article 21.5 proceeding.

---

[23] Antigua 21.5 Submission, para 45.

B. Antigua Has No Basis for Its Argument that the United States "Has Done Nothing Responsive to the DSB Rulings"

47. Antigua presents four arguments why the United States has "done nothing responsive" to the DSB rulings. Each of these is without merit.

48. First, Antigua argues that the United States relies solely on a Department of Justice ("DOJ") statement noted in the April 2006 status report submitted to the DSB.[24] To the contrary, the showing by the United States has not relied solely on the DOJ statement noted in the status report, nor on DOJ statements collectively. Such statements, however, certainly are relevant and supportive of a finding that the U.S. measures meet the requirements of the Article XIV chapeau. As noted above, under the principle of *Skidmore* deference, U.S. courts give a level of deference to an agency's interpretation of the statute it administers.

49. The April 2006 status report cited by Antigua states as follows:

> "On 5 April 2006, the US Department of Justice confirmed the position of the US Government regarding remote gambling on horse racing in testimony before a subcommittee of the US House of Representatives. The Department of Justice stated that:
>
> > 'The Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity. We have previously stated that we do not believe that the Interstate Horse Racing Act, 15 U.S.C. §§ 3001-3007, amended the existing criminal statutes.'
>
> "In view of these circumstances, the United States is in compliance with the recommendations and rulings of the DSB in this dispute."[25]

50. Nowhere in the above status report does the United States claim that the DOJ statement is a separate measure, or that the United States will rely entirely on that statement to make its showing that the IHA does not exempt gambling on horse racing from federal criminal statutes. Instead, the status report notes, as was entirely appropriate, that DOJ continues to view the relevant statutes in the manner indicated, and that accordingly the United States believes that it is in compliance with the DSB recommendations and rulings.

---

[24] Antigua 21.5 Submission, paras. 34-35.

[25] *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services – Status Report by the United States*, WT/DS285/15/Add.1 (11 April 2006).

51. Second, Antigua argues that the United States has already presented all of its arguments to the panel and the Appellate Body, and that such arguments have been rejected.[26] This is not, in fact, the case.

52. In the original proceeding, the issue of alleged discrimination arising from the IHA was not a subject focused upon by either the panel or the parties. It was only one of several dozens of issues considered by the panel, and there was no way for the panel or the parties to know that the IHA issue would be the only issue remaining in the case after the Appellate Body ruling. As a result, the Appellate Body explicitly noted that "The Panel had limited evidence before it, as submitted by the parties, on which to base its conclusion."[27]

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

54. Third, Antigua erroneously relies on the Appellate Body report in *EC – Bed Linen*[28] for the proposition that the United States does not get a "second chance" to present its case.[29] In *EC – Bed Linen,* however, the Appellate Body's statement regarding "second chances" was based on a situation where the DSB had adopted a panel report finding that the complaining party had failed to make its case on a particular issue. In this circumstance, the alleged violation that was the subject of the attempted "second chance" argument was not part of the DSB recommendations and rulings. Accordingly, the complaining party had no basis for attempting to raise this issue again in a 21.5 proceeding in order to try to obtain a finding that the responding party somehow had not complied with the DSB recommendations and rulings. The present case is entirely different: it involves an affirmative defense, an explicit finding by the Appellate Body that neither the panel nor the Appellate Body had found that the affirmative defense did not apply, and repeated language indicating that compliance with the recommendations and rulings could be achieved by showing or demonstrating that the affirmative defense applied.

55. Fourth, Antigua argues that the United States is not in compliance because the United States explained in the 21.3(c) proceeding that adopting legislation as a compliance measure would require 15 months, yet no such legislation was adopted during the compliance period.

---

[26] Antigua 21.5 Submission, paras. 36-38.

[27] Appellate Body Report, para. 364.

[28] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003 (*EC Bed Linen*).

[29] Antigua 21.5 Submission, para. 44, citing *EC – Bed Linen*, para. 96.

Antigua's argument is a *non sequitur*. It is up to each Member to decide what means it chooses to comply with DSB recommendations and rulings. Legislation to clarify the interaction between the IHA and federal criminal statutes was a possible means – but not the only means – for compliance. It was entirely appropriate for the United States to seek a compliance period that would allow for the adoption of such legislation. The fact that such legislation was not adopted in no way changes the legal analysis used to consider the means that the United States has actually used for compliance in this proceeding.[30]

V. CONCLUSION

56. For the reasons set forth above, the United States requests that the Panel reject Antigua's claims in their entirety, and find that the U.S. measures taken to comply are not inconsistent with the GATS.

[30] The United States also notes that events have shown that the U.S. request for a 15-month compliance period to adopt legislation was well-founded. As Antigua's submission notes, the U.S. Congress has been considering Internet gambling legislation during the present Congressional term. The Internet gambling legislation was signed into law on October 13, 2006. This legislation is not within the terms of reference of the panel.

Annex I

Illustrative U.S. Federal Court Cases Applying the Principle of Repeal by Implication

United States v. Cook

57. In United States v. Cook, 922 F.2d 1026, 1034 (2d Cir. 1991) (Ex. US-10), the court held that the Indian Gaming Regulatory Act did not repeal 18 U.S.C. § 1955 (illegal gambling business).

