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

Comments of the United States on the Answers of Antigua and Third Parties to Questions from the Panel

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1. The United States is pleased to provide these comments on the answers of Antigua and third parties to questions from the Panel. The United States has reprinted below those questions of the Panel with respect to which the United States is providing comments. With respect to many of the questions, the United States has addressed in its own answers and prior submissions many of the issues raised by Antigua and the third parties in their answers to the Panel's questions. Therefore, the absence of a U.S. comment on a particular question should not be taken as agreement with other parties' submissions.

Comments on Answers of Antigua to Questions from the Panel

> **Q2. ANT, USA** ***Must "measures taken to comply" with a DSB recommendation, as used in Article 21.5 of the DSU, be more recent than the original proceeding? Please explain in terms of the rule of interpretation in Article 31 and, if appropriate, Article 32 of the Vienna Convention on the Law of Treaties. In particular, please address the following:***

1. Antigua's position – that a Member must take one or more new measures to comply – is unsupported by any logic and is refuted by the text of the DSU. As the United States explained in its response to this question, DSU Article 19.1 states that the recommendations and rulings are to be that the "Member concerned **bring the measure into conformity** with that agreement." Although in many cases a Member will adopt a new measure in order to bring the measure at issue into conformity, the adoption of a new measure is not required by the DSU. Moreover, as the United States explained its response to this question,[1] there are a number of situations in which the measure at issue in an Article 21.5 proceeding will be the same as the measure at issue in the original proceeding.

2. Furthermore, Antigua's reliance on the Appellate Body report in *Canada – Aircraft (Article 21.5)* is misplaced.[2] In that dispute, both parties agreed that Canada had adopted a

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[1] Answers of the United States to Questions from the Panel (U.S. Answers), para. 5.

[2] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000 (*Canada – Aircraft (21.5)*).

revised aircraft assistance program in response to the DSB recommendations and rulings, and there was no dispute regarding the existence or identity of the "measure taken to comply" under DSU Article 21.5. Rather, the only issue in the appeal was the scope of Brazil's claims to be reviewed in the Article 21.5 proceeding regarding consistency of the new assistance program with a covered agreement.[3] Thus, the Appellate Body had no reason to (and did not) consider any issues with regard to whether the original measure in dispute may qualify as the "measure taken to comply" in an Article 21.5 proceeding.

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

3. Antigua confirms that the ordinary meaning of "take" includes "a handful" of passive meanings. Antigua errs, however, by asserting that "take" in the DSU must nonetheless be construed in a more active sense because a greater number of dictionary definitions are active than passive. The point, however, is not in the relative number of definitions. Rather, the dictionary definitions are a starting point, and Antigua agrees that this starting point includes a more passive sense. The next step needed to construe the term "take" *as used* in Article 21.5 is to consider the context, as well as the agreement's object and purpose. As the United States explained in its responses, when Article 21.5 is fully analyzed, the correct answer is that the original measure in dispute can be the measure "taken to comply" for purposes of Article 21.5.

Q6. ANT, USA ***Article 17 of the DSU grants an opportunity for a respondent to obtain review of aspects of a Panel report by means of an appeal. If that appeal does not succeed, aren't the findings in the Appellate Body report then final in accordance with Article 17.14?***

4. Antigua's response draws by analogy on the practice of the United States Supreme Court. Although U.S. law is generally not instructive on the proper interpretation of the DSU, the United States nonetheless notes that Antigua's reliance on U.S. legal practice does not support its position. Antigua claims that once a dispute is considered by the U.S. Supreme Court, the dispute is "finally resolved" by a Supreme Court determination. This, in fact, may or may not be true, depending on the actual findings of the Court. As often as not, the Supreme Court will resolve one or more issues of federal law raised in the dispute, and remand to the courts below to make the factual findings (under the legal standard set out by the Supreme Court) necessary to resolve the dispute. Thus, it is simply wrong to assert that in a dispute like the current one – where a key factual issue was not developed and not definitively decided by any finder of fact – that an appellate level decision would result in a "final" resolution of the dispute. To the contrary, appellate level decisions under the U.S. legal system determine outstanding questions

[3] *Canada – Aircraft (21.5)*, paras. 35-42.

of law, and the detailed factual findings need to be examined (and sometimes reexamined in a remand proceeding) by a trial-level court.

