ANNEX A

FIRST WRITTEN SUBMISSIONS FROM THE PARTIES

ANNEX A-1

FIRST WRITTEN SUBMISSION BY ANTIGUA AND BARBUDA (25 SEPTEMBER 2006) – EXECUTIVE SUMMARY

A. INTRODUCTION

1. This is the executive summary of Antigua's First written submission to the Panel in WT/DS285 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Article 21.5 of the DSU*. This is a unique proceeding because this is the first time that an implementing party has announced itself in compliance with the recommendations and rulings of the DSB without having actually done anything at all.

2. In the original proceeding, three federal measures of the United States were found to be contrary to the obligations of the United States under Article XVI of the GATS. The United States argued before an arbitrator that it needed at least 15 months to implement the recommendations and rulings of the DSB "through legislative or other action." Over the next 15 months, the United States took no legislative action to bring the offending measures into compliance. After the expiration of the compliance period, the United States announced that it was in compliance based upon a statement of a DOJ employee.

3. As a simple restatement of an argument made in the original proceeding, the DOJ Statement cannot be considered a measure taken to comply with the recommendations and rulings of the DSB within the meaning of DSU Article 21.5. The United States has taken no action whatsoever to comply with the recommendations and rulings, and the three federal measures found to be contrary to the obligations of the United States continue to be in violation of the GATS without meeting the requirements of Article XIV of the GATS. Accordingly, Antigua requests that the Panel find that the United States remains out of compliance with the recommendations and rulings of the DSB in the original proceeding and that it recommend that the DSB request the United States to bring its laws into conformity with the obligations of the United States to Antigua under the GATS.

B. FACTUAL AND PROCEDURAL BACKGROUND

1. The original proceeding

4. The original Panel issued its report in which it ruled that: (i) the United States had made full commitments in the US schedule to the cross-border provision of gambling and betting services; (ii) the Wire Act, the Travel Act, the Illegal Gaming Business Act and four state laws are contrary to the obligations of the United States to Antigua under Articles XVI:1 and XVI:2 of the GATS; and (iii) the United States had not been able to demonstrate that the Wire Act, the Travel Act and the IGBA were (A) provisionally justified under Articles XIV(a) and XIV(c) of the GATS and (B) consistent with the requirements of the "chapeau" of Article XIV of the GATS.

5. The United States appealed certain aspects of the Panel report, as did Antigua. The Appellate Body then issued its report. In the AB report, the Appellate Body upheld most of the determinations of the original Panel, albeit in certain circumstances for slightly different reasons. However, the Appellate Body also (i) ruled that the four state laws found by the original Panel to be contrary to the GATS had not been sufficiently discussed during the course of the original proceeding to be properly before the original Panel for evaluation; (ii) determined that, contrary to the conclusion of the original Panel, the United States had provisionally justified the Wire Act, the Travel Act and the IGBA under Article XIV(a) of the GATS; and (iii) while upholding the ruling of the original Panel that the United States had failed to meet its burden of proof under the chapeau of Article XIV of the GATS, modified the original Panel's conclusion with respect to the chapeau to find that the United States had not

demonstrated – in the light of the existence of the federal Interstate Horseracing Act (the "IHA") – that the Wire Act, the Travel Act and the IGBA were applied consistently with the requirements of the chapeau.

2. The Article 21.3 proceeding

6. In the arbitration proceeding to establish a reasonable period of time for implementation, Antigua and the United States had completely different opinions on how the United States could come into compliance. Antigua believed that the United States was required to provide Antiguan service providers with market access to consumers in the United States. The United States, however, asserted that it needed only to clarify the relationship between the IHA and pre-existing federal law to come into compliance.

7. During the arbitration process, Antigua argued the United States could come into compliance almost immediately with respect to most of the services covered by the DSB rulings either by a reversion back to prior policy by the Department of Justice and other governmental agencies or through an executive order of the American president given to the Department of Justice and other agencies of the federal government. With respect to the remaining services offered by Antiguan service providers, Antigua expressed the belief that the United States would need to come into compliance through legislation, which Antigua asserted could be enacted within six months.

8. The United States informed the arbitrator that it would require a period of at least 15 months in which to accomplish implementation of the DSB rulings through legislation which would have the effect of clarifying that relevant US federal laws entail no discrimination between foreign and domestic service suppliers in the application of measures prohibiting remote supply of gambling and betting services.

9. Crucially, the United States informed the arbitrator that implementation by legislation would be pursued because "the Panel concluded that existing high-level administrative clarifications of the meaning of the [IHA] were not sufficient to sustain the US burden of proof under the chapeau of Article XIV of the [GATS]."

10. The arbitrator awarded a period of 11 months and two weeks from the adoption of the DSB rulings as the reasonable period of time in which the United States had to implement them.

3. The lead-up to Article 21.5

11. The reasonable period of time to comply passed on 3 April 2006 without any measures having been adopted by the United States to implement the DSB rulings.

12. On 10 April 2006, the United States informed the DSB that, in its opinion, it was in compliance with the DSB rulings based upon the DOJ Statement that the DOJ views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The DOJ Statement included that the Department of Justice does not believe that the IHA amended the existing criminal statutes. In summary, on the basis of the DOJ Statement alone, the United States announced that it was in compliance with the recommendations and rulings of the DSB.

13. Antigua expressed its disagreement with the United States' assertion of compliance, noting that the DOJ Statement was in fact a restatement of one of the arguments made by the United States to the original Panel and the Appellate Body during the course of the original proceedings. Antigua then made recourse to DSU Article 21.5 by requesting consultations with the United States. Subsequent

consultations were held but did not result in a settlement. Antigua proceeded to submit a request for the establishment of a panel pursuant to DSU Article 21.5, and the DSB formed the Panel.

C. GENERAL FRAMEWORK OF LEGAL ANALYSIS

14. In general, DSU Article 21.5 proceedings are subject to the same basic procedures as original panel proceedings. The complaining party establishes the scope of the proceeding, and the matter before the Article 21.5 panel consists of the measures at issue and the claims regarding those measures as set forth in the request for the establishment of the panel.

15. The scope of what may be reviewed by a panel under Article 21.5 has generally been interpreted broadly. With respect to the measures to be considered in an Article 21.5 proceeding, the panel is not bound by the implementing party's assessment of whether the measure is "taken to comply" and thus within the scope of the panel's review. Further, the measures within the panel's purview include not only acts of the implementing party but omissions as well; and even a measure which has the effect of moving further away from compliance rather than towards it is within the consideration of the panel.

16. A panel under Article 21.5 also has a broad mandate, not just to determine whether or not the recommendations and rulings have been implemented, but also to determine whether the implementing party's measures are, in light of the circumstances at the time of investigation, compliant with the applicable covered agreements. Because of this, the facts and evidence before an Article 21.5 panel may well be different than those presented in the original proceedings.

17. Ultimately, the objective of a panel under Article 21.5 is to determine whether the implementing party has come into full compliance with its obligations. An implementing party must correct its deficient measures or remain out of compliance. An implementing party has not come into compliance for such periods as no measures taken to comply exist.

18. The complainant in a proceeding under Article 21.5 has the burden of proving its case to the satisfaction of the panel. However, when the implementing party's compliance depends on meeting the requirements of an affirmative defence, the burden of proof is squarely on the implementing party to establish that it has met each of the requirements of the defence.

19. The panel and Appellate Body findings constitute a final resolution of the dispute between the parties. A party should not be given a "second chance" in an Article 21.5 proceeding.

D. THE UNITED STATES HAS NOT COMPLIED WITH THE RECOMMENDATIONS AND RULINGS OF THE DISPUTE SETTLEMENT BODY

1. United States has done nothing responsive to the DSB rulings

20. The DSB rulings are simple and straightforward. The Appellate Body recommended that the DSB request the United States to bring its three federal measures found to be inconsistent with the GATS into conformity with its obligations under the GATS.

21. The United States has not adopted any legislation to implement the DSB rulings and its assertion of compliance is based solely on the DOJ Statement – despite having stated that it would be seeking compliance through legislation.

22. In the original proceeding, the United States endeavoured to convince the original Panel that the IHA did not permit domestic remote gambling on horse racing and thus could not serve as evidence that the three federal measures did not meet the requirements of the chapeau under

Article XIV of the GATS. The legal basis for its position was that the IHA, as a civil statute, did not repeal the pre-existing federal criminal statutes – the Wire Act, the Travel Act and the IGBA – which the United States was attempting to justify under the Article XIV chapeau.

23. The original Panel rejected the United States' position and found the United States did not demonstrate that US law precludes interstate pari-mutual wagering for horse racing over the telephone or using other modes of electronic communication, including the Internet. The Appellate Body agreed with the original Panel's assessment and found, therefore, that the United States had not met its burden of proof under the chapeau of Article XIV of the GATS.

24. The United States certainly has done nothing to comply with the DSB rulings, and has in fact done nothing at all other than reassert its old arguments, perhaps in the hope that it might do a better job in meeting its burden of proof a second time round. This, clearly, the United States is not entitled to do. The Panel report and the AB report have been adopted by the DSB, and the United States gets no second chance.

25. Having done nothing, the United States cannot possibly be in compliance with the DSB rulings. While it does not require much more than common sense to come to this conclusion, it is also arguable whether the DOJ Statement could even constitute a "measure" for purposes of WTO dispute resolution under the GATS or – if it were a "measure" for these purposes – whether it could constitute a "measure taken to comply" within the meaning of Article 21.5 of the DSU.

26. Generally, a "measure taken to comply" contemplates something subsequent to the adoption of DSB recommendations and rulings. In this dispute, although the DOJ Statement occurred subsequent to the adoption of the DSB rulings, as in form and substance the DOJ Statement is virtually identical to what was advanced in the original proceeding, it cannot be considered a "measure taken to comply."

2. The IHA remains discriminatory

27. The IHA allows interstate wagers, including bets placed by telephone and other electronic media. The IHA does not, however, permit participation in its scheme by operators located outside of the United States. The IHA not only authorises the placing of bets and wagers on a remote and interstate basis, but also limits the scope of its coverage to bets and wagers placed and accepted within the territory of the United States.

28. In 2000, a portion of the IHA was amended by Congress. The definition of "interstate off-track wager" was amended to provide that it was "a legal wager placed ... placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State ...". This amendment codified into law the longstanding and uninterrupted policy of acceptance by the United States of remote wagering by off-track and telephone accounts.

29. The US position that the IHA does not permit interstate remote wagering on horse races is not supported by US domestic law. Contrary to the Department of Justice, numerous commentators, cases and opinions indicate that interstate gambling under the IHA is completely legal in the United States. As further evidence that the Wire Act does not prohibit interstate pari-mutuel wagering permitted by the IHA, there has never been a criminal prosecution of sanctioned wagering on interstate horse racing from 1961 to the present day. Furthermore, the only reported US court case that considered both the IHA and the Wire Act together lends strong support to the conclusion that the IHA controls over any of the pre-existing federal criminal legislation.

30. A number of states have enacted enabling statutes that permit and govern cross-border, interstate remote account wagering. There are currently 18 states that expressly sanction the operation of remote account wagering services on horse and dog racing under the auspices of the IHA. These states and their respective regulatory schemes and related Internet site are summarised in the chart attached to Antigua's First written submission as Schedule 1. A number of the states which have authorised the provision of remote gambling services on horse racing have made it clear that their legislation is intended to come within the scope of the IHA.

31. There are currently over 20 domestic operators of remote gambling and betting services operating in the United States under licenses issued by one or more states. The most prominent of these operators include companies with shares listed and publicly trading on major US stock exchanges and companies owned by states or other governmental bodies. Some have been in continuous operations for decades and not one has been prosecuted by the Department of Justice for their operations, whether under the Wire Act or otherwise. The operators discussed in Antigua's submission include: YouBet.com, TVG, XpressBet, the Racing Channel, AmericaTab, US Off-Track, Capital OTB, NYCOTB and New Jersey Account Wagering. These US operators offer gambling and betting services over the Internet using the same basic method of acquiring customers, funding wagering accounts and taking and processing bets as do service providers operating from Antigua.

32. By way of example, the process for a customer to open an account and place bets with YouBet, a US-based remote gaming company, is virtually identical to the same process for customers of World Sports Exchange Ltd., an Antiguan-based provider of cross-border gambling and betting services.

33. Schedule 2 to Antigua's First written submission graphically illustrates the similar nature of wagering with both YouBet and WSE, demonstrating the processes gone through by a customer who made the same bets on the same races occurring on 23 September 2006.

34. There has never been a federal prosecution of a domestic remote gambling service provider operating under the auspices of the IHA, whether before or after the 2000 amendment. Further, despite indications by the United States during the course of the original proceeding that prosecutions of certain of these domestic operators were pending, some three years later there have still not been any prosecutions of domestic companies offering remote wagering in the United States in reliance on the IHA.

35. On the other hand, there have been a number of federal prosecutions of licensed Antiguan remote gambling service providers. In May 2006, the United States indicted two Antiguan residents and a prominent Antiguan-based operator. The criminal offences alleged in this indictment are predicated on violations of the Wire Act. In July 2006, the United States indicted individuals associated with an Antiguan-licensed operator. The offences alleged in this indictment are predicated on purported offences of the Wire Act, Travel Act and IGBA. These prosecutions remain pending.

