***UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES***

**Arbitration on the "Reasonable Period of Time"**

**Statement of the United States at the Oral Hearing**

July 21, 2005

1. Good morning, Mr. Ehlermann and members of the delegation from Antigua and Barbuda. The United States appreciates this opportunity to appear before you to further explain why the 15 months we have proposed to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in this case is a "reasonable period of time." We are especially appreciative that you, Mr. Ehlermann, have agreed to provide your expertise as the arbitrator in this proceeding.

2. I would like to begin by noting Antigua's statement at the beginning of its submission (paragraph 4) that this Arbitration is likely to be complicated by apparent profound disagreements between the parties. In light of the various arguments presented in Antigua's submission, the United States considers Antigua's initial assessment to be overly pessimistic; there is substantial agreement between the parties on the parameters for the Arbitrator's award, and on the form of implementation which the United States is to take. As a result, the central issue in this proceeding is not unlike that in other Article 21.3 proceedings: what is a reasonable period of time for the responding party to undertake legislation implementing the DSB's

recommendations and rulings? As outlined in depth in our submission, a 15-month "reasonable period of time" is justified.

**The Only Issue in this Arbitration is the Time Required for Legislation.**

3. There is no disagreement between the parties that the reasonable period of time, as clarified in previous arbitrations, should be the shortest period within the legal system of the responding Member to implement the recommendations and rulings of the DSB. Likewise, both parties recognize that the form of implementation that would achieve this objective includes legislation. In paragraph 11 of its submission, Antigua states that "it is possible for the United States to comply with the DSB recommendations and rulings" through actions that include legislation, and in paragraph 23, Antigua states its belief that "legislative action ... will be necessary in order for the United States to comply ...."

4. The consequence of this agreement is that Antigua's discussion of an executive order on non-sports gambling, and its request for various findings on the WTO-consistency of various approaches to implementation, are not ultimately relevant to the determination of the reasonable period, even if it were within the authority of the Arbitrator to consider these issues. Since Antigua has proposed a shorter time frame for the executive order, and accepted that such an order would not by itself allow the United States to implement the DSB's recommendations and rulings, the only issue of ultimate relevance in this arbitration is how long it would take to complete the legislative component. There is no basis in the DSU, as confirmed by the past practice of arbitrators under Article 21.3(c), to assign multiple reasonable periods of time for

different forms of implementation that a complaining party considers to be necessary. Rather, where the implementing party contemplates multiple forms of action, arbitrators have assigned a single reasonable period of time to complete all of the actions. The recent *Argentina – OCTG* arbitration is one example, and the arbitration in *United States - Hot-Rolled Steel* is another.

5. With that in mind, let me simply note that we do not share the views expressed in Antigua's discussion of an executive order regarding the scope of relevant U.S. laws and alleged differences with respect to sports and non-sports betting. Nor does the record in this dispute support Antigua's views. For example, Antigua's assertion that gambling and betting on horse racing is lawful in the United States[1] is unsupported by the Appeallate Body Report, which expressly declined to make that exact finding.[2]

**A 6-Month Period of Time Is Unsupported and Unreasonable.**

6. Antigua emphasizes that implementation should be "prompt" and asserts that the United States should need no more than six months to enact legislation. Simple invocation of the word "prompt," or of the fact that implementation should be done in the shortest period possible within the Member's legal system, cannot itself serve to justify an unrealistic and unsupported six month implementation period. For example, the arbitrator in *EC – Beef Hormones* found that "prompt" enactment of legislation required 15 months.

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[1] Submission of Antigua and Barbuda, n.20.

[2] Appellate Body Report, para. 371 ("[W]e 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.")

7. While it is true that the U.S. legislative process has few mandatory time frames, there are approximately 10 legislative steps that a bill goes through before it becomes law. These steps are described in our submission; some are also described in Antigua's submission. Antigua's proposal that the reasonable period of time expire in six months does not allow sufficient time for those steps – which include pre-legislative work and consultations, transmittal and introduction of proposed legislation in Congress, referral to committees and subcommittees of jurisdiction, public hearings, "mark-ups," reporting of proposed legislation by the committees to the full House and Senate, consideration by the House and Senate, reconciliation of any differences between the House and Senate versions in conference committee, consideration by the House and the Senate of the reconciled version, and signature by the President.

8. Further, Antigua's request ignores the basic reality that legislation in the United States overwhelmingly passes at the end of a session or shortly before a recess. For example, the December 2000 amendment to the Interstate Horseracing Act cited by Antigua passed at the end of a Congress.

9. In its submission, Antigua relies on the fact that legislation in the United States can sometimes pass quickly, as purportedly evidenced by 15 measures enacted through June 19, 2005. Since the 109th Congress only began in January 2005, and since a bill cannot survive from one Congress to the next, it stands to reason that measures enacted early in the 109th Congress were passed exceptionally quickly. However, the 15 measures cited by Antigua represent only a tiny fraction of the typical output of a Congress. For example, they represent only three percent

of the 498 measures that became U.S. Public Laws in the 108th Congress. They are, moreover, a minute fraction of the thousands of bills introduced thus far in the 109th Congress.