5. As the United States noted in its answers to questions,[4] there is in fact a better analogy – one based on actual practice under the DSU – that is helpful in determining the meaning of DSU Article 17.14. In the *Canada – Dair*y dispute, the Appellate Body initially found that the complaining parties did not meet their burden of showing that the Canadian measure taken to comply was inconsistent with a covered agreement (the Agreement on Agriculture). However, this determination was not "final" in the sense used by Antigua – namely, the finding did not "finally resolve" the dispute. Rather, the Appellate Body findings described the factual test that the complaining parties needed to meet in order to establish that the measure taken to comply was inconsistent with the Agreement on Agriculture. The complaining parties proceeded to do so in a second recourse to Article 21.5, in which the Appellate Body upheld the panel's finding that the complaining parties had succeeded in showing that Canada's measure taken to comply was inconsistent with the Agreement on Agriculture. Thus, contrary to Antigua's argument, Article 17.14 does not result in a "final" resolution of all factual issues in a dispute, and does not preclude additional proceedings in which a party may attempt to meet its burden on a factual issue.

> **Q7. ANT, USA** ***Does it make any difference to a DSB recommendation whether a defence is rejected outright or is simply not established for lack of evidence? Is the result the same, i.e. the defence fails?***

6. Antigua's response erroneously relies on the Appellate Body report in *EC – Bed Linen*.[5] As the United States explained in its prior submissions, that report addressed the scope of claims that a complaining party may raise for a second time in an Article 21.5 proceeding. The report made no general findings on whether a disputing party may respond to an absence of complete evidence in a prior proceeding by submitting a more complete record in a subsequent proceeding. Moreover, as noted above, the *Canada – Dairy* Article 21.5 proceeding confirmed that there is no general bar in the DSU that prevents a party from meeting its burden of proof in a second proceeding.

> **Q20. ANT** ***If a respondent had sufficient evidence to demonstrate in a compliance proceeding that its measures were consistent with a general exception provision but the compliance panel denied it a "second chance" to make out such a defence, what action would this require a respondent to take, in view of Article 3.2 of the DSU?***

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[4] U.S. Answers, para. 32.

[5] 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*).

7. Antigua's response to this question supports the views of the United States in two important respects. Antigua's response states:

> "If the non-implementing Member takes the view that (i) it has collected better evidence or (ii) circumstances have changed, and it now meets the conditions of the general exception clause, it can discuss this with the complainant. If the complainant agrees with that analysis, it should withdraw its suspension measures in accordance with Article 22.8 of the DSU. If the complainant does not agree and keeps its suspension measures in place, the respondent in the original proceeding can start a new dispute settlement case against the original complainant for violation of Article 22.8 of the DSU (as has happened in *EC - Hormones*). The 'new evidence' or the 'new circumstances' can then be assessed in this new dispute settlement case. This approach is fully compatible with Article 17.14 of the DSU."[6]

8. First, by stating that the above approach is "fully compatible with Article 17.14 of the DSU," Antigua severely undercuts its own position that Article 17.14 prevents a disputing party from meeting its burden on a factual issue in a second proceeding. Article 17.14 states that Appellate Body reports shall be "unconditionally accepted" by parties to the dispute. Article 17.14 does not limit that "unconditional acceptance" to Article 21.5 proceedings, nor does it provide any exception for claims of breaches of DSU Article 22.8. Thus, Antigua has no basis for arguing that Article 17.14 bars the full consideration of an issue based on new evidence in an Article 21.5 proceeding, but does not bar the full consideration of an issue in a dispute involving an alleged breach of Article 22.8.[7]

9. Second, Antigua suggests a procedural pathway for a full consideration of issues concerning a measure originally found to be inconsistent with a covered agreement, and Antigua seems to concede that such a procedure is desirable and/or required by Article 3.2 of the DSU. But, as the United States has explained, the DSU already allows for the original measure to be considered in an Article 21.5 proceeding, and Antigua does not and cannot explain why its suggestion of an additional procedural means of obtaining a full factual review of an affirmative defense in any way changes the proper analysis of the scope of an Article 21.5 proceeding.

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[6] Responses of Antigua & Barbuda to Questions of the Panel to the Parties, 8 December 2006 (A&B Answers), answer to question 20.

[7] The United States also notes, as it did in its answers to the Panel's questions, that any discussion of the meaning of Article 17.14 is hypothetical and not tied to any issue in dispute. The Appellate Body explicitly noted that it could *not* determine whether or not the IHA created exemptions from federal criminal laws. Therefore, in presenting new evidence on the relationship between the IHA and federal criminal statutes, the United States is *not* in this proceeding asking the Panel to depart from any findings of the Appellate Body.