36. Although the United States has not adopted any legislation to bring it into compliance, since the determination of the reasonable period of time in the 21.3 proceeding legislation directly addressing the cross-border provision of gambling and betting services has been introduced into the US Congress and one bill – HR 4411 – has been adopted by the House of Representatives. HR 4411 is in many significant respects directly contrary to the DSB rulings, clearly entrenching and institutionalising the discrimination inherent in the application of current US law addressing cross-border gambling and betting services.

37. Critically, HR 4411 has a number of specific exemptions from its coverage in favour of domestic remote gambling. First, the legislation expressly excludes from its coverage remote gambling that occurs solely within the boundaries of a state – or "intrastate" gambling. Second, it

excludes remote gambling that occurs on Native American lands within a state. HR 4411 also contains a provision that would appear to exempt domestic, state-owned lotteries from its coverage, and another exempting remote gambling involving fantasy leagues.

E. ADDITIONAL CONSIDERATIONS UNDER ARTICLE XIV OF THE GATS

1. Remote gambling in the United States in addition to that under the IHA

38. The Wire Act, the Travel Act and the IGBA are not couched in terms of prohibiting remote gambling per se. Rather, each of the statutes on its face covers gambling which is cross-border in nature–whether interstate or international. In addition to gambling under the IHA, there is currently in the United States a considerable amount of state-sanctioned gambling which is "remote," some of which is cross-border and some of which is not.

39. Americans are permitted to bet remotely on sports contests, casino games and lotteries under a number of circumstances as well. For instance, Nevada sports betting operators are authorised to accept wagers via telephone or the Internet, provided the punter is physically located within the state of Nevada. Nevada sports betting service providers offer gambling services under the state interactive wagering laws and regulations, and today, many of these operators offer bet-from-anywhere-at-any-time wagering services to Nevada residents. Nevada residents can bet from home or another convenient location with Nevada betting service providers on a wide variety of professional or amateur sports events or races located in the United States or in a foreign jurisdiction.

40. Additionally, a number of US lotteries allow punters to purchase lottery tickets via telephone or post and to direct payment of winnings by telephone and receive them by post. The Massachusetts Lottery, for instance, offers cross-border remote lottery play. Residents or non-residents of Massachusetts can order lottery tickets by telephone and pay for the tickets by cash, check or credit card. As another example, Illinois residents may purchase lottery tickets by telephone or mail from the Illinois Lottery using a check, credit card, or debit card.

2. The issue of "necessity" and reasonably available alternative measures

41. The party invoking a defence under Article XIV has the initial burden of proof to present a prima facie case that its measure is "necessary" to protect the identified interests. At this stage of the enquiry, the panel is to assess the evidence submitted and "weigh and balance" the various factors applicable to the case. If the panel concludes that the party has established its prima facie case, then it should find the measure "necessary" under Article XIV(a) of the GATS.

42. Once the measure has been found "necessary," then the burden of proof passes to the complaining party to raise a WTO-consistent alternative measure that the complaining party believes the responding party could have taken to address its Article XIV concerns instead of the challenged measures. Once an alternative is raised by the complaining party, the burden of proof then shifts back to the responding party to demonstrate that the proposed alternative is not "reasonably available." If it successfully demonstrates that the alternative is not reasonably available, then the responding party has met the requirements of provisional justification under Article XIV of the GATS.

43. The United States' prima facie case that prohibition of remote gambling and betting services is "necessary" is no longer valid. In the original proceeding, the case of the United States under Article XIV was predicated entirely on the "remote/non-remote" distinction. In light of its own sanctioned domestic remote gambling industry – particularly betting on horse racing – the United States itself has clearly arrived at the conclusion that prohibition is not "necessary" to protect citizens from the concerns the United States has associated with remote gambling.

44. Under current circumstances, there are a number of other alternative measures reasonably available to the United States in order to protect its residents from the concerns identified by the United States with respect to remote gambling. The most apparent alternative measures reasonably available to the United States are the regulatory schemes already in place in a number of states governing the remote provision of gambling and betting services under the IHA. Currently, 18 states have regulatory schemes of one kind or another governing the domestic provision of these services. The model scheme employed in these states is contained in Schedule 3 of Antigua's First written submission. Most of these states require the use of methods of electronic age, identity or location verification and have provisions regarding suspicious transactions as well as requirements regarding the provision of information on problem gambling resources.

45. A number of states have adopted age and identity verification schemes in connection with Internet sales of tobacco products in the United States. These statutory schemes rely primarily on age and location verification technologies and methods that have proliferated in recent years. Some states have statutory requirements for age and identify verification in connection with remote sales of alcoholic beverages.

46. With the growth of electronic commerce has come demand for effective and efficient identification verification methods. Age, identity and location are commonly verified by a number of techniques that rely on information furnished by the consumer to the service provider and then cross-referenced against proprietary and public record databases. There are a number of commercial operations currently providing these services or offering software for these purposes.

F. CONCLUSIONS

47. In light of the foregoing, Antigua respectfully requests that the Panel: (i) find that the United States has not taken measures to comply with the DSB rulings; (ii) find that the Wire Act, the Travel Act and the IGBA remain in violation of the United States' obligations to Antigua under, *inter alia*, Article XVI of the GATS without meeting the requirements of Article XIV of the GATS; and (iii) 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.

ANNEX A-2

FIRST WRITTEN SUBMISSION BY THE UNITED STATES (16 OCTOBER 2006) – EXECUTIVE SUMMARY

A. INTRODUCTION

1. The issue in this proceeding under Article 21.5 of the DSU is a narrow one. In the underlying proceeding, the adopted Appellate Body report, and the adopted Panel report as modified by the Appellate Body report, left only one unsettled issue regarding the many claims raised by Antigua and Barbuda ("Antigua") in the underlying dispute. That issue is whether the United States can show that three facially non-discriminatory US federal criminal statutes, as a matter of statutory interpretation, do not constitute a means of arbitrary or unjustifiable discrimination between countries, within the meaning of the chapeau to Article XIV of the GATS, as the result of interaction with a civil statute, the Interstate Horseracing Act ("IHA").

2. In the underlying proceeding, this issue regarding federal criminal statutes and the IHA was a minor one, as compared to the numerous and far-reaching claims originally advanced by Antigua in this dispute. Based on evidence that was "limited," as the Appellate Body described it, the Panel and Appellate Body in the underlying proceeding were not able to conclude that the United States had assumed its burden of meeting the non-discrimination requirement of an affirmative defence under Article XIV of the GATS.

3. The United States will show, based on a complete examination of the evidence – including the text of the statutes, the relevant legislative history, and specific principles of statutory construction under US law – that the IHA in no way limits the application of federal criminal statutes. The United States submits that the Panel, once it has considered all the evidence and arguments, will agree with this conclusion. And having done so, the Panel should proceed to find that the US measures at issue are within the scope of the GATS Article XIV exception.

B. STATEMENTS OF FACTS

1. DSB recommendations and rulings

4. The issue in this dispute under Article 21.5 of the DSU is whether the United States can meet its burden of showing – in light of and notwithstanding the existence of the Interstate Horseracing Act – that the Wire Act, the Travel Act, and the Illegal Gambling Business Act (IGBA) prohibit all forms of remote gambling, and, therefore, that the prohibition embodied in those measures is applied consistently with the requirements of the Article XIV chapeau. The other issues regarding the compliance of US gambling statutes with US obligations under the GATS were decided definitively by the Appellate Body and adopted by the Dispute Settlement Body ("DSB"). The last sections of the Appellate Body report frame the issue:

> "[t]he Appellate Body . . . with respect to Article XIV of the GATS, as regards Article XIV in its entirety, modifies the Panel's conclusion in paragraph 7.2(d) of the Panel Report and finds, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures 'necessary to protect public morals or maintain public order', in accordance with paragraph (a) of Article XIV, but that the United States has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing."

2. Key statutes at issue in the dispute

(a) The Wire Act

5. The Wire Act, enacted in 1961, is a key federal criminal statute outlawing certain gambling activities. In particular, the Wire Act, as relevant to bets and wagers, prohibits a person "being engaged in the business of betting or wagering [from] knowingly [using] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers ... on any sporting event or contest." Violation of this prohibition results in fines and/or imprisonment of not more than 2 years.

6. The Wire Act has different, somewhat more complex provisions addressing the transmission of information assisting in the placing of bets and wagers. On the one hand, the Wire Act prohibits a person "being engaged in the business of betting or wagering [from] knowingly [using] a wire communication facility for the transmission in interstate or foreign commerce of ... information assisting in the placing of bets or wagers on any sporting event or contest." On the other hand, the Wire Act exempts from that prohibition "the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal." Thus, where the placing of bets and wagers is legal in both the jurisdiction where the event or contest occurs, and in the jurisdiction where the bet is placed, then transmission of information regarding the event or contest is lawful. The legislative history of the Wire Act provides an example of how this exemption works.

> "Phrased differently, the transmission of gambling information on a horserace from a State where betting on that horserace is legal to a State where betting on the same horserace is legal is not within the prohibitions of the bill. ... Nothing in the exemption, however, will permit the transmission of bets and wagers or money by wire as a result of a bet or wager from or to any State whether betting is legal in that State or not."

(b) The Interstate Horseracing Act

7. The Interstate Horseracing Act is a civil statute that was enacted in 1978. As noted, the transmission in interstate or foreign commerce of information assisting in the placing of bets and wagers had long been lawful under the Wire Act. The IHA was enacted to address a free-rider problem: namely, that a gambling operation in one state could earn profits by accepting bets on a horse race in a different jurisdiction, without sharing any of those profits with the racetrack. In the words of one of its sponsors, "The most important feature of this legislation is that it establishes the proprietary relationship of the horseracing industry: that is, the horsemen and the racetracks, over its own races. Having established that relationship, the bill provides that interstate bets cannot be taken on those races within a particular State without proper compensation to the industry." The statute accomplishes its objective by giving the host State, the host racing association, and the horsemen's group the right to bring a civil action to recover betting revenues from out-of-state betting operators unless those operators had previously entered into a contractual revenue-sharing agreement with the track.

8. The IHA is not a criminal statute, and in fact provides no role for the Federal government to enforce the revenue-sharing purpose of the statutory scheme. Moreover, the IHA makes no reference to federal criminal law. And, more broadly, no provision of the statute states that the existence of an IHA contractual arrangement serves as an exemption to any sort of federal or state law, civil or criminal – except, of course, with respect to the IHA's own civil liability provisions.

3. Basic principles of US statutory construction

9. Although US law contains a number of principles and rules for statutory construction, three of the most basic of those principles should be stated at the outset. First, the beginning point of statutory construction is the plain language of the statute. Second, only when there is ambiguity does one need to resort to examining the legislative history of a statute. Third, under the *Skidmore* doctrine, US courts give a level of deference to an agency's interpretation of the statute it administers.

C. THE PROHIBITION EMBODIED IN THE WIRE ACT, THE TRAVEL ACT, AND THE IGBA IS APPLIED CONSISTENTLY WITH THE REQUIREMENTS OF THE CHAPEAU OF GATS ARTICLE XIV

10. On their face, the Wire Act, the Travel Act, and the Illegal Gambling Business Act ("IGBA") meet the requirements of the chapeau of GATS Article XIV. In particular, the statutes facially meet the requirement that "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail." The absence of any facial discrimination in these statutes is clear: nowhere in the text of those laws are there provisions that discriminate between countries.

11. The issue of "discrimination" in this dispute turns on whether, as Antigua argues, the IHA exempts certain domestic – but not foreign – remote gambling from the scope of the Wire Act. If the IHA indeed provides such an exemption, then – Antigua argues – the result would be an application of the Wire Act, the Travel Act, and the IGBA that would constitute a means of arbitrary or unjustifiable discrimination. Before turning to the analysis, the United States notes that the focus of this issue of alleged discrimination is necessarily on the Wire Act, as opposed to the Travel Act or the IGBA. Of these three laws, it is only the Wire Act that defines – without reference to any other criminal statutes – which gambling activities are illegal.

12. The IHA's plain text – which is the starting point of statutory construction under US law – makes clear that it was not intended to serve as an across-the-board permission for gambling on horse racing. To be sure, Antigua vigorously asserts that the IHA "allows" certain activities. Remarkably, however, Antigua never cites the specific text of the IHA which supposedly accomplishes such an exemption from other civil or criminal laws. In fact, the IHA says no such thing.

13. Perhaps Antigua is attempting to rely on section 4 of the IHA. That provision states: "No person may accept an interstate off-track wager except as provided in this Act." On its face, this language does not indicate any intent to exempt betting on horse races from provisions of law outside of the IHA. And in the context of the other provisions of the IHA, the meaning of this language is quite clear. IHA Section 5 requires the gambling operator to enter into a revenue-sharing arrangement with the horse track, and Section 6 gives the State or racetrack the right to bring a civil action to recover lost revenue in the event the gambling operator fails to enter into the contractual arrangement. Thus, in context, what section 4 of the IHA means is that "no person may accept an interstate off-track wager without exposure to civil liability under section 6 unless the person meets the revenue-sharing requirements of section 5."

14. Similarly, IHA Section 5 is not expressed in terms of providing an exemption from criminal or civil statutes outside the scope of the IHA itself. Section 5 starts out "An interstate off-track wager may be accepted by an off-track betting system only if consent is obtained from – the horse racing association," followed by extensive conditions and provisos concerning the revenue-sharing arrangement with the horse track. As written, and in its context within the IHA, Section 5 specifies the requirements noted more generally in Section 4.

15. In sum, the IHA on its face does not indicate any intent to create exemptions from any state or federal criminal laws, or from any other state or federal civil laws. For this reason, the United States

submits that it has met its burden of showing that the IHA does not exempt gambling on horse racing from the criminal prohibitions of the Wire Act.