10. Moreover, Antigua fails to note that some of these measures were already considered in previous Congresses. For example, Antigua's figures appear to include the Class Action Fairness Act of 2005, which the President signed into law on February 18, 2005, less than a month after its introduction. However, Antigua neglects to mention that Congress first started considering this legislation all the way back in October 1997 – more than seven years earlier.

11. Antigua also fails to note that some of these measures concerned extraordinary circumstances. For example, Antigua cites the examples of H.R.241 and S.686. The first of these was an emergency measure to provide a tax incentive for contributions to the relief of victims of the devastating Indian Ocean tsunami. The second was an emergency measure relating to the care of a dying person. As noted in our written submission, Members are not required to undertake *extraordinary,* rather than normal, legislative procedures in order to implement DSB recommendations and rulings.

12. In all, of the 15 measures that Antigua appears to be citing, by our count, four dealt with disaster relief or emergencies, three were legislative packages thoroughly considered in a previous Congress or Congresses, four dealt with the renewal of measures previously enacted but due to expire, and four involved the naming of buildings and museum regents. Contrary to Antigua's assertion that these measures "well illustrate[]" the flexibility of Congress to pass legislation quickly, we submit that the time required to pass these measures in the early months

of the 109th Congress is not at all representative of the *ordinary* workings of the U.S. legislative process or the likely time required in connection with this dispute.

13. Concerning the complexity of the legislation at issue, Antigua appears to take contradictory positions. On one hand, Antigua suggests that the United States should authorize Internet gambling from Antigua – an approach that would presumably require the crafting of complex new legislative and regulatory regimes. On the other hand, Antigua suggests in paragraph 55 of its submission that the United States could simply repeal its relevant federal criminal laws "in their entireties" or exempt Antiguan operators from their application. Among other problems, both of these supposedly easy alternatives ignore the vital interests that the Appellate Body found were protected by the relevant criminal laws. Since the United States intends to continue to protect those interests, there can be no "easy solutions" as suggested by Antigua. On the contrary, the clarification contemplated by the United States will be complex for the reasons described in our submission.

14. Prior arbitral awards do not support Antigua's recommendation of 6 months for implementation through legislative means. In fact, the disputes that have involved arbitrations on the reasonable period of time for implementation through legislative measures resulted in periods from 10 months up to more than 15 months.[3] Article 21.3(c) arbitrations are part of the dispute settlement system of the WTO, and in this connection the United States takes note of Article 3.2 of the DSU, which says that "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." For the

[3] U.S. Submission, note 1.

reasons set forth in our written submission, including the complexity of the options available to comply with a finding relating to perceived discriminatory treatment in U.S. statutes, the pre-existing Congressional debate in this area, and the fact that legislative action typically occurs prior to a Congressional adjournment or recess, the United States considers that the reasonable period in this dispute is 15 months.

**Antigua as a Developing Country**

15. Antigua has argued that its interests as a developing country should be taken into account in two ways. First, Antigua asks that its developing country status be "resorted to in order to resolve any ambiguities or uncertainties in the compliance process in Antigua's favor." Second, Antigua asks that its status be "availed of in order to ensure at this stage of the process that the United States' suggested method of compliance is ... consistent with the relevant recommendations and rulings of the DSB and with the provisions of the covered agreements."

16. By these requests, Antigua is seeking to expand the scope of this proceeding beyond the determination of the reasonable period of time and to alter the established standard for determining the reasonable period. We request that the Arbitrator reject these requests, as have previous arbitrators. For example, in *United States – OCTG Sunset (Argentina),* Argentina requested the arbitrator to use as "context" the fact that Argentina is a developing country Member. The arbitrator in that dispute concluded that "beyond the fundamental requirement that the implementation process should be completed in the shortest period possible within the legal and administrative system of the United States, the 'reasonable period of time' for

implementation is not affected by the fact that Argentina, as the complaining Member, is a developing country."[4]

17. Further, advisory opinions on possible implementation options are simply not within the mandate of arbitrators in Article 21.3 proceedings. It is well-established that the means of implementation is for the implementing Member to decide and is outside the scope of an Article 21.3(c) arbitration. Antigua itself acknowledges that the precise method by which the United States implements is within the discretion of the United States.[5]

**Conclusion**

18. To conclude, the purpose of this proceeding is to determine the reasonable period of time for the United States to implement fully the recommendations and rulings of the DSB. The United States has presented detailed arguments supporting a 15 month implementation period on the basis of the time required for legislation. Antigua has offered an unsubstantiated argument for six months, based largely on an undue inference of great flexibility from several non-representative examples. Antigua's proposed deadline for legislation is unrealistic, inconsistent with the requirements of the U.S. legislative process, and at odds with the results of past arbitrations.

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[4] *United States – OCTG Sunset (Argentina),* WT/DS268/12, Award of the Arbitrator circulated 7 June 2005, para. 52.

[5] Submission of Antigua and Barbuda, para. 24.

19. Given the nature and the complexity of the U.S. legislative process, the complexity of the contemplated measures, and the previous record of time required for legislative implementation, we request that you award a reasonable period of time of 15 months.

20. We thank you again, Mr. Ehlermann, for your time in conducting this arbitration. We would be happy to answer any questions you may have.