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

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

November 13, 2006

Table of Contents

I. INTRODUCTION 1

II. THE SCOPE OF THE ISSUES IN THIS PROCEEDING IS DETERMINED BY THE DSB RECOMMENDATIONS AND RULINGS 2

III. ANTIGUA FAILS TO SHOW THAT THE IHA RESULTS IN A REPEAL BY IMPLICATION OF THE WIRE ACT 3

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 8

A. The Complaining Member and the Responding Member are in Fundamentally Different Positions in Article 21.5 Compliance Proceedings 9

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 10

C. Antigua Has No Basis For Implying a Lack of Good Faith on Behalf of the United States 12

V. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 IS NOT WITHIN THE PANEL'S TERMS OF REFERENCE 13

VI. CONCLUSION 16

I. INTRODUCTION

1. The Appellate Body in this dispute found that the three U.S. criminal laws at issue fall within the scope of the exception under Article XIV of the *General Agreement on Trade in Services* ("GATS") for measures "necessary to protect public morals or to maintain public order." It also found, however, that the United States in the original panel proceeding had "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."[1] In its first submission in this Article 21.5 proceeding, the United States has made that showing. In particular, the United States – relying on U.S. principles of statutory construction, pertinent judicial decisions, and relevant legislative history – showed that the IHA does not exempt domestic suppliers of betting on horse racing from the prohibitions in U.S. criminal laws.

2. In its second written submission, Antigua fails to rebut the U.S. showing. 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.

3. 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."[2] 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.

4. 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.

5. The United States submits that the Panel should dispense with Antigua's procedural argument that would prevent an examination of the substantive issues in this dispute, that the Panel should find that the October 13 measure raised by Antigua is outside the Panel's terms of

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[1] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005 (hereinafter "Appellate Body Report"), at para. 372.

[2] DSU Art. 3.4.

reference, and should proceed to examine the central issue of whether, as the United States has shown, the IHA provides no exemptions from federal criminal law.

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

6. 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. 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."[3]

7. 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:

> "369. . . . 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."[4]

> "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***

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[3] 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/RW2, adopted 14 March 2006, para 61.

[4] Appellate Body Report, para. 369 (emphasis added).

> ***suppliers to provide certain remote betting services that would otherwise be prohibited by the Wire Act, the Travel Act, and/or the IGBA.***"[5]
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> "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.[6]

8. Based on the plain findings of the Appellate Body, the United States submits that the only substantive[7] 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."[8]

9. The United States also would like to highlight a helpful clarification contained in footnote 55 of Antigua's Second Written Submission. In particular, Antigua acknowledges that in its first submission, Antigua "also argued some points that were raised if not considered in the Original Proceeding," and that Antigua "should be allowed to reargue its positions on Article XIV." Antigua then cites paragraphs 46-146 of its first submission – paragraphs accounting for fully two thirds of that submission. As the United States explains below, there is no basis for allowing a complainant to bring up in a compliance proceeding claims such as these that were not reflected in the DSB's recommendations and rulings.

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

10. In Section III of 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. In its Second Submission, Antigua

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[5] Appellate Body Report, para. 371 (emphasis added). In footnote 31 of Antigua's Second Submission, Antigua complains that it is "unable to locate in the AB report any such 'explicit finding'" to the effect that neither the Panel nor the Appellate Body had definitively found that the U.S. measures do not meet the requirements of the Article XIV chapeau. The United States would refer Antigua to the above statement of the Appellate Body.

[6] Appellate Body Report, para. 372 (emphasis added).

[7] By "substantive," the United States means issues regarding the consistency of the U.S. measures with the GATS. The issue raised by Antigua regarding the "existence of a measure taken to comply" is a procedural issue under the DSU.

[8] Appellate Body report, para. 371 (set out above).

takes note of the U.S. explanation.[9] But 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.

11. First, Antigua cites the initial section of the IHA, titled "Congressional findings and policy."[10] 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. Thus, for example, the Wire Act does not prohibit the interstate transmission of live video of a horse race from a horse track to an off track betting parlor in another state. In fact, the legislative history of the Wire Act explicitly noted that such interstate transmissions were exempt from any Wire Act prohibition. Instead, the activity prohibited under the Wire Act is the interstate transmission of the wager itself.

12. 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.

13. 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

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[9] Second Antigua Submission, Section V.B (paras. 31 to 45).