10. The United States also notes the following with regard to a hypothetical proceeding under Article 22.8: (1) It presupposes that the complaining party actually suspends concessions. This is a scenario which may or may not occur, depending on the findings of a possible Article 22.6 arbitration[8] and on the decision of the complaining Party to suspend concessions. (2) The dispute would be heard by a new panel, and not necessarily the panelists who were already familiar with the dispute. (3) Initiating a second dispute on the exact same issue that could have been addressed in an Article 21.5 proceeding, and to do so following an unnecessary Article 22.6 arbitration, would result in a waste of time and resources for all of the parties. (4) The responding Member would be unfairly subject to a suspension of concessions for its decision to maintain and defend a WTO-consistent measure.

11. In sum, Antigua seems to agree with the United States that where a Member concerned does not initially meet its burden of establishing an affirmative defense, the DSU does not preclude the Member concerned from seeking a full consideration of the issue based on additional evidence. Moreover, Antigua provides no basis, in the text of the DSU or otherwise, for believing that such a showing cannot be made in an Article 21.5 proceeding, and must instead be made in a new and different dispute settlement proceeding.

Q23. ANT ***How does Antigua's case concerning the Interstate Horseracing Act relate specifically to the Illegal Gambling Business Act? Please note that the IGBA refers to State laws but not to other federal laws, such as the Wire Act.***

12. The basis of the finding that the United States has not shown that its criminal laws meet the "arbitrary or unjustifiable discrimination" proviso of the Article XIV chapeau is that activities under the IHA (according to Antigua) arguably provide an exemption to federal criminal law. This finding cannot apply to the IGBA. Unlike the other two federal criminal statues, the IGBA requires an underlying violation of a state law. In particular, a conviction for violating the IGBA is warranted if the minimum size and revenue/duration requirements are proved along with a showing that the gambling activity involved violates the laws of the state in which it is conducted.[9] And, as Antigua concedes, "by the express terms of the IHA, the activity must be lawful in each state where it takes place, so *per se* the IGBA would not come into play with respect to activity coming within the scope of the IHA."[10] In other words, since one

[8] As the United States has previously explained, in these circumstances an Article 22.6 arbitration should necessarily result in a finding of zero nullification and impairment, because the WTO-consistent measure would not result in nullification or impairment of WTO benefits.

[9] IGBA, 18 U.S.C. 1955(b)(1) (Ex. AB-3).

[10] A&B Answers, answer to question 23. The "express terms" referred to by Antigua are in IHA section 5, 15 U.S.C. 3004 (Ex. AB-4). Under that provision, consent for off-track wagers must be obtained from the host racing association, the "host racing commission" (which is a state agency in the state where the race occurs), and "the off-track racing commission" (which is a state agency in the state in which the bet is accepted).

condition for an IHA off-track wager is state consent, and since the IGBA requires a violation of state law, there is no way under any theory that the IHA could provide an exemption from an IGBA prosecution.

13. The fact that the Appellate Body and the original panel erroneously used the theory applied to the Wire Act and the Travel Act in the finding on the IGBA simply shows, again, that the entire issue of the IHA and its relation to federal law was not fully developed during the panel proceeding.

Q32. ***Please refer to the States' laws and regulations on account wagering "under the auspices of the IHA" provided by Antigua (Exhibits AB-34 to AB-51), as well as State licences to specific operators among the information on particular operators (Exhibits AB-65 to AB-73).***

(a) ANT ***Do these laws and licences purport to permit wagering under certain conditions that would otherwise violate the Wire Act, the Travel Act or the Interstate Gambling Business Act? If so, how is this related to the operation of the IHA?***

14. Contrary to what Antigua implies, the gambling activities that are contemplated under state statutes do not affect what activities are lawful under federal gambling statutes (absent an explicit incorporation by the federal statute of state laws, such as is the case with IGBA). In other words, no state statute can "permit" – in the sense of providing an exemption from federal laws – any activity that is subject to prosecution under federal criminal law.[11] Moreover, the content of any state law is not pertinent to the statutory interpretation of the relationship between various federal laws.