16. Although a legal analysis under US law need go no further, the United States will proceed to address the additional principles of statutory construction that would apply if, as Antigua argues, there were ambiguity in the interaction between the IHA and the Wire Act. US principles of statutory construction include a doctrine under which a subsequent statute, even in the absence of explicit statutory language referencing an earlier statute, may be deemed to accomplish a "repeal by implication" of the earlier statute. Such "repeals by implication," however, are extraordinary, and nothing in the IHA could amount to a repeal by implication of the Wire Act.

17. Repeals by implication are disfavoured and the intent of the legislation to do so must be clear and unambiguous. As the United States Supreme Court explained:

> "It is a cardinal principle of construction that repeals by implication are not favoured. When there are two acts upon the same subject, the rule is to give effect to both if possible. ... The intention of the legislature to repeal 'must be clear and manifest'... . It is not sufficient as was said by Mr. Justice Story in Wood v. United States, ... 'to establish that subsequent laws covered some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary'. There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication, only, pro tanto, to the extent of the repugnancy.'"

18. In Annex I to its First written submission, the United States has provided detailed descriptions of four federal court cases that illustrate how US courts consider claims of repeal by implication. Each of the cases in Annex I are instructive to the issue in this dispute. In each case, the court considered regulatory schemes with some degree of overlap, and found that effect should be given to both schemes and that the later-in-time statute did not result in a repeal by implication of the earlier statute.

19. An application of US "repeal by implication" principles to the Wire Act and IHA cannot result in a finding that the IHA resulted in a repeal by implication of the Wire Act. In particular, there is no clear and unequivocal intent of repeal by implication because there is (i) no repugnancy between the statutes, and (ii) no subsequent statute that covers the field of an earlier one.

20. First, there is an absence of any repugnancy between the two statutes. To the contrary, as explained above, the original legislative history of the Wire Act noted that a gambling operation in one state could offer betting on horse races held in another state (so long as the bet or wager did not cross state lines.) And, as noted, the IHA fits with the Wire Act by creating a civil liability scheme to address the free-rider problem created by this type of interstate gambling on horse racing. Each scheme has its own purpose and effect, and there is no repugnancy between the statutes. Second, in no way could the IHA be considered to cover the entire field occupied by the Wire Act. The Wire Act is far broader in scope than the IHA because the Wire Act is applicable to many forms of gambling, not just wagering on horse races.

21. In sum, the IHA does not even approach a repeal by implication of the Wire Act. Antigua's main argument to the contrary concerns a legislative change in 2000 to a single definition in the IHA. In December 2000, Congress amended Section 3 of the IHA to revise the definition of the term "interstate off-track wager." Antigua claims that this amendment "clarifies" that the IHA "permits" interstate wagering on horse racing despite the Wire Act's criminal prohibition. Once again, Antigua's argument fails to cite any language of "permission" in the IHA. As explained above, no such language exists.

22. Also, the amendment to this one definition does not change that the IHA does not repeal the Wire Act under principles of repeal by implication. First, neither the amendment itself, nor the IHA as amended, is "repugnant" to the Wire Act. In fact, the amendment can be seen as closing a loophole in the implementation of the IHA's goal of enforcing revenue-sharing between betting operators and racetracks. Before the amended definition, racetracks could bring civil enforcement suits against betting operators that failed to engage in revenue sharing, but the IHA arguably was not clear with regard to whether the horse tracks retained this right when the betting operators committed the additional wrong of using a wire communication facility to transmit wagers in interstate commerce. The IHA amendment clarifies the definition of "interstate off-track wager" in such a way that racetracks will not lose their civil enforcement rights when betting operators transmit wagers across state lines. In short, both the Wire Act and the IHA can continue to have their separate effects, and there is no repugnancy between the Wire Act and the IHA as amended in 2000.

23. The 2000 IHA amendment triggers another principle of repeal by implication. Namely, the rule that repeal by implication is disfavoured "applies with even greater force when the claimed repeal rests solely in an Appropriations Act." The 2000 amendment was one part of a lengthy appropriations bill that provided funding for several Federal agencies and the District of Columbia. No other part of the statute was aimed at the regulation of gambling or horse racing.

24. The United States submits that the text of the legislation is clear, and thus that there is no need to resort to legislative history. Nonetheless, the legislative history does not support Antigua's view. The report of the committee that drafted the statutory language is considered one of the primary sources that is examined to determine Congressional intent. The relevant committee reports for the 2000 IHA amendment indicate no intention (as Antigua argues) to "allow" new types of remote gambling, nor to amend or repeal any criminal statutes. The committee language simply describes the change in the definition, without any stated intention of amending or repealing the Wire Act or any laws other than the IHA itself.

25. Antigua's sole argument to the contrary is based on a single floor statement by one Member of Congress who was not a drafter of the IHA amendment, and who opposed its adoption. For purposes of statutory interpretation, isolated statements of individual members of Congress do not express the intent of Congress as a whole. Such statements are therefore weak evidence of congressional intent. Given that the statements of the committee that drafted the IHA amendment expressed no similar interpretation, the legislative history cannot be said to support the view that Congress as a whole had the "clear and unambiguous" intent to accomplish a repeal by implication.

D. THE UNITED STATES HAS SATISFIED THE DSU ARTICLE 21.5 REQUIREMENT OF THE EXISTENCE OF MEASURES TAKEN TO COMPLY

26. The overarching point is that compliance with the DSB recommendations and rulings must depend on the specific findings of the Appellate Body in this dispute. In particular, the Appellate Body noted that neither the Panel nor the Appellate Body itself had found that the US measures were out of compliance. Instead, the Appellate Body noted that it would not overturn under DSU Article 11 review the Panel's finding that the United States "had not shown" or "had not demonstrated" or "did not establish" that its measures met the requirements of the Article XIV chapeau, and thus did not establish that the measures were entitled to an affirmative defence. The Appellate Body explained there was only a "possibility" of non-compliance based on a finding by the panel that the IHA does "appear" to permit certain betting activities.

27. The United States submits that in the particular circumstances of this case – where the responding party in the original proceeding did not meet its burden of showing that the measures at issue satisfy the requirements of an affirmative defence – the only sensible way to apply the DSU is to allow the statutes at issue (in this case, the Wire Act, Travel Act, and IGBA) to be the "measures

taken to comply." The US statutes are indeed measures. And as the United States has demonstrated – at the explicit invitation of the Appellate Body – these measures do in fact meet the requirements of the Article XIV exception of the GATS. Thus, these measures "comply" with the recommendations and rulings of the DSB. The only remaining issue is whether the measures are "taken to" comply. The phrase "taken to" is neither explicit nor self-defining. In the circumstances of this case, this phrase must be construed to allow for the measures at issue to be the "measures taken to comply"; if not, the application of the DSU to such circumstances could lead to absurd results.

28. The problem is that unless the measures in dispute are the "measures taken to comply," the responding party would be required under DSU Article 21 to enact new measures when it was already in compliance with its obligations. The new measures could even be substantively identical measures, which the responding party would then proceed to defend successfully by making the showing that the measures met the affirmative defence. In short, the responding party would be forced to take meaningless, additional action for no other purpose.

29. Similarly, the complaining party would gain nothing. The complaining party could not expect the responding party to adopt any substantively different measure, because the original measure was already in compliance. Nor would the complaining party be entitled to suspend concessions. Under Article 22, the level of suspension of concessions must be equivalent to the level of nullification or impairment. Since the measures in dispute would already be in compliance with the responding party's obligations under the agreement, the level of nullification or impairment would necessarily be zero. Thus, where the responding party has a valid affirmative defence that did not succeed only because of a lack of a full showing in the original proceeding, the only sensible result is to construe "measure taken to comply" such that the responding party can proceed to make that showing in an Article 21.5 proceeding.

30. Antigua presents four arguments why the United States has "done nothing responsive" to the DSB rulings. Each of these is without merit. First, Antigua argues that the United States relies solely on a DOJ Statement noted in the April 2006 status report submitted to the DSB. To the contrary, the showing by the United States has not relied solely on the DOJ Statement noted in the status report, nor on DOJ Statements collectively. Such statements, however, certainly are relevant and supportive of a finding that the US measures meet the requirements of the Article XIV chapeau. As noted above, under the principle of *Skidmore* deference, US courts give a level of deference to an agency's interpretation of the statute it administers.

31. Second, Antigua argues that the United States has already presented all of its arguments to the panel and the Appellate Body, and that such arguments have been rejected. This is not, in fact, the case. In the original proceeding, the issue of alleged discrimination arising from the IHA was not a subject focused upon by either the panel or the parties. It was only one of several dozens of issues considered by the panel, and there was no way for the panel or the parties to know that the IHA issue would be the only issue remaining in the case after the Appellate Body ruling. As a result, the Appellate Body explicitly noted that "The Panel had limited evidence before it, as submitted by the parties, on which to base its conclusion." Now, at this stage of the dispute, the parties have the opportunity to present, and the Panel to consider, complete evidence on the interaction between the IHA and federal criminal statutes. And, the evidence submitted by the United States concerning the text, legislative history, and applicable principles of statutory construction was in fact not presented to the panel in the original proceeding.

32. Third, Antigua erroneously relies on the Appellate Body report in *EC – Bed Linen* for the proposition that the United States does not get a "second chance" to present its case. In *EC – Bed Linen*, however, the Appellate Body's statement regarding "second chances" was based on a situation where the DSB had adopted a panel report finding that the complaining party had failed to make its case on a particular issue. In this circumstance, the alleged violation that was the subject of the

attempted "second chance" argument was not part of the DSB recommendations and rulings. Accordingly, the complaining party had no basis for attempting to raise this issue again in a 21.5 proceeding in order to try to obtain a finding that the responding party somehow had not complied with the DSB recommendations and rulings. The present case is entirely different: it involves an affirmative defence, an explicit finding by the Appellate Body that neither the panel nor the Appellate Body had found that the affirmative defence did not apply, and repeated language indicating that compliance with the recommendations and rulings could be achieved by showing or demonstrating that the affirmative defence applied.

33. Fourth, Antigua argues that the United States is not in compliance because the United States explained in the 21.3(c) proceeding that adopting legislation as a compliance measure would require 15 months, yet no such legislation was adopted during the compliance period. Antigua's argument is a *non sequitur*. It is up to each Member to decide what means it chooses to comply with DSB recommendations and rulings. Legislation to clarify the interaction between the IHA and federal criminal statutes was a possible means – but not the only means – for compliance. It was entirely appropriate for the United States to seek a compliance period that would allow for the adoption of such legislation. The fact that such legislation was not adopted in no way changes the legal analysis used to consider the means that the United States has actually used for compliance in this proceeding.

E. CONCLUSION

34. The United States requests that the Panel reject Antigua's claims in their entirety, and find that the US measures taken to comply are not inconsistent with the GATS.

ANNEX B

THIRD PARTY WRITTEN SUBMISSIONS

ANNEX B-1

THIRD PARTY SUBMISSION BY THE EUROPEAN COMMUNITIES (23 OCTOBER 2006) – EXECUTIVE SUMMARY

A. INTRODUCTION

1. The parties' First written submissions demonstrate that the issues in dispute before the Panel are rather limited.

2. Antigua and Barbuda ("Antigua") complains that the United States has done nothing at all to bring itself into compliance despite having insisted earlier in the Article 21.3 phase of the proceedings that legislative implementation was the only option, and that it needed at least 15 months for this purpose. The United States responds that it was under no obligation to do much at all, beyond meeting its burden of proof for an affirmative defence under Article XIV of the GATS, which the DSB found it had not met in the original proceeding.

3. The European Communities ("EC") submits that there are a number of issues of systemic importance in these proceedings. They are dealt with in the EC's submission under the following headings:

(a) Measures to be brought into conformity (section B)

(b) Legal Framework for Compliance Review under Article 21. 5 of the DSU (section C)

(c) Compliance Review and the Legal Effect of Adopted Panel and Appellate Body Reports (Questions related to *Res Judicata*) (section D)

(d) Representations Made in the Article 21.3 Phase of the Proceedings (section V)

4. The EC reserves its right to make further comments on this dispute.

B. MEASURES TO BE BROUGHT INTO CONFORMITY

5. There appears to be some disagreement between parties as to the precise rulings or recommendations of the DSB in relation to the original dispute.

6. The EC would recall that both the Panel and the Appellate Body reports in this dispute contain findings that the United States had acted inconsistently with its obligations under the GATS.

7. In particular, the Appellate Body upheld the Panel's finding that, by maintaining the following three measures, the United States acts inconsistently with its obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2 of the GATS: Section 1084 of Title 18 of the United States Code (the "Wire Act"); Section 1952 of Title 18 of the United States Code (the "Travel Act"); and Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act", or the "IGBA").

8. Having ruled that there were inconsistencies, the Panel examined whether the measures could be justified under the chapeau of Article XIV of the GATS as an affirmative defence. The Panel concluded that the United States had failed to justify its measures as "necessary" under paragraph (a) of Article XIV, and that it had also failed to establish that those measures satisfy the requirements of the chapeau.

9. The Appellate Body disagreed with the Panel on the latter point, holding that the United States measures in question did satisfy the "necessity" requirement. Nevertheless, in regard to the language of chapeau of Article XIV of the GATS, the Appellate Body upheld the Panel's finding that the United States had not demonstrated that its measures, found to be inconsistent with Article XVI of the GATS, satisfied the requirements of Article XIV of the GATS. Both the Panel and the Appellate Body and found that, due to ambiguity in the relationship between the Wire Act, the Travel Act and the IGBA, on the one hand, and a federal civil statute known as the Interstate Horseracing Act (the "IHA") on the other hand, the United States had not satisfied its burden of justifying the measures at issue under the chapeau to Article XIV of the GATS.