[10] That section provides:

> "(a) The Congress finds that--
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> (1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders;
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> (2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests; and
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> (3) 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.
>
> (b) 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."

IHA, 15 USC 3001 (Exhibit AB-4).

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.

14. In sum, contrary to Antigua's assertions, nothing in the IHA's Congressional findings and policy indicates that the IHA overrides pre-existing federal criminal statutes.

15. Second, after reciting the Congressional findings and policy, Antigua then jumps to the conclusion that the IHA "allows interstate horserace wagering between two states."[11] 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 an "interstate off-track wagers" are exempt from federal criminal laws.

16. Third, Antigua relies on the following statement from the IHA's legislative history:

[11] Antigua Second Submission, para. 33.

> "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*."[12]

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.

17. 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."[13] 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.

18. Fifth, Antigua relies on an article published in the Kentucky Law Journal.[14] 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."[15] 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.

19. Sixth, Antigua – citing the Supreme Court decision in *Posadas* – argues that the United States "ignored" one of the two prongs of implied preemption analysis.[16] Antigua's argument is puzzling – the First U.S. Submission cites *Posada*s,[17] and clearly addresses both of the prongs of implied preemption.[18] 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

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[12] As cited in Antigua's Second Submission, para 35.

[13] Antigua Second Submission, para. 36.

[14] Antigua Second Submission, para. 36.

[15] Student Note, footnote a1 (Exhibit AB-21).

[16] Antigua Second Submission, para. 38.

[17] See First U.S. Submission, para. 26.

[18] See First U.S. Submission, paras. 29-30, 35-36.

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.

20. Finally, Antigua relies[19] on the judicial decisions in the *Sterling* case.[20] 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.

21. As the United States explained in its first submission,[21] *Sterling* 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 a "predicate act" of a civil RICO claim. The Appellate Court held that the defendant's conduct did not violate the Wire Act, and thus could not serve as a "predicate act" for a civil RICO claim. Importantly, the Appellate Court did not rely on the existence of the IHA for its finding that the plaintiff failed to show a violation of the Wire Act.[22]

22. 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."[23] 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.

23. 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

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[19] Antigua Second Submission, paras. 40-45.

[20] *Sterling Suffolk Racecourse Limited Partnership* v. *Burrillville Racing Association, Inc.*, 802 F. Supp. 662 (D.R.I. 1992) [Exhibit AB-117]; 989 F.2d 1266 (1st Cir. 1993) *Sterling Suffolk Racecourse Limited Partnership* v. *Burrillville Racing Association, Inc.*, 989 F.2d 1266 (1st Cir. 1993) [Exhibit AB-30].

[21] First U.S. Submission, at 10, note 15.

[22] *Sterling*, 989 F.2d at 1272 ("Conceding, withal, that wagering of the sort transacted at Lincoln's facility is permissible under the relevant laws of all interested states, appellant pins its RICO-related hopes on section 1084(a). But, section 1084(a) carves out a specific exception [the information assisting in the placing of bets or wager exception] for circumstances in which wagering on a sporting event is legal in both the sending state and the receiving state. See 18 U.S.C. § 1084(b). That exception applies here.") [Exhibit AB-30].

[23] Sterling, 989 F.2d at 1273 [Exhibit AB-30].

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:

> "Sterling would have the Court determine that any violation of the IHA exposes the wrongdoer to criminal fines and imprisonment under section 1084 as well as civil treble damages or criminal penalties under RICO. Interpreting the section 1084(b) exception [for information assisting in the placing of bets or wagers] as excluding off-track betting solely as a result of a violation of the IHA would convert the civil violation into a criminal one. The Court believes that such an interpretation ignores Congress's intentions in enacting section 1084 and the IHA, and, thus, refuses to reach this inconsistent result."[24]

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.

24. In sum, the United States in its first submission showed that the IHA does not provide an exemption to the Wire Act, and Antigua in its second submission has not provided any evidence to the contrary. In particular, Antigua has not shown any explicit language in the IHA which would accomplish a repeal of the Wire Act. Nor has Antigua shown – under the doctrine of "repeal by implication" – any "repugnancy" or "irreconcilable conflict" between the two statutes. Thus, the United States submits that the Panel should find that the Wire Act's prohibition on remote gambling does not contain an implicit carve out for interstate gambling on horse racing, and thus that the Wire Act is applied in a manner that meets the requirements of the chapeau of Article XIV of the GATS.

