

**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 SECOND WRITTEN SUBMISSION  
OF THE UNITED STATES**

**20 November 2006**

## I. INTRODUCTION

1. In its second written submission, Antigua fails to rebut the U.S. showing that the IHA does not exempt domestic suppliers of betting on horse racing from the prohibitions in U.S. criminal laws. In fact, Antigua fails even to address the specific statutory language, the legislative history, and the case law governing “implied preemption” of prior legislative enactments. Instead, Antigua’s arguments mostly rely on circular, baseless assertions that the IHA – by its very existence – must necessarily exclude any application of criminal law.

2. Instead of addressing the substantive issue in this dispute, most of Antigua’s arguments are addressed to other matters. First, Antigua argues that even if the United States has shown that its measures meet the requirements of the Article XIV chapeau, the Panel must nonetheless find the U.S. measures to be *out of compliance* with obligations under the GATS because to do otherwise would give the United States a “second chance.” Antigua’s “second chance” theory – no matter how adamantly Antigua demands it – is not contained in the text of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), and would not be consistent with the goal of the DSU to achieve a “satisfactory settlement of the matter in accordance with the rights and obligations under [the DSU] and under the covered agreements.” To the contrary, the best means for achieving such a “satisfactory settlement” is for the Panel to address the remaining substantive issue in this dispute.

3. Second, Antigua focuses on a U.S. measure, adopted on October 13, 2006, that amends neither the criminal laws at issue nor the IHA. The October 13 measure is not within the Panel’s terms of reference, and is not instructive as to whether the United States has made its showing that the IHA does not exempt domestic suppliers of betting on horse racing from the prohibitions in U.S. criminal laws.

## II. THE SCOPE OF THE ISSUES IN THIS PROCEEDING IS DETERMINED BY THE DSB RECOMMENDATIONS AND RULINGS

4. Part II of Antigua’s second submission is devoted to what Antigua calls “corrections” to “errors” that Antigua purports to find in the introductory paragraph of the First U.S. Submission. Antigua’s claims of purported errors are baseless. The first paragraph in the first U.S. submission simply summarized the open issues regarding the application of Article XIV to the U.S. measures that remained as a result of the Dispute Settlement Body (“DSB”) recommendations and rulings. In order to avoid any further such claims of “error”, the United States will set out below the specific findings of the Appellate Body regarding what the United States had, and had not, established with respect to whether the U.S. measures at issue meet the requirements of Article XIV of the GATS:

“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.***”

5. Based on the plain findings of the Appellate Body, the United States submits that the only substantive issue in this proceeding is whether the United States can “demonstrate that the prohibition embodied in the measures at issue applies to both foreign and domestic suppliers of remote gambling services, notwithstanding the IHA.”

### **III. ANTIGUA FAILS TO SHOW THAT THE IHA RESULTS IN A REPEAL BY IMPLICATION OF THE WIRE ACT**

6. In the First U.S. Submission, the United States addressed the key substantive issue in this proceeding – in particular, the United States showed that under basic principles of U.S. statutory construction, the IHA does not exempt interstate gambling on horse racing from the criminal prohibition set out in the Wire Act. Antigua does not rebut, and in fact hardly even acknowledges, the explanations set out in the First U.S. Submission. Instead, Antigua presents a number of arguments and assertions that provide no further support for its position.

7. *First*, Antigua cites the initial section of the IHA, titled “Congressional findings and policy.” But, contrary to Antigua’s implication, the IHA’s statement of “findings and policy” is entirely consistent with the pre-existing criminal provisions of the Wire Act. As the United States explained in its first submission, the Wire Act allows for interstate transmission of information assisting in the placing of bets and wages. As the United States further explained, the purpose of the IHA was to prevent the free-rider problem arising when OTB parlors benefit from a horse race in another state. To address this problem, the IHA creates a system of civil liability that encourages horse tracks and OTB parlors to enter into revenue-sharing agreements.

8. The IHA’s Congressional “findings and policy” are entirely consistent with the U.S. description of the IHA’s purpose, and the “findings and policy” in no way indicate any intention to repeal any federal criminal laws. In particular:

- The finding that “the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders,” is a general statement concerning gambling that is consistent with the overall approach in the United States of permitting the States in the first instance to decide many issues of gambling within that State.
- The findings note that “the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests.” This finding is consistent with the continued application of and enforcement of a statute, such as the Wire Act, which represents an “identifiable national interest.”