C. LEGAL FRAMEWORK FOR COMPLIANCE REVIEW UNDER ARTICLE 21.5 OF THE DSU

10. Insofar as the mandate and scope of an Article 21.5 panel is concerned, the EC wishes to emphasize the following principles, which derive from settled Appellate Body jurisprudence:

(a) The *claims, arguments and factual circumstances* before a compliance panel may not necessarily be the same as those that were pertinent or relevant in the original dispute. However, this is linked with the fact that Article 21.5 proceedings do not, as a rule, involve the original measure, but rather a new and different measure that was not before the panel.

(b) The *mandate of a compliance* panel needs to be interpreted broadly. Its task is not limited to examining whether the implementation measure fully complies with the recommendations and rulings of the DSB. A compliance panel needs to consider the new measure in its totality, including its consistency with a covered agreement.

(c) In order to fulfil its mandate a panel must be able to take *full account of the factual and legal background* against which relevant measures are taken, so as to determine the existence, or consistency with the covered agreements, of measures taken to comply.

11. The Appellate Body has also given clear guidance as to how the scope of jurisdiction of a compliance panel must be determined. It has ruled that what constitutes a "measure taken to comply" in a given case is not determined exclusively by the implementing Member, nor by the complaining Member, but is a matter for judicial review.

1. Measures submitted in the original proceedings as measures "taken to comply"

12. In its First written submission Antigua proceeds on the assumption that the United States relies as a "measure taken to comply" on the Department of Justice statement of 5 April 2006, referred to by the United States in its status report to the DSB of 10 April 2006. In its First written submission the United States denies this. The United States contends that the legislative measures which were at issue in the original dispute – and which were found inconsistent – must be regarded as measures "taken to comply" for the purposes of this proceeding.

13. The EC has a number of observations on this US position, in addition to its submissions on *res judicata* and the new "Unlawful Internet Gambling Enforcement Act of 2006", which will be discussed below.

14. The EC has major difficulties with the notion that a Member that needs to bring inconsistent measures into conformity, could simply present the same "old" measures again in a compliance proceeding, without showing any relevant change in these measures or in any modification of any aspect of these measures. Compliance review involves, as a rule, the examination of new measures taken by the implementing party after the adoption by the DSB of rulings or recommendations. In the

EC's view, an implementing party that is not bringing any new measures before a compliance panel must provide cogent reasons consistent with the dispute settlement system to support such a move. In the specific legal circumstances of this case the EC would have expected the United States to provide a reasonable explanation, consistent with the dispute legal system, of why it believes no new legislative measures were, after all, necessary.

15. In the present case, it would appear that the only reasoning the United States provides is the following: its affirmative defence failed to convince the Panel and the Appellate Body the first time around because only limited evidence was presented; not having been able to meet its burden of proof in the original proceeding, the United States argues that it should now be permitted to present complete evidence before the Panel on the same issue in relation to the same measures to meet its burden of proof the second time around. In the EC's view this line of argumentation appears at odds with a fundamental principle governing the WTO dispute settlement system: parties to a particular dispute are not allowed to re-open debate on matters that must be regarded as having been finally settled by the DSB's adoption of the panel and appellate reports in relation to the same dispute.

2. The "Unlawful Internet Gambling Enforcement Act of 2006"

16. The EC submits that one of the matters for the Panel to consider for its assessment. may be the new "Unlawful Internet Gambling Enforcement Act of 2006" (the "UIGEA"). The legislative history of this new Act shows that it is apparently closely related to earlier bills which have been referred to by parties in their submissions.

17. The EC has the following additional observations derived from settled jurisprudence of the Appellate Body, which may assist the Panel in its assessment of whether it should take this new Act into consideration. Firstly, panels have a broad mandate in matters of compliance review. They should take full account of the factual and legal background against which relevant measures are taken, so as to determine the existence, or consistency with the covered agreements, of measures taken to comply. Municipal law can be treated as evidence of compliance or non-compliance with an implementing Member's obligations under the covered agreements. Secondly, a panel is allowed to take into account any measure which is closely connected with the measures which the DSB has deemed inconsistent, even if the measure at issue was taken after the original panel report. Thirdly, what is a "measure taken to comply" in a given case is not determined exclusively by the implementing Member, nor by the complaining Member, but is a matter for judicial review.

D. COMPLIANCE REVIEW AND THE LEGAL EFFECT OF ADOPTED PANEL AND APPELLATE BODY REPORTS (QUESTIONS RELATED TO *RES JUDICATA*)

18. An important issue is to what extent parties may in Article 21.5 proceedings re-litigate issues that have been ruled upon in the original proceedings. In examining this issue, the Appellate Body has been guided by Article 17.14 if the DSU, which instructs parties to the dispute to "unconditionally" accept reports adopted by the DSB. It follows that findings and conclusions of panel reports – amended, as the case may be, by Appellate Body reports – must be regarded as a final resolution of the dispute between parties for the particular claim and the specific (aspect of) a measure at issue.

19. This principle, which is sometimes referred to as the principle of *res judicata*, requires identity between both the measures and claims as well as identity between parties. The EC points out that in *EC – Bed Linen*, the Appellate Body applied this principle to hypothesis where a party had been found not to have established a prima facie case, holding that even in such a hypothesis, that party is not entitled to a "second chance" in an Article 21.5 proceeding.

20. In application of the above, neither party should be entitled to re-open the debate on issues settled by final adjudication.

1. Submission by Antigua and Barbuda – *res judicata* and fresh evidence

21. The EC notes that Antigua agrees with the principles set out above, but is also trying to re-open debate in Section V of its First written submission, in relation to a particular issue on which the Panel and the Appellate Body have ruled: on whether or not the United States had provisionally justified the statutes at issue under Article XIV(a) as "measures … necessary to protect public morals or to maintain public order". Antigua contends that this issue should be reviewed by this Panel on the ground that there would be "significant factual developments" since the date of the panel report.

22. The EC understands Antigua's submission to mean that since the original panel report has been rendered, new evidence has come to light which the original Panel did not have before it. The new facts/evidence to Antigua refers in its First written submission do not appear to relate to any allegedly new measure taken by the United States.

23. In the EC's view the question of whether a party should be allowed to re-open a debate on the basis of alleged new evidence, where no new measure has been taken, is a delicate issue. The DSU does not contain provisions allowing for the admission of fresh evidence during the course of proceedings. The EC points out that to the extent that some international tribunals allow for adducing of new evidence, and especially in the context of appellate proceedings, such a right is often strictly circumscribed. Generally, the party wishing to bring fresh evidence would need to demonstrate that this evidence was not available at the first instance; either because it did not exist or, if it did exist, it could not have been discovered through the exercise of due diligence.

24. In the EC's view, it is an entirely different question however, whether in the WTO dispute settlement system a panel under Article 21.5 DSU should be required to be open to admission of allegedly fresh evidence. The EC sees a clear tension here with the (*res judicata*) principle referred to above: i.e., adopted reports must be regarded as a final resolution of the dispute between parties in relation to a particular claim. At the same time, the EC acknowledges that the discovery of pertinent fresh evidence that was not available at the first instance could possibly be regarded as an exception to this rule, because of the broad mandate a compliance panel is entrusted with.

2. Submissions of the United States – *res judicata* and affirmative defences

25. The United States contends that the *res judicata* principle set out above is not pertinent because it would not apply in a case where a party's argument was rejected on the ground that it did not meet its burden of proof for an affirmative defence.

26. The EC submits that this line of argumentation should be rejected. The principle referred to above, according to which adopted reports must be regarded as a final resolution of the dispute between parties in relation to a particular claim applies with equal force to affirmative defences. The distinction which the United States seeks to draw between "claims" and "affirmative defences" for the application of the *res judicata* principle is unconvincing. In addition, it makes no difference for the application of the principle, whether a complaining party's claim or a responding party's affirmative defence was rejected because of failure to meet a burden of proof or for any other reason, as long as it is established that the claim or the affirmative defence was ruled upon.

27. Further, it is of no relevance that the claim or affirmative defence would only have been raised as a "minor" issue or at a relatively late stage in the proceedings before the original panel, or that the Appellate Body observed that the Panel had only "limited evidence" before it on this issue. Under the DSU every party is required to bring its best case forward in the original proceedings.

28. In the EC's view its position is clearly supported, *inter alia*, by the Appellate Body's ruling in *EC – Bed Linen*.

E. REPRESENTATIONS MADE IN THE ARTICLE 21.3 PHASE OF THE PROCEEDINGS

1. Legal and systemic analysis

29. A further issue that this Panel may have to consider is what weight should be attached to declarations and representations made by Members in the Article 21.3 phase of the proceedings. The EC submits that this issue cannot be resolved without looking into the role of Article 21.3 phase of the proceedings in the whole dispute settlement system.

30. In the EC's view, where a reasonable period has been granted (for compliance by the Member obligated to implement the recommendations and rulings of the DSB) compliance at the expiration of this period must be assessed also in the light of the representations made by that Member in the Article 21.3 phase of the proceedings.

31. The dispute settlement system would be undermined if it the reasonable period of time were allowed to expire without the Member having taken the course of action which lies at the basis of the award of the reasonable period, and without the implementing Member having provided a reasonable explanation. In the EC's view, such an approach is not only essential to preserve the integrity of the dispute settlement system; it is also a reflection of the requirement of good faith set out in Article 3.10 of the DSU: parties need to engage in the dispute settlement procedures in good faith in an effort to resolve the dispute.

2. Representations made by the United States in the Article 21.3 phase

32. The EC takes no issue with the general contention of the United States that a responding party is in principle free to choose any of the various options that may exist to bring about compliance. In essence, all a responding party is required to do under the dispute settlement system is to bring itself into compliance.

33. However, this dispute is not about whether or not the United States was free to select a particular method to bring itself into compliance. The question of the method of implementation of the DSB's recommendations and rulings was already extensively litigated in the Article 21.3(c) arbitral proceedings of this case. In these proceedings the United States declared that the only option for it was to enact fresh legislative measures, whilst firmly rejecting any suggestion that there would any possibility of implementation by any other means.

34. The Arbitrator expressly relied on these US submissions as "particular circumstances" relevant for the determination of the reasonable period of time. It led him to determine that United States should be granted a reasonable period of time of 11 months and 2 weeks from the date of the adoption by the DSB of the Panel and Appellate Body reports.

35. The EC does not claim that the United States was under a legal obligation flowing from its declarations before the Article 21.3(c) Arbitration proceeding to adopt new legislative measures. However, in the particular circumstances of this case the United States should be required to provide a reasonable explanation for why it believes that legislative action is after all, not necessary. The only reasoning offered by the United States in the present case is that its "old" measures were already in compliance, and that it is allowed to have a second chance at meeting its burden of proof in relation to the affirmative defence under Article XIV (a) of the GATS. In the EC's view this line of reasoning cannot be regarded as a reasonable explanation; it is at odds with the *res judicata* principle set out above.

F. CONCLUSIONS

36. The EC respectfully requests that the Panel take account of the considerations above in making its findings in this case. The EC submits that this Panel should confirm the Findings and Conclusions of the original Panel report, as modified by the Appellate Body report.

ANNEX B-2

THIRD PARTY SUBMISSION BY JAPAN (23 OCTOBER 2006) – EXECUTIVE SUMMARY

A. INTRODUCTION

1. The Government of Japan would like to address two issues. The first issue is whether, for the purposes of an Article 21.5 proceeding, a WTO Member may merely re-argue the merits of the underlying issues before the original panel or is required to implement a specific new measure. The second issue concerns the appropriate level of discretion afforded a Member in determining what would qualify as a "measure taken to comply".

B. "MEASURES TAKEN TO COMPLY" FOR PURPOSES OF DSU ARTICLE 21.5 THAT THE UNITED STATES SHOULD TAKE IN THIS DISPUTE MUST BE SEPARATE AND APART FROM THE MEASURES SUBJECT TO THE RECOMMENDATIONS AND RULINGS OF THE DSB

2. The United States in its First written submission argues that its task in this Article 21.5 proceeding is to demonstrate that its domestic legislative scheme for the regulation of internet gambling services, properly interpreted, is consistent with its obligations under Article XIV of the GATS. Japan is of the view that such an approach taken by the United States is an improper attempt to re-open the substance of the underlying dispute concerning US defences under the chapeau to GATS Article XIV, defying the ordinary meaning and structure of Article 21.5, particularly the meaning of "measures taken to comply", and the finality of the recommendations and rulings of the DSB. Japan is further of the view that the United States also unfoundedly argues that no new US measure "taken to comply" with the DSB rulings in the underlying dispute is required because in its view the challenged statutes are consistent with its WTO obligations. Such an assertion by the United States cannot be justified in light of the DSB rulings adopted in the course of this dispute.

1. Ordinary meaning and structure of Article 21.5

3. The phrase "measures taken to comply with … recommendations and rulings" denotes a measure occurring or taking effect after the issuance of the DSB rulings. Considerable WTO jurisprudence supports this proposition. The Appellate Body in *US – Shrimp*, for example, has explained that Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel.