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

25. The First U.S. Submission explained that in the particular circumstances of this case – that is, where the measures at issue are consistent with WTO obligations but the responding party in the original proceeding did not meet its factual burden of showing that such measures satisfy the requirements of an affirmative defense – the only sensible way to apply the DSU is for the measures at issue to be the "measures taken to comply" under DSU Article 21.5. Antigua presents a number of objections to this proposition, and the United States will address them below.

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[24] *Sterling*, 802 F. Supp. at 670 [Exhibit AB-117].

26. At the outset, however, the United States would highlight that 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,[25] 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. As noted in the First U.S. Submission, one result would be that the responding Member apparently could come into compliance by re-enacting the prior, WTO-consistent measures as new but substantially identical WTO-consistent measures.

27. 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."[26] 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

28. Antigua argues that there is no distinction between the complaining Member's burden of proof to establish a WTO violation, and the burden of proof of a responding Member to establish an affirmative defense. From this proposition, 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.

29. 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.

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[25] DSU Art. 3.2.

[26] DSU Art. 3.4.

30. 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.

31. 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

32. 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. The record now includes a substantial number of court cases on principles of U.S. statutory interpretation, cases applying the principle of "repeal by implication," and the legislative history of both the Wire Act and the IHA. 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.

33. The United States was, of course, not withholding such information during the original panel proceeding. But as the record of the original panel proceeding demonstrates, there was considerable uncertainty as to exactly which measures Antigua was challenging and which claims were being presented. It was only at the Appellate Body stage that some of these issues were brought into focus. 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.

34. 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.[27] And in several passages the panel highlighted the difficulties it faced:

> "6.156 In its response to the United States' request for preliminary rulings, the Panel noted that, in its Panel request, in its first written submission, and in its comments on the US request for preliminary rulings, Antigua had indicated that it is effectively challenging the overall and cumulative effect of various federal and state laws which, together with various policy statements and other governmental actions, constitute a total prohibition on the cross-border supply of gambling and betting services which is, in Antigua's view, inconsistent with the US GATS obligations. Indeed, at that stage of the proceedings, we considered that this was the basis upon which Antigua was framing its challenge.
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> 6.157 However, in its second written submission, Antigua stated that it is challenging a "total prohibition" on the cross-border supply of gambling and betting services. According to Antigua, this total prohibition "in and of itself constitutes a measure within the meaning of the GATS". When we asked Antigua whether it was challenging specific legislative and regulatory provisions, the specific application of those provisions, and/or US practices vis-à-vis (foreign) cross-border supply of gambling and betting services, Antigua confirmed that it was challenging all three aspects with the objective of bringing the "total prohibition itself before the Panel". Antigua submitted at that stage of the Panel proceedings that it considered it "logical and efficient to challenge the United States' total prohibition as a measure in and of itself composed of specific legislative and regulatory provisions, applications and practices that separately and jointly impair Antigua's GATS benefits".
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> . . . .
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> 6.159 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. It argues that there is no need to conduct a debate on the precise scope of specific US laws because the United States has admitted a total prohibition on the cross-border supply of gambling and betting services under US law. It further argues that the fact that a "measure" that is challenged in the WTO may comprise one or more laws, rules or actions under domestic law cannot be definitive in determining whether the sum of the laws constitutes a "measure" within the meaning of the DSU.

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[27] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005 (hereinafter "Panel Report"), at 171-196.

. . . .

> 6.165 Despite the fact that the United States has admitted that federal and state laws are applied and enforced so as to prohibit what it describes as the "remote supply" of most gambling and betting services, what remains unclear is: what are the specific provisions of those laws that prohibit the remote supply of gambling and betting services in the United States and with which specific provisions and why are they inconsistent with the GATS?
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> 6.166 As is evident from the foregoing, the Panel has encountered significant difficulty in pin-pointing the specific measures at issue in this dispute."[28]

35. Particularly in this context – where Antigua deemed it "wasteful and unnecessary" to specify the measures at issue – it is not surprising that the United States during the original panel proceeding did not describe in detail the manner in which each U.S. measure possibly covered in the dispute complied with each aspect of the requirements of the Article XIV chapeau. The point here is not, as Antigua implies, that the United States is claiming that it faced some procedural bar on presenting such evidence.[29] Rather, the point is that this dispute 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

36. 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?[30]

37. 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."[31]

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[28] Panel Report, paras. 6.156, 6.157, 6.165, 6.166 (excerpts, footnotes omitted).