- The findings note that “in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers.” This statement is again limited to activity that is “legal” under existing law; the statement makes no reference of any policy to legalize any form of interstate gambling that was prohibited under state or federal law. It is also a reference to the free-rider problem arising from off-track betting parlors making use of horse races in other states.
- Finally, the Congressional policy statement provides that “It is the policy of the Congress in this Act to regulate interstate commerce with respect to wagering on horseracing, in order to further the horseracing and legal off-track betting industries in the United States.” This statement is again a reference to the free-rider problem arising from off-track betting parlors making use of horse races in other states. And, the statement makes no reference of any policy to legalize any form of interstate gambling that was prohibited under state or federal law.

9. *Second*, after reciting the Congressional findings and policy, Antigua then jumps to the conclusion that the IHA “allows interstate horserace wagering between two states.” But, once again, Antigua fails to cite any provision of the IHA that purportedly grants such an “allowance.” Instead, Antigua relies only on the IHA’s definition of “interstate off track wager.” 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 “interstate off-track wagers” are exempt from federal criminal laws.

10. *Third*, Antigua relies on the following statement from the IHA’s legislative history: “While this bill provides for the regulation by the Federal Government of interstate wagering on horseracing, there will be no Government enforcement of the law. *Any person accepting an interstate wager other than in conformity with the Act will instead be civilly liable in a private action.*” Aside from the limits on the use of legislative history in interpreting U.S. statutes, that statement simply reflects that the bill being considered was limited to providing for civil liability. Nothing in this Congressional statement indicates the bill would exempt horse racing from criminal laws or even affect any other law. Nor could legislative history have any effect on the enforcement of existing laws.

11. *Fourth*, Antigua claims that “the United States does not explain how or why the Wire Act could allow for the prosecution of someone operating pursuant to the IHA.” Once again, this statement assumes the conclusion Antigua seeks – that the IHA is intended to “allow” certain types of interstate activities. To the contrary, as the United States has explained, the IHA instead provides that certain interstate activities result in civil liability in the absence of a revenue sharing agreement.

12. *Fifth*, Antigua relies on an article published in the Kentucky Law Journal. This article provides no support for Antigua’s legal position. As a preliminary matter, under the U.S. legal

system, the fact that an argument is found in a law journal does not grant such argument any authority or relevance on issues of statutory construction. Moreover, the article merely restates the same flawed arguments relied upon by Antigua. Furthermore, the article is written by a law student (not even a law professor), and the student thanks a national horse racing association for its “consultation and extensive research.” In short, a student-written note prepared with the assistance of a U.S. horseracing association is not a persuasive source for construing the statutes at issue.

13. Sixth, Antigua – citing the Supreme Court decision in *Posadas* – argues that the United States “ignored” one of the two prongs of implied preemption analysis. Antigua’s argument is puzzling – the First U.S. Submission cites *Posadas*, and clearly addresses both of the prongs of implied preemption. As the United States explained in its first submission, there is no “repugnancy” (or, as Antigua prefers to call it, “irreconcilable conflict”) between the IHA and the Wire Act. Rather, both statutes operate in pursuit of their separate policy goals – the Wire Act prohibits interstate transmission of wagers, but allows gambling operators and horse tracks to engage in the transmission of information assisting in the placing of wagers. The IHA, on the other hand, imposes civil liability on gambling operators who fail to enter into revenue-sharing agreements with horse tracks. Despite Antigua’s vigorous and repeated assertions, the statutes are not in conflict.

14. *Finally*, Antigua relies on the judicial decisions in the *Sterling* case. Once again, Antigua misreads the case – nowhere does either the trial court or the Appellate Court state that the IHA provides an exemption from the Wire Act.

15. In an attempt to salvage its RICO claim, the plaintiff in *Sterling* argued that the defendant’s noncompliance with the IHA somehow resulted in a criminal violation. The Appellate 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.” Thus, nowhere did the Appellate Court find that the IHA provides an exemption to the Wire Act. Moreover, the statement that the IHA has “purely civil consequences” directly contradicts Antigua’s argument that the IHA provides an exemption to pre-existing criminal laws.

16. In its second submission, Antigua shifts its reliance to the findings of the trial court. As an initial matter, the United States notes that Antigua has no basis for relying on a trial court decision where the Appellate Court in the same case addresses the same issue. Nonetheless, an examination of the trial court decision shows that even the trial court did not support Antigua’s view. The plaintiff’s argument was not that the IHA provided an exemption to the Wire Act, but instead that the violation of the IHA removed the activity from the scope of the Wire Act’s provision allowing the interstate transmission of information assisting in the placing of a bet or wager. Thus, contrary to Antigua’s arguments, the trial court never even considered the proposition – as advocated by Antigua – that the IHA resulted in a repeal by implication of the Wire Act.