4. The structure of the DSU further supports this interpretation. Under Article 19, panels and the Appellate Body are charged with the task of determining whether challenged measures are inconsistent with covered agreements, and when such inconsistency is found, they shall recommend that the Member concerned to bring that measure into conformity with its WTO obligations. The two-stage substantive review process is the only mechanism prescribed in the DSU for ascertaining the consistency of challenged measure with a Member's WTO obligations. The subsequent stages of the dispute settlement process, under Articles 21 and 22, have limited, specified functions that lead to the final disposition of a dispute. The Appellate Body in *EC – Bed Linen* has also clarified that a party should not be given a second chance in an Article 21.5 proceeding to raise anew its substantive claims in the underlying dispute. An Article 21.5 proceeding should not be the forum to supplement the arguments, defence or otherwise, which the responding party was unable to complete at the original proceeding. A defending Member is therefore clearly not allowed to re-open the substantive issues already resolved under the Article 19 process.

2. Finality of the DSB rulings

5. The finality of adopted DSB decisions is critical to provide the "security and predictability" and the "prompt settlement" of disputes that the dispute settlement system is designed to provide. Further, Article 21.1 of the DSU provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to secure effective resolution of dispute". The basic rule of finality underscored by the relevant provisions of the DSU would be rendered meaningless if defending Members were allowed to use the Article 21.5 compliance process to re-open the substantive issues argued in the underlying Article 19 process. Article 17.14 of the DSU also provides that an adopted Appellate Body report must be unconditionally accepted by the parties to the dispute. The US effort to re-open the underlying substantive dispute therefore violates the rule of "unconditional acceptance".

6. Consistent with the rule of finality, the function of a 21.5 compliance panel is to ascertain whether a "measure taken to comply" does in fact comply with the DSB rulings. The compliance process does not open a door to a renewed dispute on the substance of the issues giving rise to the recommendations and rulings. Ample WTO jurisprudence supports the application of this principle, which is akin to *res judicata*, in the current dispute. For example, in *Mexico – Corn Syrup*, the Appellate Body in the 21.5 compliance proceeding refused to revisit rulings in the underlying challenge because, *inter alia*, "Articles 3.2 and 3.3 of the DSU reflect the importance to the multilateral trading system of security, predictability and the prompt settlement of disputes." The Appellate Body has also explained in *EC – Bed Linen* that adopted DSB rulings must be accepted by the parties as a final resolution to the dispute between them with respect to the particular claim and the specific component of the measure that is the subject of the claim. The United States did not, at the appropriate stage of the proceeding, demonstrate that it met its burden under the chapeau of GATS Article XIV, and this fact is not "unsettled" as claimed by the United States. It cannot distort the authorized scope of 21.5 compliance panel review and seek to escape from the rule of finality to change that fact at this stage.

3. Asserted US exception to the required operation of Article 21.5 and to the finality of the DSB rulings is without merit

7. The DSB issued specific recommendations and rulings, including the finding that "the United States has not shown, in light of the Interstate Horseracing Act ("IHA"), that the prohibitions embodied in [the three federal laws] are applied to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, has not established that these measures satisfy the requirements of the chapeau [of GATS Article XIV]". In other words, the Appellate Body found that the US statutory scheme is inconsistent with the relevant provisions of the GATS in light of the IHA. The United States, therefore, needs to take some type of measure to implement these specific DSB rulings.

8. The United States purports to identify an exception to the required operation of Article 21.5 and to the rule of finality of the DSB rulings by arguing that, when the responding party has a valid affirmative defence that did not succeed only because of a lack of a full showing in the original proceeding, the only sensible result is to construe "measure taken to comply" to be the measure at issue in the original proceeding so that the responding party can proceed to make that showing in an Article 21.5 proceeding.

9. This claim is however without foundation in law. First, the DSB rulings require the United States to "bring its measures" found to be "inconsistent with the [GATS] into conformity with its obligations under that Agreement." These instructions contain no ambiguity, and provide no authority for the United States to attempt to use the Article 21.5 compliance process to augment or repeat the arguments made, and evidence supplied, in the underlying panel and the Appellate Body proceeding.

10. Additionally, the United States claims that this case is exceptional because the panel and the Appellate Body in the underlying proceeding did not explicitly find the non-applicability of the affirmative defence. The United States interprets the language of the panel and Appellate Body reports as indicating that "compliance with the recommendations and rulings could be achieved by showing or demonstrating" the applicability of the affirmative GATS Article XIV defence. Even if this is the case, for the reasons set forth above, this Article 21.5 compliance proceeding cannot function as the forum for the United States to make such a demonstration. The legal issues concerning GATS Article XIV in this case were finally resolved by the Appellate Body, and are settled.

11. Finally, the United States claims that the question of alleged discriminatory application of the US law in question was only one of many issues, and that it had no way to know that this would be the only issue "remaining" after the Appellate Body ruling. However, since the GATS Article XIV defence was raised by the United States, it could not have been unaware of its burden of showing the applicability of that defence. Evidentiary deficiencies in the underlying case should not be permitted to be cured at a later stage as it would seriously disturb the rule of finality crucial to the proper functioning of the dispute settlement system.

C. A MEMBER HAS BROAD LATITUDE IN DETERMINING THE TYPE OF GOVERNMENTAL ACTION QUALIFYING AS A "MEASURE TAKEN TO COMPLY" FOR PURPOSES OF DSU ARTICLE 21.5

12. Subsequent to the adoption of the Appellate Body report, an official of the US Department of Justice ("DOJ") testified before the US Congress that the Department of Justice interpreted the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. Antigua and Barbuda argued that this statement does not constitute a "measure taken to comply" with the DSB rulings, and the United States appears to agree. Japan however respectfully disagrees with their view, if they regard the DOJ Statement as a priori excluded from being considered as constituting a "measure taken to comply" due only to its formality as being a "statement".[1]

13. The GATS itself defines the term "measure" as any measure by a Member, "whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form." An authoritative statement by an official of the government entity charged with administration of the statute in question falls within that broad definition. Appellate Body decisions also support a broad interpretation of the term "measure" in analogous contexts. For example, the Appellate Body in *Guatemala – Cement I* stated that, "[i]n the practice established under the GATT 1947, a "measure" may be any act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government….".

14. Antigua appears to argue that the United States is now precluded from choosing other means of complying with the DSB rulings, as the United States requested in Article 21.3 proceeding 15 months for compliance because at that time it believed legislation might be necessary. Japan is of the view that the United States is not necessarily locked into a legislative action only due to its intention expressed before the Arbitrator.

15. WTO Members are permitted to decide how they will comply with the DSB rulings. A substantial body of WTO jurisprudence supports the proposition that the implementing Member retains the discretion to choose its preferred method of implementation. No provision of the DSU

[1] This view of the Government of Japan is without prejudice to any evaluation of the sufficiency of the DOJ Statement in this particular case as a "measure taken to comply".

deprives Members of this flexibility to devise implementing measures as warranted by their sovereign considerations.

ANNEX C

REBUTTALS FROM THE PARTIES

ANNEX C-1

REBUTTAL BY ANTIGUA AND BARBUDA (30 OCTOBER 2006) – EXECUTIVE SUMMARY

A. INTRODUCTION

1. This is the executive summary of Antigua's rebuttal submission in *WT/DS285 United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Article 21.5 of the DSU*.

2. In its First written submission, the United States highlights that it has done nothing to come into compliance with the recommendations and rulings of the DSB in the original proceeding.

3. In Antigua's view, the Panel should rule that, because the United States has done nothing to come into compliance with the recommendations and rulings of the DSB in the original proceeding, the United States remains out of compliance with the DSB rulings. This would make unnecessary any further evaluation of the arguments presented in this proceeding.

4. Were the Panel to go further, it would not be necessary to go much further, as the United States is not permitted a "second chance" to persuade the Panel in an Article 21.5 proceeding that it has met its burden of proof under the "chapeau" of Article XIV of the GATS.

5. And, finally, regardless of whether the United States should be given a "second chance", it remains clear that, as before, the United States has failed to meet its burden of proof under the chapeau of Article XIV of the GATS that its measures are not applied in a discriminatory fashion or otherwise do not constitute a disguised restriction on trade in services.

6. This submission considers each of the foregoing points in order, after correcting some of the misstatements of law and fact contained in the First written submission of the United States in this proceeding.

B. THE UNITED STATES HAS DONE NOTHING

7. The United States has done nothing to come into compliance. The United States now asserts that the "measures taken to comply" for purposes of this proceeding are the three federal statutes ruled contrary to the United States' obligations under the GATS in the original.

8. There being no assertion by the United States, nor any evidence, that any of the three federal statutes have been amended, supplemented or otherwise changed since the determination of the reasonable period of time under Article 21.3 of the DSU, it is clear that the United States has taken no action towards compliance. The United States therefore remains out of compliance with the DSB rulings.

C. THE UNITED STATES DOES NOT GET A "SECOND CHANCE"

1. Introduction

9. The United States takes the position that it is entitled to reargue its case under the chapeau of Article XIV of the GATS. In doing so, the United States relied on two utterly specious arguments – first, it alleges that the original Panel and the Appellate Body did not really find that the United States had not met its burden of proof under the chapeau of Article XIV of the GATS and second, it asserts

that failures with respect to the establishment of affirmative defences should be treated differently than failures of a complaining party to establish proof required of it.

2. Failure to meet the burden of proof

10. The United States now attempts to cast its failure to meet its burden of proof with respect to the satisfaction of the chapeau as something less, or different, than what is really was – a failure of proof. The reality is that the United States simply failed to meet its burden of proof on the affirmative defence, and thus the defence failed.

11. In order for a defence under Article XIV to succeed, the responding party must not only establish whether a "challenged measure falls within the scope of one of the paragraphs of Article XIV", but it must also prove that the "measure satisfies the requirement of the chapeau of Article XIV." Thus, the United States' defence under Article XIV did not succeed, and thus the DSB rulings – that the United States bring the Wire Act, the Travel Act and the IGBA into conformity with its obligations under the GATS.

12. Astonishingly, the United States blames the failure of its proof on the "limited evidence" before the original Panel and the Appellate Body, as if somehow the United States had not been permitted to thoroughly present its evidence during the course of the original proceeding.

13. In reality, the United States is responsible for any failure to meet the burden of proof. Despite opportunities to do so, the United States did not even discuss Article XIV until its second – and final – written submission in the original proceeding. Antigua claimed that the delay of the United States in asserting an Article XIV defence until so late in the original proceeding should have precluded any review of the defence, but this point was contested by the United States and rejected by the Appellate Body. In the course of contesting Antigua's position, the United States averred that it had "provided detailed evidence and argumentation on Article XIV in its Second written submission." At no point did the United States argue that it had been prejudiced or unable to submit sufficient evidence. Nor did the United States ask the original Panel for an additional opportunity to submit further Article XIV evidence. Under the circumstances, it is absurd for the United States to argue that it had an inadequate opportunity to present its "complete evidence" in the original proceeding.

3. No difference between a failure of an affirmative defence and a failure of a complainant's proof

14. Although the United States seemingly concedes that WTO jurisprudence precludes the re-argument of a failed primary case in a proceeding under Article 21.5 of the DSU, the United States nevertheless apparently argues for the limitation of this doctrine to the case-in-chief of a complaining party. Under WTO jurisprudence, there is no distinction between the burden of proof on a complainant to establish its case and the burden of proof on a responding party to establish an affirmative defence.

4. The issue has been resolved

15. A party that has "failed to make its case on a particular issue" has done just that – and there is no "second chance." This rule clearly applies whether the failure is of establishing a prima facie case or whether the failure is of a fully considered issue.

16. To decide otherwise and give the United States an opportunity to meet its failed burden of proof in a proceeding under Article 21.5 of the DSU would run "directly counter to the plain language and structure of the DSU," opening up "a potentially endless loop."

D. THE BURDEN IS NOT MET

1. Introduction

17. In its First written submission, Antigua presented substantial evidence and argument as to why, even were the United States entitled to reargue its case under the chapeau of Article XIV, the US case would again fail. Not only does the IHA, on its face, expressly authorise remote gambling on an intra- and interstate basis, but in practice the IHA has been applied to fuel a substantial domestic sanctioned, licensed and regulated industry.

18. Ignoring the reality of its significant domestic industry and the fact that no remote gambling service provider operating under the authority of and in compliance with the IHA has ever been subject to prosecution, the United States continues to rely on its selective and haphazard "repeal by implication" reasoning as its sole basis of proof. As Antigua has demonstrated, the United States' position with respect to the IHA and the relationship between the IHA and the Wire Act is simply wrong. And, if there was any doubt previously about the discriminatory application of US law when it comes to remote gambling, as well as about whether the IHA authorises domestic remote gambling in the United States, these doubts were emphatically put to rest by the recent enactment into law of the so-called "Unlawful Internet Gambling Enforcement Act of 2006" (the "UIGEA").

2. Additional matters regarding the IHA and the Wire Act

19. The United States either mis-comprehends or misconstrues certain fundamental provisions of the IHA along with the practical and actual realities of the present remote gambling landscape operating in the United States by virtue of the IHA.

20. The IHA was passed by the US Congress in 1978 and was intended to "regulate interstate commerce with respect to wagering on horseracing, in order to further horseracing and legal off-track betting industries in the United States."

21. The IHA gives the individual 50 states the primary responsibility of determining what horserace wagering can take place legally within their borders. The IHA also allows interstate horserace wagering between two states provided it is legal in both the state where the bet takes place and the state where the person placing the bet is located. This definition of interstate off-track wagering, which was expanded and clarified by the 2000 amendment to the IHA, clearly authorises interstate wagering via the Internet from one state to another.

