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

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE MEETING WITH THE PANEL HELD ON NOVEMBER 27, 2006

December 4, 2006

1. The United States will address both elements of the DSU Article 21.5 disagreement: that is, the existence of measures taken to comply, and the consistency of such measures with a covered agreement. But before doing so, the United States needs to emphasize the last part of the phrase that sets out the matter to be covered in an Article 21.5 proceeding; namely, the measure to be examined is the measure taken to comply with "the recommendations and rulings of the DSB." Thus, under the DSU, the starting point in any analysis must be the specific recommendations and rulings in the dispute.

2. In this dispute, the recommendations and rulings are unusual, due to the combination of two factors: (1) the limited nature of the factual record, and (2) the fact that when an affirmative defense is involved, the responding party has the burden of proof to show that the affirmative defense applies. In this dispute, the Appellate Body found that the U.S. measures at issue provisionally fell within the scope of an exception to Article XIV of the GATS, namely, the exception for measures "necessary to protect public morals or maintain public order" under paragraph (a) of Article XIV.

3. The Appellate Body, quoting the original panel, explained the serious nature of those concerns regarding public morals and public order: "[T]he United States has legitimate specific concerns with respect to money laundering, fraud, health and underage gambling that are specific to the remote supply of gambling and betting services, *which suggests that the measures in question are 'necessary' within the meaning of Article XIV(a)*."

4. The chapeau of Article XIV of the GATS provides that when a measures falls within Article XIV(a), "nothing in this Agreement shall be construed to prevent the adoption or enforcement of such measures," subject only to the provisos set out in the chapeau. In this dispute, due to the limited nature of the factual record, the Appellate Body finding on the Article XIV chapeau is unusual. On the one hand, due to the limits in the factual record, the Appellate Body was not able to conclude that with respect to one limited area involving horseracing, the United States had met its burden of showing that the U.S. measures at issue met one proviso of the Article XIV chapeau. But on the other hand, and again because the record was limited, the Appellate Body specifically noted that it could not conclude that the U.S. measures did not meet the proviso. Since the responding party has the burden of showing the applicability of an affirmative defense, the result of the Appellate Body's finding was the issuance of recommendations and rulings with respect to measures that may, or may not be, consistent with the covered agreements.

5. The Appellate Body found that the only remaining issue regarding the applicability of Article XIV is whether the U.S. prohibition embodied in the measures at issue applies to both foreign and domestic suppliers of remote gambling services, notwithstanding the Interstate Horseracing Act ("IHA"). This basic question involves a question of fact concerning U.S. law.

6. Under U.S. law, the starting point of statutory construction is the text of the statute. In this case, nothing in the text of the IHA indicates any intention to serve as an across-the-board permission for gambling on horse racing, nor to serve as an exemption from criminal laws. To be sure, Antigua vigorously asserts that the IHA "allows" certain activities. Remarkably, however, Antigua never cites the specific text of the IHA which supposedly accomplishes such an exemption from other civil or criminal laws.

7. Antigua appears to place its reliance on a single definition contained in the IHA. This reliance, however, is misplaced. The definitions in the IHA are used only in the IHA itself, and do not amend definitions provided in the Wire Act or any other federal statute. Moreover, nowhere in the IHA does the statute provide that all transactions meeting the definition of an "interstate off-track wager" are exempt from federal criminal laws.

8. Antigua also appears to rely on an exceptional doctrine of U.S. law known as "repeal by implication." However, "repeals by implication" are extraordinary, and nothing in the IHA could amount to a repeal by implication of the Wire Act. As the United States Supreme Court explained: "It is a cardinal principle of construction that repeals by implication are not favored ... . There must be `a positive repugnancy' between the provisions of the new law and those of the old ... ." There simply is not, as Antigua asserts, any "repugnancy" or "irreconcilable conflict" between the Wire Act and the IHA. To the contrary, 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, 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 – the Wire Act's prohibition on interstate transmission of wagers – and the IHA's requirement for revenue sharing agreements – has its own purpose and effect, and there is no repugnancy between the statutes.

9. Finally, Antigua has relied on a legislative change in 2000 to the IHA's definition of the term "interstate off-track wager." Antigua, however, does not explain how the change in a single definition creates a "repugnancy" between the two statutes. 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.

10. Antigua's second main argument is that <u>even if the United States has made its showing</u> that the IHA does not limit the Wire Act, Antigua must nonetheless prevail under the "existence" requirement of DSU Article 21.5. The United States submits that in the particular circumstances of this case, Antigua's argument is without any basis.

11. The overarching point is that compliance with the DSB recommendations and rulings must depend on the <u>specific</u> findings of the Appellate Body in this dispute. In this dispute, the Appellate Body noted that neither the Panel nor the Appellate Body itself had found that the U.S. measures were out of compliance. The United States submits that under these unusual circumstances, it is appropriate for the statutes at issue to be the "measures taken to comply."