#### **IV. ANTIGUA HAS FAILED TO REBUT THAT THE UNITED STATES HAS SATISFIED THE DSU ARTICLE 21.5 REQUIREMENT OF THE EXISTENCE OF MEASURES TAKEN TO COMPLY**

17. None of Antigua’s arguments even touch on the fundamental procedural dilemma presented by its position: namely, how could the dispute be sensibly resolved if a responding Member is precluded from presenting facts in an Article 21.5 proceeding in order to show that WTO-consistent measures are, in fact, WTO consistent? When the measures at issue are WTO-consistent, further dispute settlement proceedings – such as requests for suspension of concessions equal to the level of nullification and impairment (which would necessarily be nonexistent) – would be without purpose. And, given that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements, the responding Member would have no clear path for responding to an Article 21.5 finding, as adopted by the DSB, that the responding Member failed to come into compliance.

18. Under the WTO dispute settlement system, DSB recommendations and rulings “shall be aimed at achieving a satisfactory settlement in accordance with the rights and obligations under [the DSU] and the covered agreements.” It is in the interest of all parties involved to determine in the Article 21.5 proceeding whether the measures at issue are – or are not – consistent with WTO obligations.

##### **A. The Complaining Member and the Responding Member are in Fundamentally Different Positions in Article 21.5 Compliance Proceedings**

19. Antigua asserts that 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 – it fails to take account of the fundamentally different positions of complaining and responding parties under Articles 21 and 22 of the DSU.

20. Under Article 21 (“Surveillance of Implementation and Recommendations and Rulings”) and Article 22 (“Compensation and Suspension of Concessions”) the responding Member (known as the “Member concerned”) is in a special status. It is the Member concerned, and not any other Member, that is called upon to comply with the DSB recommendations and rulings. In an Article 21.5 proceeding, the issue to be examined is the existence or consistency with a covered agreement of a measure taken to comply by the Member concerned. And it is the Member concerned that, if it fails to comply with the recommendations and rulings, could be subject under Article 22 to the suspension of concessions.

21. 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. Article 21.1 reinforces that it is essential for the effective resolution of disputes under the DSU that there be prompt compliance “with the recommendations and rulings of the DSB.” Likewise, Article 21.3 requires the Member concerned to state its intentions with respect to implementation of “the recommendations and rulings of the DSB,” and provides for a reasonable period of time in which

to do so. Article 22 provides for consequences where the Member concerned has not done so. 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. Thus, the Member concerned would have had no basis for making any response to such failed claims during the compliance period, and there would be no basis for finding that the Member concerned had failed to comply with DSB recommendations and rulings based on unsuccessful claims during the initial panel proceeding.

22. Unlike the scope of original panel proceedings, the scope of Article 21.5 proceedings is limited. And in this dispute, the DSB recommendations and rulings were concerned with what the United States has or has not “established” or “demonstrated.” For these reasons, Antigua is wrong in asserting that the complaining Member and the responding Member must be placed in the exact same position with regard to the opportunity for presenting new evidence on issues where the burden of proof was not met during the initial panel proceeding.

**B. As Compared to the Panel Proceeding, the Compliance Panel Has Before It a Much More Complete Factual Record Concerning the Relationship Between the IHA and the Wire Act**

23. As compared to the factual record in the panel proceeding, the current panel has before it a far more complete factual record concerning the interrelationship under U.S law between the IHA and the Wire Act. Antigua does not appear to dispute that the record in the current proceeding is much enhanced; rather, Antigua argues that the Panel must not examine the issue in light of this full factual record.

24. The fact that the Panel now has a more complete factual record on this one issue is a result of choices that Antigua made in its presentation in the original panel proceeding. During the original panel proceeding, even the identity and the scope of the measures at issue was subject to much discussion. In fact, the panel report contains at least 25 closely-reasoned pages addressed to this one topic. And in several passages the panel highlighted the difficulties it faced. The Panel explained, for example, that: “Antigua has consistently stated that it is wasteful and unnecessary to identify the various domestic legislative provisions that will need to be brought into conformity with the GATS. . . . As is evident from the foregoing, the Panel has encountered significant difficulty in pin-pointing the specific measures at issue in this dispute.”