22. The United States, while providing the Panel with certain of the generic rules of statutory construction under US law, does not indicate how or why the Wire Act could allow for the prosecution of someone operating pursuant to the IHA. It is patently absurd to suggest, as the United States apparently does, that the IHA – with its extensive provisions regarding interstate remote wagering, revenue sharing and state regulation – would have been put in place solely to (i) provide civil remedies for what (the United States would argue) remains criminal conduct and (ii) allow racetracks to receive and share revenue from this (the United States would argue) illegal activity.

23. Despite the United States' protests to the contrary, the IHA must and can be harmonised with the Wire Act. In essence, what the IHA did was take one course of conduct that had arguably been prohibited by the Wire Act out of its coverage under certain conditions and circumstances, while leaving the remainder of the Wire Act's coverage completely intact. For the position taken by the United States concerning the Wire Act to be given effect, the entire regulatory scheme along with the preclusion of criminal claims predicated by the Congress in the IHA must be ignored – or itself be "repealed by implication." This would be completely contrary to US law concerning statutory construction. The IHA was enacted later than the Wire Act and it is far more specific than the Wire

Act. The IHA is specific to the interstate horseracing industry while the Wire Act is a generic criminal law aimed at the transmission of gambling information. While repeal by implication is disfavoured, it occurs when a subsequent or a more specific statute cannot be reconciled with an earlier statute.

24. The conflict, if any, between the IHA, the later statute, and the Wire Act, the earlier statute, over interstate wagering on horseracing results in a repeal by implication of the Wire Act to the extent of the conflict. Simply put, interstate wagering on horseracing is not subject to the Wire Act because the statutory scheme and Congressional intent made the participants subject to only civil liability even for non-compliance with the IHA. US law allows for two different types of repeal by implication and does not require that the later act cover the entire subject matter – just that there is an irreconcilable conflict between portions of the applicable statutes.

25. In its submission, the United States also fundamentally misconstrues *Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Association, Inc*. Bizarrely, the United States claims in its submission that *Sterling* somehow stands for the proposition that the IHA and the Wire Act exist in different "spheres" of the law. Far from it, *Sterling* actually reinforces the proposition that the IHA removes wagering on interstate horseracing from any possibility of prosecution under the Wire Act or any other federal criminal law. Thus, while Antigua has identified the one actual decision by an American court on the scope of the interrelationship between the IHA and the Wire Act, the United States must rely upon bare claims from a Department of Justice that has failed to bring a single criminal action under the Wire Act against an IHA-sanctioned, licensed and regulated operator.

3. The "Unlawful Internet Gambling Enforcement Act of 2006"

26. Less than a week after Antigua filed its First written submission in this proceeding, the United States enacted the UIGEA. The UIGEA is clearly within the terms of reference of the Panel in this proceeding.

27. While the UIGEA itself clearly violates the GATS in a number of respects, it is perhaps best suited to (i) demonstrate that the IHA permits remote gambling on horseracing in the United States by state-sanctioned operators; (ii) demonstrate that the Congress has conceded that states and Native American tribes can regulate remote gambling; (iii) confirm Antigua's argument that the Wire Act does not prohibit intrastate remote gambling; and (iv) highlight the trade-discriminatory affect of the Wire Act, the Travel Act and the IGBA.

28. Having already criminalised the cross-border provision of gambling and betting services with the Wire Act, the UIGEA now makes it a federal criminal offense for a remote gambling and betting service provider to accept funds from or pay funds to consumers in the United States – effectively yet another method of prohibiting the cross-border supply of gambling and betting services from Antigua to consumers in the United States. This violates Article XVI:1 and Article XVI:2(a) and (c) of the GATS for exactly the same reason that the Wire Act, the Travel Act and the IGBA violate the GATS. As well, criminalising "international transfers and payments for current transactions" involving an activity – the cross-border supply of gambling and betting services – for which the United States has made specific commitments in its schedule under the GATS clearly violates Article XI of the GATS.

29. Ironically, in the arbitration proceeding, the United States took the position that it would enact legislation to in essence "clarify" that the IHA does not permit domestic remote gambling in the United States. Given the chance to do so – in legislation adopted by the US Congress and signed into law by the American president subsequent to the arbitration award in the 21.3 proceeding – the United States has instead chosen to do the opposite.

30. In the original proceeding, in response to Antigua's argument that remote gambling services can be effectively regulated, the United States argued that it had determined regulation of remote gambling was not possible. Yet Antigua has shown that the United States already regulates the domestic, remote supply of gambling and betting services. Sections of the UIGEA, by making adoption of regulations that include age and location verification requirements a condition of the exclusion of intrastate and Native American remote gambling from coverage of the legislation, unambiguously demonstrate that – contrary to the position of the United States in this proceeding – the US Congress recognises that these services can be regulated.

31. Antigua has consistently argued that nothing in the Wire Act prohibits solely intrastate remote gambling. The UIGEA affirms the position of Antigua in this regard, clarifying that "unlawful Internet gambling" does not include intrastate remote gambling while imposing the regulatory requirements discussed in the preceding paragraph if the intrastate gambling is to be clearly excluded from the scope of the new legislation.

32. Passage of the UIGEA, with its express "carve-outs" for a number of domestic remote gambling opportunities, has made it impossible to assert that the Wire Act, the Travel Act and the IGBA are applied in compliance with the chapeau of Article XIV of the GATS. Antigua cannot supply its services to consumers under the IHA, nor by definition can Antigua provide cross-border services on an intrastate basis or within Native American lands. Rather than using a legislative opportunity to either provide Antigua with market access to US consumers or to prohibit all domestic remote gambling, in an almost cruelly ironic act, the Congress has instead chosen to make its laws even more discriminatory and WTO-inconsistent than they were at the adoption of the DSB rulings.

E. GOOD FAITH, THE EFFICACY OF THE DSU AND DEVELOPING COUNTRIES

1. Introduction

33. Antigua shares the concern evidenced by the European Communities over the position of the United States in this proceeding. Although Antigua understands that participants in a dispute resolution process should be entitled to use the process to the best of their ability in order to achieve their legitimate objectives, Antigua believes that each Member must conduct itself in good faith, in accordance with principles of fair play and comity, when pursuing those legitimate objectives. While Antigua has a number of concerns about the conduct of these proceedings by the United States, it is particularly troubled by what has transpired with respect to compliance since the adoption of the DSB rulings in May 2005.

34. These circumstances call into question not only the efficacy of the dispute resolution system under the DSU, but also whether developing countries such as Antigua can effectively avail themselves of the remedies ostensibly provided by the DSU when up against a developed country, such as the United States, with comparably endless resources.

2. The requirement of good faith

35. Article 3.10 of the DSU reads in pertinent part that it "is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute."

36. The Appellate Body has stated that

> "Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the

> dispute". This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules."

3. The United States and compliance

37. Having announced that it intended to comply with the DSB rulings and would need a reasonable period of time to do so, the United States argued in the 21.3 proceeding that it would need at least 15 months to come into compliance with the DSB rulings by adopting legislation. The arbitrator, clearly relying on the United States' representation, awarded a reasonable period of time of 11 months and two weeks.

38. On 10 April 2006, upon expiration of the reasonable period of time, the United States informed that it was in compliance with the DSB rulings. Contrary to its assertion to this Panel in its First written submission, the United States informed the DSB that, in its opinion, it was in compliance with the DSB rulings based solely upon a purported statement of a Department of Justice employee.

39. That the United States considered the DOJ Statement its basis for "compliance" with the DSB rulings was reinforced at a meeting of the DSB on 21 April 2006, when a representative of the United States told the Members that in "view of the circumstances" of the DOJ Statement, the United States was in compliance with the DSB rulings.

40. Now, in its First written submission in this proceeding, the United States takes yet a third position with respect to compliance–that the Wire Act, the Travel Act and the IGBA themselves are "compliance measures" and that the United States has been in compliance with the DSB rulings all along.

41. This unfathomable assertion of the United States is without precedent in WTO dispute resolution. Under the logic of the United States' current position, it was in compliance with the DSB rulings immediately upon the rulings having been made. If that is so, then why did the United States not simply say exactly that at the DSB meeting of 18 May 2005?

42. Antigua agrees with the general proposition that an implementing Member should retain the right to determine how to come into compliance with recommendations and rulings of the DSB, and further that under certain circumstances an implementing Member may change its original opinion on how to achieve compliance. That being the case, Antigua agrees with the European Communities when it said that should a Member later come to the view that contrary to earlier declarations to the DSB, enactment of fresh legislation is not longer necessary, the implementing Member should be required to provide a reasonable explanation.

4. The United States position threatens the dispute resolution system

43. The circumstances of this proceeding raise into serious doubt the efficacy of the WTO dispute resolution system, particularly where a small nation with limited resources is attempting to secure compliance of large, developed economy such as the United States with an adverse ruling from the DSB. In the 17 months since the DSB adopted its recommendations and rulings in this case, the United States has done nothing to come into compliance with the DSB rulings; it has refused on repeated occasions to engage in any constructive dialogue with Antigua towards a mutually

satisfactory resolution of the dispute; it has arrested, indicted and prosecuted Antiguans and Antiguan service providers simply for providing licensed, regulated gambling and betting services to consumers in the United States; and it has adopted a punishing, discriminatory law that has already had a material, adverse impact upon Antigua and its citizens.

F. CONCLUSIONS

44. In light of the foregoing, Antigua respectfully requests that the Panel: (i) find that the United States has not taken measures to comply with the DSB rulings; (ii) find that the Wire Act, the Travel Act and the IGBA remain in violation of the United States' obligations to Antigua under, *inter alia*, Article XVI of the GATS without meeting the requirements of Article XIV of the GATS; and (iii) 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.

ANNEX C-2

REBUTTAL BY THE UNITED STATES (13 NOVEMBER 2006) – EXECUTIVE SUMMARY

A. INTRODUCTION

1. In its Second written submission, Antigua fails to rebut the US showing that the IHA does not exempt domestic suppliers of betting on horse racing from the prohibitions in US 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 US 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 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 US 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 US criminal laws.

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

4. Part II of Antigua's Second written submission is devoted to what Antigua calls "corrections" to "errors" that Antigua purports to find in the introductory paragraph of the US First written submission. Antigua's claims of purported errors are baseless. The first paragraph in the US First written submission simply summarized the open issues regarding the application of Article XIV to the US measures that remained as a result of the 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 US 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."

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

6. In the US First written submission, the United States addressed the key substantive issue in this proceeding – in particular, the United States showed that under basic principles of US 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 US First written 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 written 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 parlours 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 parlours to enter into revenue-sharing agreements.

8. The IHA's Congressional "findings and policy" are entirely consistent with the US 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:

(a) 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.

(b) 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."

(c) The findings note that "in the limited area of interstate off-track wagering on horse races, 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 parlours making use of horse races in other states.

(d) 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 parlours 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 US 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 US 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 US 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 US First written submission cites *Posadas*, and clearly addresses both of the prongs of implied preemption. As the United States explained in its First written 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 non-compliance 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 written 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.

D. 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.

1. 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 defence 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.

2. 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 US 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.

3. Antigua has no basis for implying a lack of good faith on behalf of the United States

26. In Part VI of its Second written 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 written submission, a bill to amend the Wire Act has been pending in the US 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 US 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 US legal principles and the legislative history of the statutes at issue.

E. 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 written submission is addressed to the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), which was signed into law on October 13, 2006, approximately three 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 *US – 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 *US – 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.

ANNEX D

ORAL STATEMENTS OF THE PARTIES AT THE SUBSTANTIVE MEETING OF THE PANEL

ANNEX D-1

OPENING STATEMENT BY ANTIGUA AND BARBUDA (27 NOVEMBER 2006) – EXECUTIVE SUMMARY

A. THE UNITED STATES WAS FOUND OUT OF COMPLIANCE WITH THE GATS

1. The starting point here is that three federal statutes were found by the Panel and the Appellate Body to be contrary to Article XVI of the GATS. Both the Panel and the Appellate Body found that the United States was not entitled to the affirmative defence of GATS Article XIV. That is why the Appellate Body recommended that the DSB "request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the General Agreement on Trade in Services, into conformity with its obligations under that Agreement."

B. THE UNITED STATES HAS DONE NOTHING

2. There is complete agreement that the United States has done nothing since the adoption of the DSB rulings to come into compliance with them. Yet, the United States would ask this Panel to declare the United States in compliance with the DSB rulings, based upon the exact same laws, facts and circumstances as were present – and argued by the United States – in the original proceeding and rejected by both the Panel and the Appellate Body.

C. NO SECOND CHANCES

3. In the face of all contrary WTO law and jurisprudence, the United States asserts it is entitled to try and meet its burden of proof on the chapeau this time around. The DSU does in fact contain a firm basis for Antigua's "second chance theory" – and that is Article 17.14 of the DSU. There is no ambiguity in that provision. The DSB did not recommend to the United States that it do a better job convincing the Panel and the Appellate Body a second time around. There is no authority supporting the US position in this proceeding. The US position, if were accepted, would make a complete mockery and farce of the DSB and the object and purpose of dispute resolution at the World Trade Organisation. Therefore, the enquiry must end here. To take it any further will be to distort the DSU beyond all reason and set a devastating and outrageous precedent. The United States has done nothing at all to come into compliance with the DSB rulings and therefore must be found to be out of compliance with them.