[29] Antigua Second Submission, para. 22.

[30] Antigua Second Submission, para. 70.

[31] Antigua Second Submission, para. 72.

38. During the Article 21.3 arbitration, the United States noted that: "Implementation can be achieved through legislative action,"[32] and requested a 15-month period for the adoption of such legislation. 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"[33] and the United States needed to be sure that the reasonable period of time did not foreclose pursuing this option.

39. 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.[34] 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.

40. 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.

41. In sum, Antigua has no basis for its implications of bad faith. For the United States to seek a compliance period that would allow for the adoption of then pending legislation was entirely reasonable. Furthermore, when such legislation had not passed as of the end of the compliance period, it was reasonable for the United States to rely on a different means of compliance. At all times the United States has acted appropriately, in good faith, and with complete respect for the WTO dispute settlement system.

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

42. 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,

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[32] U.S. Article 21.3 Submission, para. 2.

[33] DSU Art. 3.4.

[34] Antigua First Submission, paras. 108-114. Although Antigua was dissatisfied with the language of that bill, the language was far from final and the bill was an appropriate legislative vehicle for obtaining a clarification of the relationship between the Wire Act and the IHA.

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.[35]

43. 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. Those terms are set out in WT/DS285/19, which provides:

> 2. At that DSB meeting, it was also agreed that the Panel should have standard terms of reference as follows:
>
> "To examine, in the light of the relevant provisions of the covered agreements cited by Antigua and Barbuda in document WT/DS285/18, the matter referred to the DSB by Antigua and Barbuda in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[36]

44. And document WT/DS285/18, the Panel request, concludes as follows:

> "***Request for Establishment of a Panel***
>
> Because there is a disagreement between the parties as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB in DS285, within the meaning of Article 21.5 of the DSU, Antigua and Barbuda requests the establishment of a panel under Article 21.5 of the DSU, and further requests that this matter be referred to the original panel in DS285 with the standard terms of reference under Article 7 of the DSU.
>
> Antigua and Barbuda additionally respectfully requests that the panel:
>
> (1) find that the United States has not taken measures to comply with the recommendations and rulings of the DSB in DS285;
>
> (2) find that the Wire Act, the Travel Act and the IGBA remain in violation of the United States' obligations to Antigua and Barbuda under, inter

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[35] See UIGEA, sections 5361 to 5366 [Exhibit AB- 113].

[36] *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, Constitution of the Panel, Note by the Secretariat*, WT/DS285/19 (16 August 2006). These are the standard terms of reference set out in Article 7 of the DSU.

alia, Article XVI of the GATS without meeting the requirements of Article XIV of the GATS; and

(3) recommend that the DSB request the United States to bring the Wire Act, the Travel Act and the IGBA into conformity with the obligations of the United States under the GATS."[37]

45. 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).

46. 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.

47. 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, "the principal issue in this appeal concerns the scope of proceedings under Article 21.5 of the DSU. 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."[38] 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."

48. The present situation is entirely different. The question is not about whether a particular measure is "taken to comply."[39] The question is whether a measure not in existence at the time

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[37] *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, Request for the Establishment of a Panel,* WT/DS285/18 (7 July 2006).

[38] Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS257/AB/RW, adopted 20 December 2005 (hereinafter "*Softwood Lumber IV*")), para. 61 (emphasis added).

[39] The United States notes that if Antigua had waited until the UIGEA was enacted before submitting its Article 21.5 Panel request, and if Antigua had included the UIGEA within that request, the UIGEA would nonetheless fall outside the scope of an Article 21.5 proceeding under the principles set out in *Softwood Lumber IV*. UIGEA does not amend, or alter in any way, the three federal criminal statutes at issue in this dispute. As Antigua notes in its submission, the UIGEA does not define any new types of illegal gambling activities, instead it starts with whatever is already illegal under federal or state law. Antigua Second Submission, para. 48. Moreover, the UIGEA explicitly notes that none of its provisions "shall be construed as altering, limiting, or extending any Federal or State

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.[40] 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.

49. In sum, the UIGEA 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.

VI. CONCLUSION

50. 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.

law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States. UIGEA, section 5361(b) [Exhibit AB- 113].

[40] *See, e.g*, Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, adopted 21 March 2005, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of the panel was not within the panels terms of reference).