Q35. ***Regarding Youbet.com, TVG, XpressBet.com, Capital OTB and the other U.S. domestic operations described by Antigua (Exhibits AB-65 to AB-73):***

(d) ANT ***If the U.S. has not prosecuted these operators, why is this due to the existence of the IHA and not due to other factors, such as a liberal interpretation***

[11] The second paragraph of Article VI of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

> ***of the safe harbor provision in the Wire Act, or the nature of what these operators actually transmit by wire? How does the alleged non-prosecution of these operators differ from the rates and patterns of prosecution of other potential offenders under the Wire Act?***

15. As stated in the U.S. response to question 34, the decision of whether to bring charges in any particular case rests upon a variety of factors within the discretion of the prosecutor, such as the availability of resources, and prosecutorial priorities. To our knowledge, no defendant has ever raised compliance with the IHA as a defense to a prosecution for a violation of any federal gambling statute. If such a defense were raised, the United States believes such a defense would be legally unsuccessful.

16. The United States would again call attention to the Appellate Body findings on evidence regarding numbers of prosecutions. In paragraph 356 of its report, the Appellate Body states as follows:

> In our view, the proper significance to be attached to isolated instances of enforcement, or lack thereof, cannot be determined in the absence of evidence allowing such instances to be placed in their proper context. Such evidence might include evidence on the *overall* number of suppliers, and the *patterns* of enforcement, and on reasons for particular instances of non-enforcement. Indeed, enforcement agencies may refrain from prosecution in many instances for reasons unrelated to discriminatory intent and without discriminatory effect." In paragraph 357, the Appellate Body stated that "[f]aced with limited evidence the parties put before it with respect to enforcement, the Panel should have focused, as a matter of law, on the wording of the measure at issue. These measures, on their face, do *not* discriminate between United States and foreign suppliers of remote gambling services. We therefore reverse the Panel's findings, in paragraph 6.589 of the Panel report. . . ."

Comments on Answers of Third Parties to Questions from the Panel

> **Q6. EC, JPN Please refer to the Appellate Body report in *EC - Bed Linen*. Why in your view does this report mean that a responding party to a dispute can use a compliance proceeding to obtain a "second chance"? (EC oral statement, para. 20; Japan oral statement, para. 2)**

17. The EC first responds as follows: "[T]he reason why parties are not entitled to a 'second' chance at rearguing their case in an Art. 21. 5 proceeding is based on the general principle of *res*

judicata which finds its expression in Art. 17.14 DSU."[12] The United States submits that this statement is both incorrect and devoid of any practical meaning.

18. As noted, the EC assertion is simply incorrect. The Appellate Body in *EC-Bed Linen* – in nearly 12 pages of analysis – fully explained its reasoning regarding why the complaining party could not reargue a failed claim in an Article 21.5 proceeding.[13] Although the EC argued that the Appellate Body should use principles of *"res judicata*", the Appellate Body did not do so. In fact, nowhere in the report (except for the summary of the EC argument)[14] does not Appellate Body even mention "*res judicata*." Instead, as was proper, the Appellate Body considered the relevant provisions of the DSU.

19. The EC statement is also devoid of any practical meaning. The term "*res judicata*" is not self-defining. Indeed, under U.S. law, for example, *res judicata* is a complex doctrine, with many rules and exceptions, all of which turn on the particular facts and circumstances of the legal proceeding. A broad reference to the "general principle of *res judicata*" does not indicate whether or not a particular claim should be considered by a tribunal. This is best illustrated by the *Canada – Dairy* dispute, which involved two Article 21.5 proceedings addressed to the same alleged inconsistency with a provision of a covered agreement. Perhaps the EC is implying that the Appellate Body was wrong in *Canada – Dairy* to hear the appeal in a second Article 21.5 proceeding. Or perhaps the EC believes that such a proceeding was consistent with the EC's "general principles of *res judicata*." The EC does not say. In short, the procedural issues in this dispute must be decided based on the provisions of the DSU, and a reference to the "general principle of *res judicata*" throws no light on the issues.

20. The EC also makes a second groundless assertion:

> "While the case *EC – Bed Linen* specifically addressed a situation where the complaining party tried to re-open a claim already settled, it is clear from the Appellate Body's reasoning in this case that the principle of finality or *res judicata* equally applies to complaining and responding parties. In particular in paragraph 98 of its ruling, the Appellate Body put the emphasis on the object and purposes of the DSU which is the prompt settlement of cases in order to guarantee the effective functioning of the WTO."[15]

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[12] EC answers to questions, para. 16.

[13] *EC-Bed Linen*, paras. 71-99.