D. NO "SPECIAL STATUS"

4. Antigua would like to respond to the claim of the United States that it is somehow entitled to "special status" in an Article 21.5 proceeding. The theory advanced by the United States is that the responding party in a 21.5 proceeding has the sole and exclusive right to reargue its failed case before the panel because the recommendations and rulings of the DSB only relate to the case as initially proven by the complaining party. This twisted logic not only has no basis under the DSU or WTO jurisprudence, but in fact is contrary to both. There is nothing in Article 21 of the DSU to support this claim by the United States for "special status."

E. EVEN A "SECOND CHANCE" THE UNITED STATES LOSES

5. Were the Panel to give the United States its "second chance," nonetheless the United States fails. If the United States wants to revisit the issue of the IHA and the chapeau of Article XIV, then it must at the very least be forced to revisit it in whole, not just in selective parts. The conclusion that the IHA permits wagering on a remote basis, is supported by the plain language of the IHA, our

evidence and discussion on the proper interpretation of statutes in seeming conflict, legal commentary, the courts, and the facts on the ground.

F. THE IHA/WIRE ACT ISSUE

6. The United States relies on its selective use of cases and arguments on "repeal by implication" to attempt to prove that the IHA does not permit remote gambling. Antigua's view on this legal analysis is different. While the United States assigns no weight to the opinion of a "mere" law student that supports Antigua's reading of the two statutes, it glaringly overlooks a legal opinion of the Attorney General of Maryland that expressly supports Antigua's position as well. A review of the US submissions shows no one supporting its position on the issue. And, again, the one court case considering the two statutes together supports Antigua's interpretation of what the IHA allows. Under these circumstances alone, it would be impossible to conclude that the United States had met its burden of proof of establishing that the IHA is non-discriminatory.

G. THE REALITY

7. As we know, the United States asserted in the original proceeding that all remote gambling was prohibited in America. That is just not true. It is obvious that a healthy, sanctioned domestic remote gambling industry exists in the United States.

H. THE NEW LEGISLATION AND THE IHA

8. The new US legislation – the so-called "Unlawful Internet Gambling Enforcement Act of 2006" – has made it crystal clear that the IHA permits remote gambling on horse racing in the United States.

I. THE UNITED STATES LOSES IN A FULL REASSESSMENT OF THE CHAPEAU

9. The United States considers its "second chance" only open to a limited review of the IHA and the chapeau of GATS Article XIV. Why this would be the case is a mystery. Even were the "second chance" to be limited to a review of the chapeau, there is no reason why a full reconsideration of the chapeau should not take place. Surely in the game of "second chances" there could be no prejudice in allowing both sides the opportunity to supplement the evidence in this regard. Obviously, we believe that a full and complete assessment of the IHA and remote gambling and betting service providers operating under it unmistakeably establishes that sanctioned, domestic remote gambling exists in the United States. Furthermore, not only does the express language of the Wire Act not prohibit all domestic remote gambling, but indeed there is considerable sanctioned domestic remote gambling in the United States now in addition to the activities under the IHA. And, particularly in light of favoured, domestic-only carve-outs in the new federal statute, this can only be expected to continue to grow.

10. The Wire Act does not prohibit remote gambling, but in fact only prohibits (or restricts) cross-border gambling. Thus, all American states are free under the Wire Act to offer virtually unlimited remote gambling solely within their own borders. Obviously, if the "remoteness" of the services is their vice, the fact that the services do or do not cross a state or international border is irrelevant. If the United States was concerned about the "remoteness" of the services, then the Wire Act would reflect that. However, the Wire Act, on its face, absolutely does not prohibit remote gambling that does not cross a state or international border.

11. In light of the express language of the Wire Act, the new federal legislation and ample evidence of sanctioned, domestic remote gambling in the United States it is impossible for the United

States to assert that it enforces or applies its laws in anything but a discriminatory fashion – contrary to its commitments under the GATS and in clear conflict with the chapeau of GATS Article XIV.

J. GOOD FAITH AND FAIR DEALING

12. We feel it fair and appropriate to point out what we consider to be unfair dealings on the part of the United States and demand that these factors be considered by the Panel in assessing the relative merits of the parties in this proceeding. At the very least, we are owed a reasonable explanation for the contortions of the previous year and a half. And the proffered explanation – that the WTO was wrong and the United States was right – is *per se* unreasonable. The unreasonableness of the US position is underscored by the United States' admission that from the very beginning, it simply believed the WTO to be wrong. It further claims that it had been considering a legislative option, but as the Congress never acted, it "had but little choice to rely on a different means of compliance." Yet we observe that no legislation was ever introduced into the Congress that would have brought the United States into compliance had it been adopted. Although, as it explained during the course of the Article 21.3 proceeding, part of the role of the USTR is to suggest legislation to the Congress and seek its introduction and approval, the USTR certainly did not do so in this case.

K. OTHER ISSUES

13. If the United States is to get its "second chance," then the Panel should revisit the issue of reasonably available alternatives. In addition to those things that we asserted in the original proceeding – such as our own regulatory scheme, the regulatory schemes of other countries and the willingness of our operators to use agents such as those used by lotteries in the United States to sign up and qualify consumers – there are other alternatives to consider, including:

(a) Existing state regulatory schemes for remote gambling under the IHA;

(b) Other analogous regulatory schemes such as those for sales of alcoholic beverages; and

(c) New age, identity and location technologies that are available and in use.

14. With respect to whether the new US legislation is within the Panel's terms of reference, one need only look as far as WTO jurisprudence – such as the panel decision in *Australia – Salmon* – to conclude that it is. We did our best to anticipate whatever form the anticipated American legislation might take. We monitored the legislation throughout the process, referring to whatever was then pending or adopted in our request for consultations, in our Panel request and then, in some detail, in our First written submission in this proceeding. And, of course, in our Second written submission we discussed the legislation as finally adopted and approved.

15. There are additional criteria that should be applied by a panel to determine whether or not it may also examine other measures. Some measures with a particularly close relationship to the declared "measure taken to comply", and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under DSU Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared ‘measure taken to comply' is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one "taken to comply" and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding.

16. As the final legislation adopted by the American Congress, following a number of introduced bills and permutations; as the only legislation adopted by the Congress dealing expressly with remote gambling since the adoption of the DSB rulings; and as it is patently trade discriminatory, the new legislation fits squarely within the doctrine so ably elucidated by the panel in *Australia – Salmon.*

17. The attempt of the United States to preclude consideration by the Panel of this legislation because it was not described in our Panel request in its form as finally adopted should receive no consideration here at all.

18. While it is obvious why the United States wants to exclude this regressive legislation from the ambit of the Panel, it is very relevant, and very helpful, in an analysis of the status of American compliance with the DSB rulings. For if it does nothing else, this new legislation serves well to highlight the trade discriminatory approach of the United States when it comes to the remote supply of gambling and betting services.

L. CONCLUSIONS

19. The United States has done nothing to come into compliance with the DSB rulings. It has used and arguably abused the WTO dispute resolution system to gain time and advantage in a manner and under circumstances most certainly not anticipated nor contemplated by the DSU–or consistent with the fair and prompt resolution of trade disputes. In the meantime, it has aggressively been prosecuting and persecuting licensed Antiguan operators and working hard to destroy the non-domestic industry.

20. What a terrible precedent it would set were the US approach to prevail. Every losing party seeking delay and advantage would simply wait for a 21.5 proceeding to re-litigate its case. Although the United States may not like the DSB rulings in our case, the fact is that they are what they are. What good is a system where a loser decides on its own which judgements are correct and which are not? Neither the United States nor any other implementing Member can cherrypick the good from the bad. All of us, the United States included, need to bear the responsibilities associated with a fair and transparent dispute resolution process.

21. In conclusion, we respectfully ask that Panel to find the United States has not complied with the recommendations and rulings of the DSB in this matter, that you find that the federal statutes at issue remain in violation of Article XVI of the GATS without meeting the requirements of Article XIV and that you recommend that the DSB request the United States to bring its laws into conformity with its obligations under the covered agreements.

ANNEX D-2

OPENING STATEMENT BY THE UNITED STATES (27 NOVEMBER 2006) – EXECUTIVE SUMMARY

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

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

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

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

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

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

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

8. Antigua also appears to rely on an exceptional doctrine of US law known as "repeal by implication." However, "repeals by implication" are extraordinary, and nothing in the IHA could amount to a repeal by implication of the Wire Act. As the United States Supreme Court explained: "It is a cardinal principle of construction that repeals by implication are not favored ... . There must be 'a positive repugnancy' between the provisions of the new law and those of the old ... ." There simply is not, as Antigua asserts, any "repugnancy" or "irreconcilable conflict" between the Wire Act and the IHA. To the contrary, the original legislative history of the Wire Act noted that a gambling operation in one state could offer betting on horse races held in another state – so long as the bet or wager did not cross state lines. And, the IHA fits with the Wire Act by creating a civil liability scheme to address the free-rider problem created by this type of interstate gambling on horse racing. Each scheme – the Wire Act's prohibition on interstate transmission of wagers – and the IHA's requirement for revenue sharing agreements – has its own purpose and effect, and there is no repugnancy between the statutes.

9. Finally, Antigua has relied on a legislative change in 2000 to the IHA's definition of the term "interstate off-track wager." Antigua, however, does not explain how the change in a single definition creates a "repugnancy" between the two statutes. In fact, the amendment can be seen as closing a loophole in the implementation of the IHA's goal of enforcing revenue-sharing between betting operators and racetracks.

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

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

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

13. In the circumstances of the present dispute, Article 22.5 must be construed to allow for the measures at issue to be the "measures taken to comply." If not, the application of the DSU to such circumstances could lead to absurd results. The problem is that unless the measures in dispute are the "measures taken to comply," the responding party would be required under DSU Article 21 to enact new measures when it was already in compliance with its obligations. This result would be inconsistent with the DSU, because Article 3.2 of the DSU explicitly provides that recommendations and rulings of the DSB cannot "add to or diminish the rights and obligations under the covered agreements." This fundamental principle is so important that it is restated in Article 19.2 of the DSU, covering panel and Appellate Body recommendations. So, if – as the United States believes it has shown on a full factual record – it was entitled to maintain the Wire Act's criminal prohibitions under the Article XIV exception, that right cannot be diminished by any DSB recommendations and rulings.

To the contrary, the United States has that right under Article XIV both before, and after, the DSB recommendations and rulings. The means to avoid such conflict with Article 3.2 is clear: in these circumstances, the measure examined in the original proceeding must be the "measure taken to comply" under DSU Article 21.5.

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

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

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

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

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

19. Second, Antigua's opening statement calls into question the good faith of the United States. Antigua uses phrases such as "prevarication," "intent of doing nothing," "blatant dissembling," and "cynical attempt." There is no basis for this type of name calling in this dispute. During the Article 21.3 proceeding, the United States was very clear on its view of the US law and on the means

of compliance. In particular, we explained that we viewed the US statutes as not containing any exemption for IHA activities, and that the US measures thus met the requirements of the Article XIV chapeau and were consistent with US GATS obligations. The United States further sought a reasonable period of time to allow for a legislative clarification that would show that the statutes were, in fact, as the United States described them. The United States did not assert that legislation was the only possible means of compliance. We also emphasized the difficulty involved in passing legislation, including that such legislation was not in the control of USTR or the Executive Branch as a whole. The fact that such legislation was not adopted during the reasonable period of time in no way indicates that the United States was not acting in good faith. It simply shows – as the United States explained in the Article 21.3 proceeding – that a clarification through legislation was indeed difficult.

ANNEX D-3

CLOSING STATEMENT BY ANTIGUA AND BARBUDA (28 NOVEMBER 2006)

1. Mr. Chairman and Members of the Panel, we would like to thank you for your participation in this process. I for one have enjoyed the sessions and your very insightful questions. It is always much more enjoyable and interesting when questions are asked and dialogue engaged in. I think the questions have done much to clarify the issues and develop the enquiry.

2. I would like to quickly review some of the important points in this case, most of which we have discussed at some length, but I think important to highlight. First, it is our view that the deciding issue here is simple. The United States has done nothing to comply with the rulings and recommendations of the DSB. And, having done nothing, must be found out of compliance. This is, we believe, where the Panel should end its enquiry.

3. Second, the entire remaining body of issues that have been raised here come into consideration only should the Panel decide to give the United States the "second chance" to meet its burden of proof under GATS Article XIV. We think that Article 17.14 of the DSU and related jurisprudence is absolutely clear on this matter – the United States is not entitled to a second chance. Like the rest of us, having agreed to follow and be bound by this dispute resolution process, the United States must live with the decisions, both for good and for bad.

4. We observe that this is not a case where the panel and the Appellate Body made a clearly wrong decision and it would be inequitable for the United States have to comply with an unjust decision. For, as we know, the United States does not prohibit remote gambling at all. What it prohibits is all remote gambling from other countries. And some domestic remote gambling, but in most cases only if it crosses a state or international boundary.

5. Here I would like to add that we agree wholly with the European Communities, Japan and China on the issue of second chances – however we find ourselves in a difficult spot here – for if the United States can get a second chance, so indeed should we.

6. Third, were the United States to get a second chance, it cannot limit the enquiry to the issues it would like to focus on. At the very least, the enquiry should go to the United States burden of proof on the entire chapeau and, as we said yesterday, there is really no logical reason why all of GATS Article XIV should not then be on the plate. The United States wants to direct the Panel's attention solely to the IHA and at that, solely to this "repeal by implication" issue. And while we believe that even on this narrow issue the United States fares poorly, it is obvious why they want to do so – because the reality of remote gambling in the United States makes their claim of no discrimination impossible, ludicrous even.