> "The fact that the two statutes provide criminal penalties for the same activity, however, is not determinative in this case. For a repeal by implication, the provisions of one must be repugnant to the other. This is not the case. While it is true that both provisions punish gambling operations that violate state law, the scope of section 1955 exceeds that of section 1166. Section 1955 prohibits not only gambling businesses in violation of state law but those enterprises that are conducted by more than five persons and that have operated continuously for more than thirty days or that produce revenue of $2,000 on any single day. 18 U.S.C. 1955(b). That provision targets large-scale illegal gambling enterprises and imposes stringent penalties-a maximum fine of $20,000 and/or imprisonment for not more than five years and forfeiture of all property used in the illegal enterprise. [citation omitted.] It would be illogical to suppose that Congress now intends to punish extensive gambling businesses under state misdemeanor statutes, which are subsumed under section 1166(a), simply because they are conducted in Indian country. [citation omitted.] We conclude therefore that the provisions do not demonstrate the mutual exclusivity necessary to impute to Congress the clear, affirmative intent to repeal."

United States v.Mitchell

58. In United States v.Mitchell, 39 F.3d 465 (4th Cir. 1994) (Ex. US-11), the court found no repeal of criminal statutes by implication where the latter enacted statute either provides for a lesser penalty or no criminal penalty. In particular, the court held that the Endangered Species Act and the Agricultural Act did not repeal by implication 18 U.S.C. § 545 (smuggling goods into the United States). Mitchell was charged with violating Section 545 for importing merchandise contrary to law by smuggling untanned animals hides into the United States. The Court first determined that "contrary to law" could include violations of regulations issued by Customs, the Fish and Wildlife Service (FWS), and the Agriculture Department. The FWS regulations were issued pursuant to the Endangered Species Act and the Agriculture Department regulations were issued pursuant to the Agriculture Act. The Court determined that Mitchell was claiming that "his § 545 conviction is invalid because the subsequently promulgated regulations repealed by implication the applicability of § 545 to his actions." 39 F.3d at 472. The Court found no repeal by implication. The court noted that the legislative histories of the ESA and the Agriculture Act showed nothing to indicate that Congress intended these statutes to be the

exclusive means of prosecuting violations of regulations promulgated under those Acts. In addition, the court explained that its holding was "in accord with the majority of cases dealing with repeal by implication in the context of a later enactment providing a lesser penalty for the same conduct subject to greater punishment under the earlier statute." 39 F.3d at 474 (citing several cases).

United States v. Hansen

59. In United States v. Hansen, 566 F.Supp. 162, 164-165 (D.D.C. 1983) (Ex. US-12), the court held that a statute providing criminal penalties, 18 U.S.C. § 1001 (providing false statements), was not repealed by implication by Section 706 of the Ethics in Government Act (EIGA), which was a civil statute providing a civil enforcement mechanism for the knowing and willful falsification of a disclosure report or for the willful failure to file a report. Hansen was a Congressman and he was charged with violations of Section 1001 for making false statements concerning his financial status on financial disclosure reports, which he was required to file pursuant to the Ethics in Government Act, 2 U.S.C. §§ 701-709. Hansen alleged that Congress intended to limit enforcement of financial disclosure requirements to the civil sanctions contained in EIGA. The D.C. Circuit upheld this decision. United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985). The Court rejected the claim that the EIGA repealed Section 1001 by implication. "The terms of § 1001 cover falsification of EIGA financial disclosure forms; if Congress wished to exclude the coverage it would normally have said so; we will not readily conclude that it did so by implication" 772 F.2d 940. Hansen also allege that Section 1001 was repealed by implication because 2 U.S.C. § 708 provided for civil actions against those who falsified reports, and that this was the complete sanction that Congress had proscribed. The Court stated that "the question remains whether it clearly suggests a repeal of the sanction provided by earlier legislators. We think not. There is no difficulty in applying both 18 U.S.C. § 1001 and 2 U.S.C. § 706. Indeed, the two sections combine to produce a natural progression in penalties: those who intentionally fail to file EIGA forms are subject only to the civil sanction of § 706, while those who lie on their forms are additionally subject to the criminal penalty of § 1001. If this does not represent evident harmony, it at least does not begin to approach the `irreconcilable conflict' that the Supreme Court has instructed us to require as textual evidence of am implicit repeal." 772 F.2d at 945.

United States v. Vulcan Materials Co

60. In United States v. Vulcan Materials Co., 320 F. Supp. 1378, 1380 (D.N.J. 1970) (Ex. US-13), the district court held that the Federal Water Pollution Control Act, 33 U.S.C. 466 et seq., did not repeal by implication prior criminal statute (New York Harbor Act, which prohibited the discharge or depositing of refuse and other matter into the tidal waters of New York Harbor). The defendants were charged with violating the New York Harbor Act, 33 U.S.C. §441, for discharging waste from manufacturing plants into parts of New York Harbor. The defendants claimed that the Federal Water Pollution Control Act impliedly repealed the New York Harbor Act because Congress had "developed a comprehensive legislative plan for dealing with the problems of pollution" and application of the New York Harbor Act 'has been

superseded by the newer legislation." 320 F. Supp. at 1380. The district court disagreed. The Federal Water Pollution Control Act "does not provide for the criminal prosecution of polluters. Only abatement procedures are established and formulated under the terms and provisions of the Act. Thus, it becomes inconceivable that Congress intended to repeal the New York Harbor Act, a criminal statute, by implication, with a civil statute, as is urged by the defendants." 320 F. Supp. at 1380.