25. This dispute thus presents exceptional circumstances that, as a practical matter, meant that the United States was not even able to identify which specific measures were at issue in the dispute, let alone develop a full factual record for every possible measure that might have been included in the dispute on every issue that could have arisen under the Article XIV chapeau.

**C. Antigua Has No Basis For Implying a Lack of Good Faith on Behalf of the United States**

26. In Part VI of its Second Submission, Antigua indicates “concerns” about whether the United States has acted in good faith in the compliance phase of this dispute. Those concerns

can be summarized as follows: if the three federal statutes at issue are “the measures taken to comply” under Article 21.5, why did the United States request a compliance period rather than immediately announce compliance during the May 2005 meeting of the DSB?

27. The answer is simple: as Antigua itself concedes, “an implementing Member should retain the right to determine how to come into compliance with recommendations and rulings of the DSB, and further under certain circumstances an implementing Member may change its original opinion on how to achieve compliance.” For the United States to seek a legislative change was entirely reasonable and appropriate. Antigua had already made clear that it disagreed with the United States on issues of statutory construction, and Antigua was also unsatisfied with prior Executive Branch statements regarding the relationship between the IHA and the Wire Act. Thus, a legislative change – although not the only means of compliance – was perceived as a viable option for obtaining “a satisfactory settlement of [this] matter” and the United States needed to be sure that the reasonable period of time did not foreclose pursuing this option.

28. Moreover, legislative action was not an unrealistic option. As Antigua noted in its first submission, a bill to amend the Wire Act has been pending in the U.S. Congress this term. Under the United States legislative system, however, the Executive Branch does not control the course of legislation. When the compliance period came to its conclusion in April 2006, the legislation to amend the Wire Act had not been adopted.

29. At that point, the United States had little choice but to rely on a different means of compliance. Given that under fundamental U.S. legal principles the IHA cannot provide any exemptions from federal criminal statutes, and with the Department of Justice on record as consistently and formally adopting this position, the United States could not agree that it was out of compliance with its WTO obligations. And with the legislative option not having come to pass, the United States turned to the alternative means of clarifying the relationship between the IHA and the Wire Act -- a means which involves the elaboration and explanation of U.S. legal principles and the legislative history of the statutes at issue.

#### **V. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 IS NOT WITHIN THE PANEL’S TERMS OF REFERENCE**

30. Part V.C of Antigua’s Second Submission is addressed to the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), which was signed into law on October 13, 2006, approximately 3 months after the terms of reference for this panel were established. The UIGEA does not amend any of the statutes at issue (that is, the IHA, the Wire Act, the Travel Act, or the Illegal Gambling Business Act). Instead, the UIGEA prohibits certain financial transactions associated with activities already deemed illegal under existing state or federal laws.

31. Given that the UIGEA did not exist when the terms of reference were established, it is not within the Panel’s terms of reference. Nor does Antigua’s panel request even refer to it. Although the panel request mentions that various forms of legislation were under consideration in Congress, it does not refer to the UIGEA nor request a finding regarding the UIGEA’s WTO-



consistency – nor could Antigua possibly do so – since the UIGEA did not exist as a measure until it was signed into law on October 13 (approximately 3 months after the date of Antigua’s panel request).

32. Antigua asserts that the UIGEA is within the panel’s terms of reference, but the assertion is baseless. Antigua does not even cite this Panel’s actual terms of reference as set out in WT/DS285/19. Instead, Antigua cites, without explanation, the Appellate Body Report in *Softwood Lumber IV (Article 21.5 – Canada)*. That report, however, does not address which measures are within the terms of reference of an Article 21.5 panel. Rather, as the Appellate Body explains, “Specifically, we must consider whether and to what extent a panel acting pursuant to Article 21.5 of the DSU may assess a measure that the implementing Member maintains is not ‘taken to comply’, when the complaining Member nevertheless identifies that measure in its request for recourse to an Article 21.5 panel and raises claims against it.” In other words, there was no disagreement as to the existence of the measure; the only question was whether the measure was “taken to comply.”

33. The present situation is entirely different. The question is not about whether a particular measure is “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. There is no dispute that the measure did not exist when the Panel was established. 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. The UIGEA was enacted after the date of panel establishment and thus, unlike the additional measure in *Softwood Lumber IV*, was not identified in the request for recourse to an Article 21.5 panel. In sum, the UIGEA is not within the Panel’s terms of reference.