12. The U.S. view is much narrower than Antigua has painted it. The United States is not "rearguing" any point of law or factual finding actually made by the Panel or Appellate Body; instead, we are introducing new factual evidence to show that the U.S. measures are, in fact, consistent with the GATS.

13. In the circumstances of the present dispute, Article 22.5 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. 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. This result would be inconsistent with the DSU, because Article 3.2 of the DSU explicitly provides that recommendations and rulings of the DSB cannot "add to or diminish the rights and obligations under the covered agreements." This fundamental principle is so important that it is restated in Article 19.2 of the DSU, covering panel and Appellate Body recommendations. So, if – as the United States believes it has shown on a full factual record – it was entitled to maintain the Wire Act's criminal prohibitions under the Article XIV exception, that right cannot be diminished by any DSB recommendations and rulings. To the contrary, the United States has that right under Article XIV both before, and after, the DSB recommendations and rulings. The means to avoid such conflict with Article 3.2 is clear: in these circumstances, the measure examined in the original proceeding must be the "measure taken to comply" under DSU Article 21.5.

14. Antigua asserts that the finding in *Bed Linen* must apply both ways: that is, if the responding Member can attempt to meet a burden of proof for an affirmative defense in an Article 21.5 proceeding, then the complaining Member must likewise be allowed to re-argue all of its failed claims of alleged violations. Antigua's argument is wrong, because it fails to take account of the fundamentally different positions of complaining and responding parties under Articles 21 and 22 of the DSU. Under the DSU, it is the responding party (known as "the Member concerned"), and not any other Member, that is called upon to comply with the DSB recommendations and rulings. The DSB's recommendations and rulings serve as instructions to the Member concerned with regard to what is expected of that Member during the compliance period. In this context, it would not be consistent with the scope of Article 21.5 to allow a complaining party in an Article 21.5 proceeding to present new evidence on its prior, failed claims of WTO breaches, because those failed claims would not have been included in the DSB recommendations and rulings.

15. Finally, in its second submission, Antigua wrongly argues that the new Internet gambling legislation enacted in October of this year, after the terms of reference for this proceeding were established, is within the terms of reference of this proceeding. The new legislation does not amend any of the measures at issue. Moreover, this new measure was not covered in Antigua's recourse to Article 21.5, nor could it be, since the measure did not exist when Antigua requested this proceeding. In these circumstances, the new measures cannot be within the Panel's terms of reference.

16. Antigua's assertion to the contrary has no basis. Antigua's only explanation is a reference, without explanation, to the Appellate Body report in *Softwood Lumber IV (Article 21.5 – Canada),* which Antigua has quoted from at length this morning. That report, however, does not address which measures are within the terms of reference of an Article 21.5 panel. Rather, the issue in that dispute was whether a measure that was mentioned in the request for recourse to a panel was a measure "taken to comply" under the terms of Article 21.5.

17. The present situation is entirely different. The question is not about whether the new Internet gambling law is a measure "taken to comply." The question is whether a measure not in existence at the time of panel establishment can nonetheless somehow be within the Panel's terms of reference. Past reports have already addressed the question of whether a measure not yet in existence when a panel is established can be within the panel's terms of reference, and have concluded that such a measure cannot be within the terms of reference.

41. At this time, the United States will also respond to two issues raised by Antigua in its opening statement. First, Antigua calls attention to a Maryland Attorney General's opinion cited in a footnote to its first submission. This opinion suffers from the same defects as Antigua's arguments and as the student-written note upon which Antigua relies; namely, the opinion simply asserts – without analysis – that the very existence of the IHA must provide an exemption from federal criminal laws. As the United States has explained, this is simply wrong under fundamental U.S. principles of statutory construction. Moreover, the opinions expressed by State officials have no role in the construction of a federal statute.

42. Second, Antigua's opening statement calls into question the good faith of the United States. Antigua uses phrases such as "prevarication," "intent of doing nothing," "blatant dissembling," and "cynical attempt." There is no basis for this type of name calling in this dispute. During the Article 21.3 proceeding, the United States was very clear on its view of the U.S. law and on the means of compliance. In particular, we explained that we viewed the U.S. statutes as not containing any exemption for IHA activities, and that the U.S. measures thus met the requirements of the Article XIV chapeau and were consistent with U.S. GATS obligations. The United States further sought a reasonable period of time to allow for a legislative clarification that would show that the statutes were, in fact, as the United States described them. The United States did not assert that legislation was the only possible means of compliance. We also emphasized the difficulty involved in passing legislation, including that such legislation was not in the control of USTR or the Executive Branch as a whole. The fact that such legislation was not adopted during the reasonable period of time in no way indicates that the United States was not acting in good faith. It simply shows – as the United States explained in the Article 21.3 proceeding – that a clarification through legislation was indeed difficult.