[14] *EC-Bed Linen*, para. 35.

[15] EC answers to questions, para. 17.

21. Again, the EC assertion is groundless. Remarkably, the EC ignores most of the 12 pages of the Appellate Body's reasoning. Much of that reasoning – contrary to the EC's assertion that the Appellate Body relied on some general "principle of finality" – was closely tied to the particularities of an Article 21.5 proceeding and the role of the responding Member under Articles 19, 21 and 22. The Appellate Body started with an analysis of the function of Article 21.5 proceedings. (Para. 79.) The Appellate Body summarizes the findings in the *US – Shrimp* Article 21.5 proceeding, in which the Appellate Body agreed with the panel that a complaining party could not challenge an aspect of a measure previously found to be WTO-consistent. (Para. 83.) The Appellate Body engaged in a detailed analysis of the measures taken to comply by the EC in the *Bed Linen* dispute, and on the relationship between those measures, the original findings, and India's claim regarding the new measures. (Paras. 84-87.) The Appellate Body distinguished two prior disputes (*Canada – Aircraft* and *US – FSC)* in which the complaining parties were permitted to raise new claims concerning a measure taken to comply. (Paras. 88-89.) The Appellate Body considered the meaning of DSU Article 17.14 in the context of other DSU provisions relating to Article 21.5 proceedings, including DSU Articles 19, 21, and 22. (Para. 93.) The Appellate Body then expressed its agreement with the panel's finding that India was barred from rearguing its failed claim. (Para. 97.)

22. Finally, in its penultimate paragraph of reasoning, the Appellate Body went on to note that its conclusion "is also consistent with the object and purpose of the DSU." (Para. 98, emphasis added.) For the EC thus to assert that the Appellate Body "put the emphasis on the object and purposes of the DSU" simply is not correct.

23. Furthermore, the EC incorrectly implies that the general goal of "the prompt settlement of cases" argues in favor of disallowing the presentation of new evidence in the circumstances of this dispute. As discussed above, even Antigua recognizes that a responding Member must have some procedural opportunity to present evidence to show that a WTO-consistent measure meets the requirements of an affirmative defense. However, it does not promote "prompt settlement" to require – as Antigua suggests – that the responding Member make this showing in an entirely new proceeding under DSU Article 22.8 or some other provision of the WTO Agreement.

> **Q9. Please refer to Articles 19 and 21 of the DSU. In your view, do these provisions grant a special status to the implementing Member? For example, do DSB recommendations and the procedures for surveillance of their implementation focus on the respondent rather than the complainant, so that the respondent knows what aspects of a measure it is required to modify to comply with a DSB recommendation, and protect the respondent from having to face a second claim with respect to the same aspect?**

24. The United States notes that third parties China and Japan acknowledge that Article 21 "focuses" on the responding Member, and that the EC writes that Article 21 is "addressed to" the responding Member. Thus, although the third parties do not adopt the term "special status," all

third parties agree (as they must) that Article 21 applies differently to the responding Member than to any other WTO Member.

> **Q11. JPN If this Article 21.5 compliance proceeding "cannot function as the forum" for the U.S. to show or demonstrate the applicability of the Article XIV defence, what would be the appropriate forum in which the U.S. could make such a showing or demonstration? (Japan third party submission, para. 14)**

25. This question is fundamental to the central procedural issue in this dispute. Unfortunately, Japan in its response has chosen not to address it.[16]

> **Q14. If a respondent had sufficient evidence to demonstrate in a compliance proceeding that its measures were consistent with a general exception provision but the compliance panel denied it a "second chance" to make out such a defence, what action would this require a respondent to take, in view of Article 3.2 of the DSU?**

26. This question is similar to Question 11 above, and thus fundamental to the central procedural issue in this dispute. No third party has directly addressed it, which – again – is unfortunate. The United States submits that this refusal to address the fundamental procedural issue presented by this dispute shows that the third parties have not fully thought through how the DSU must apply in the context of the facts and circumstances of this dispute, and that the answers of the third parties must be considered in this light.

[16] Japan's response ignores the context of the Panel's hypothetical, which was how the DSU should treat a WTO-consistent measure that was found otherwise solely on the basis of the failure of the responding party to meet its factual burden of proof. Thus, Japan's response – "Consistent with the rule of finality of the DSB rulings and recommendations as aforementioned, the appropriate forum should be the original proceeding."– avoids answering the fundamental question.