7. Fourth, it is important to realise, as the Appellate Body noted in paragraph 349, that the United States chapeau claim was based on the premise that it prohibits all remote gambling, regardless of source. Fifth, although the Appellate Body clearly missed it, in fact the Wire Act itself is facially discriminatory, completely omitting intra-state remote gambling from its coverage. The IHA is too, of course, only allowing states to participate in its scheme.

8. Sixth, we have shown, with overwhelming and un-controverted evidence that, no matter what the Department of Justice may say to the contrary, a significant, entrenched, state-sanctioned remote gambling industry exists in the United States, out in the open and free from prosecution. While the Department of Justice has told us that the lack of prosecution of operators in the United States should

not be viewed with any significance, when you consider that the Department of Justice has seen fit to allocate its scarce prosecutorial resources to the prosecution of Antiguan operators – including at least two significant federal prosecutions this year alone–these statements of the Department of Justice ring pretty hollow.

9. Seventh, any doubt as to the discriminatory effect of America's law and practice was resolved by the new prohibition law. Given a chance to come into compliance with the DSB rulings, the American Congress chose instead to move in the opposite direction, adopting a baldly protectionist law, further institutionalising its discrimination when it comes to remote gambling services.

10. Eighth, undoubtedly, what the United States has decided in this case is that it must be right and the WTO and Antigua must be wrong. After the Appellate Body decision, the United States had one of two choices – grant Antiguan service providers market access or ensure that, as it had represented to the panel and the Appellate Body, all domestic remote gambling is prohibited just as are foreign services.

11. Ninth, the United States has done neither of these things. Therefore, the United States simply remains out of compliance with the recommendations and rulings of the DSB in this matter. The United States has effectively and unjustifiably bought itself well over a year of additional time to prosecute and persecute Antiguan service providers. If the United States remains committed to the WTO and the dispute resolution system process, it is time for the United States to make serious efforts towards compliance. We respectfully request that this Panel confirm the recommendations and rulings of the DSB in this case, and further request the United States to bring its offending laws into compliance with the GATS.

12. Thank you very much.

ANNEX E

ORAL STATEMENTS OF THIRD PARTIES AT THE SUBSTANTIVE MEETING OF THE PANEL

ANNEX E-1

ORAL STATEMENT BY CHINA
(28 NOVEMBER 2006)

1. Notwithstanding China did not submit a written submission to the Panel, China would like to emphasize its systematic interests in this dispute regarding whether the United States has brought its measures into compliance with the DSB's recommendations and rulings as required by WTO rules, including the disciplines mandated under the DSU.

2. To begin with, China would focus the following four issues which China believes of critical importance for this Panel to take into consideration in these proceedings:

(a) whether the "old" measures in the original proceedings could be the "measures taken to comply" under Article 21.5 of the DSU;

(b) whether a second chance is permitted under the DSU and could be presented with the defending party even in the case of affirmative defence;

(c) whether the DOJ Statement could be construed as "measure taken to comply" under Article 21.5 of the DSU;

(d) whether an appropriate weight should be given to the Article 21.3 arbitration proceeding.

3. As to the first issue, China notes that the United States argues that the "old" measures, i.e. the Wire Act, Travel Act, and IGBA, are the "measure taken to comply" under Article 21.5 of the DSU and therefore the United States is exempted from taking any other new measures in implementing the DSB's recommendations and rulings. China cannot agree in this regard. The plain language in Article 21.5 stipulates that "measures taken to comply" should be to comply with the recommendations and rulings. Hence, there should be a time sequence between the DSB's recommendations and rulings and the "measures taken to comply". This view has also been confirmed by the WTO jurisprudence among which the Appellate Body in *US – Shrimp* case ruled that "Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel."

4. The second issue is to some extent interrelated with the first issue. The United States thinks that the Article XIV chapeau of GATS involves an affirmative defence, and since the Appellate Body only ruled that the United States has not demonstrated that the alleged measures are applied consistently with the requirements of the chapeau of GATS Article XIV, the US views that it only needs to meet the requirement of burden of proof in this affirmative defence which it has missed in the original proceeding. The critical question here is whether a second chance is permitted under the DSU and could be presented with the defending party even in the case of affirmative defence. In this regard, China is of the view that the United States' argument of a second chance could not be justified.

5. In China's view, the United States could not be justified by both the plain reading of Article 17.14 of the DSU and the WTO jurisprudence. Article 17.14 of the DSU stipulates that an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute. Both the words "shall" and "unconditionally" indicates that the discipline under Article 17.14 is of mandatory nature. China cannot see any reason why this mandatory discipline would permit the parties to the dispute to have a second chance to re-claim or re-defend what has already settled by the Appellate Body. In *EC-Bed Linen (Article 21.5- India)* case, the Appellate Body confirmed the above

understanding. However, China notes that in its First written submission, the United States submits that Antigua erroneously relies on the Appellate Body report in *EC – Bed Linen* and that since this proceeding involves so-called "affirmative defence", the defending party should be entitled to the privilege in taking advantage of a second chance. China cannot share such an argument. China believes that for both parties, neither of them should be required to bear the consequences of a deficient claims or defences in the original proceedings. It would be unbalanced where the affirmative defence is involved, the complaining party would do nothing but undertake the adverse effect as a result of the defending party's deficiency even in the case of affirmative defence.

6. The third issue is whether the DOJ Statement could be construed as "measure taken to comply" under Article 21.5 of the DSU. In both the request for the establishment of a panel and the First written submission, Antigua argues that the DOJ Statement could not be a "measure" for purposes of the DSU. By simply stating that the "old" measures in the original proceeding are the "measure taken to comply", it is interesting that the United States seems unwilling to rebut Antigua's argument. Instead, the United States argues that it is not its position to claim that the DOJ Statement is a separate measure, or that the United States will rely entirely on that statement to make its showing that the IHA does not exempt gambling on horse racing from federal criminal statutes. China recalls that the Appellate Body in *US – Softwood Lumber IV (Article 21.5-Canada)* ruled that what is a "measure taken to comply" in a given case is not determined exclusively by the implementing Member, nor by the complaining Member, but is a matter for judicial review. Therefore, China thinks that this issue is left for this panel to make a conclusion as to whether the DOJ Statement could be construed as "measure taken to comply" for the reason that it is a matter for judicial review. While China shares the view with Japan that as shown by the plain language of relevant WTO Agreements and considerable WTO jurisprudence, Members enjoy discretion to shape the "measures taken to comply", China would like to ask this panel to be cautious in making findings on this issue. What concerns China is that, in the event this panel concludes that the DOJ Statements could be "measure taken to comply" for the purpose of Article 21.5 of DSU, could a defending party be considered as having implemented the DSB's recommendations and rulings in such a way by simply putting forward statements by administrative employees?

7. The fourth issue is a systematic and complicated one with regard to whether an appropriate weight should be given to the Article 21.3 arbitration proceeding. China would like to thank the contribution of both the panel and the parties to this dispute in making available the records during the Article 21.3 proceeding to the third parties. It is a systematic issue because as an integral part of the whole WTO dispute settlement procedure, an appropriate weight should be given to the Article 21.3 arbitration proceeding. It is a complicated issue because to what extent the weight should be given to the Article 21.3 proceeding, neither the text of the DSU nor the WTO jurisprudence can provide clear and direct guidance. Members enjoy a broad discretion to shape the "measures taken to comply", and China agrees that the intention or statement to act in a specific way to implement the DSB's recommendations and rulings presented during the Article 21.3 proceeding could not be construed as legally binding upon the implementing party. On the other hand, the DSU also provides for the basic principle of good faith under Article 3.10. China observes that, the implementing party could not be regarded as in good faith by presenting the complexity of the measure purported to be taken in order to justify longer reasonable period of time, while after the expiration of the reasonable period, it choose to do nothing at all. China is of the view that proper balance should be evaluated between the discretion of an implementing member to shape the "measures taken to comply" and the principle of good faith, and appropriate weight should be given to the Article 21.3 arbitration proceeding in this dispute.

8. Mr. Chairman, this concludes China's oral statement. Thank you for your attention.

ANNEX E-2

ORAL STATEMENT BY THE EUROPEAN COMMUNITIES (28 NOVEMBER 2006) – EXECUTIVE SUMMARY

A. INTRODUCTION

1. The EC decided to intervene in this compliance proceeding because of its systemic interest in the DSU, and in particular in the correct interpretation of Article 21.5 thereof. In its Third party written submission of 23 October 2006 the EC addressed four matters arising from the parties' First written submission. The EC confirms herewith its written submission in its entirety. In its oral statement the EC wishes to make additional comments relating to the four subject matters addressed in its Third party written submission, arising from the parties' Second written submission.

2. Before doing so the EC wishes to comment on a procedural matter that has recently arisen. As far as the EC understands, the Panel has informed the parties of its intention to request the record of arbitration of the Article 21.3(c) proceedings. The European Communities agrees with this request.

B. MEASURES TO BE BROUGHT INTO CONFORMITY

3. The parties continue to disagree on the precise content of the rulings and recommendations of the DSB in relation to the original dispute. The United States holds to the view that the disputed measures that were the subject of the original proceedings are WTO-consistent. This is obviously closely linked with the United States' view that it can have a second try at proving its case under the chapeau of Article XIV GATS. The EC will provide further comments on this matter shortly, in its additional comments on questions relating to *res judicata*. Nevertheless, the EC finds it important to recall from the outset that both the original panel report and the Appellate Body report unequivocally concluded that the United States had acted inconsistently with its obligations under the GATS (see Appellate Body report, paras. 265; 296-299; 323-327, 368). Further, the Appellate Body recommended that the DSB request the United States to bring its measures, found to be inconsistent with the GATS, into conformity with its obligations under that Agreement (para. 374).

C. LEGAL FRAMEWORK FOR COMPLIANCE REVIEW UNDER ARTICLE 21.5 OF THE DSU

4. The parties disagree as to whether the 'Unlawful Internet Gambling Enforcement Act of 2006' comes within this Panel's scope of review. The US argument that the UIGEA is not mentioned in the terms of reference for this Panel is not dispositive of this issue. As outlined in the EC's written submission, the case law confirms that the scope of jurisdiction of a compliance panel is determined not only through the terms of reference for the Panel, but also through Article 21.5 DSU.

D. COMPLIANCE REVIEW AND THE LEGAL EFFECT OF ADOPTED PANEL AND APPELLATE BODY REPORTS (QUESTIONS RELATED TO *RES JUDICATA*)

5. Among the most important issues this Panel will have to address is whether parties are entitled to re-litigate issues ruled upon in the original proceedings. As outlined by the EC in its written submission, the Appellate Body has unequivocally and consistently held that as a matter of principle, Article 21.5 proceedings cannot be used by parties to re-litigate issues that have been ruled upon in the original proceedings and contained in reports adopted by the DSB. The Appellate Body arrived at this conclusion on the basis of Article 17.14 DSU, which instructs parties to "unconditionally" accept

reports adopted by the DSB. Consequently, this Panel should firmly decline any attempt by either party to reopen issues that have been settled in adopted reports relating to the original proceedings.

6. In its First written submission Antigua attempted to reopen the debate on an issue that has been ruled upon the original proceeding and contained in the reports adopted by the DSB: namely, whether the United States had provisionally justified the three criminal law statutes at issue under the general exception of "necessity" circumscribed in Article XIV(a) GATS. For the reasons set out in its written submission, the EC takes the view that this Panel should decline to do so. In its Second written submission Antigua has clarified that its quest for a reopening of the debate on Article XIV (a) should be viewed in conditional terms: should this Panel allow the United States to reopen debate on whether the prohibitions contained in the three criminal law statutes at issue are applied consistently with the requirements of the chapeau of Article XIV, Antigua should in turn be allowed to make further submissions on whether the disputed measures are justified as necessary. This however, as Antigua concedes, this would not be sustainable in view of the *res judicata* principle. The EC agrees.

7. In its written submission the EC also addresses whether Antigua could be allowed to present fresh evidence before this compliance panel in relation to a matter ruled upon in the original proceedings. The EC submitted that two hypotheses needed to be distinguished: firstly, where a new measure was brought before the panel; secondly, where no new measure is brought. In relation to the first hypothesis the EC generally holds the view that if there is a new measure before a compliance panel, this entails the emergence of new factual circumstances and thus a broad right to bring new claims, arguments and factual circumstances against the new measure and all its elements. The second hypothesis, however, presents more difficult systemic questions. As outlined in the EC's written submission, the DSU contains no rules on the admission of fresh evidence in compliance proceedings where no new measures have been presented. Further, allowing admission of fresh evidence in such a hypothesis may be regarded as undermining the *res judicata* principle.

8. In its Second written submission Antigua has now substantially softened its submission pertaining to fresh evidence. It alludes to "changed circumstances and developments that justify submission of new evidence", without, however, spelling out what these new circumstances and developments are. There is therefore no reason, according to the EC, for this Panel to take the issue of alleged fresh evidence any further or to enter into the systemic debate of the second aforementioned hypothesis referred to above.

9. The United States has made various submissions in support of its position that it should in these compliance proceedings, receive a second chance at attempting to meet its burden of proof under the chapeau of Article XIV GATS.

10. The United States now contends that there is no rule in the DSU that bars a responding party from re-litigating issues, and affirms that it would be inconsistent with the goal of the DSU, for this Panel not to allow the United States to reargue its burden of proof under the chapeau of Article XIV GATS. For the reasons outlined by the EC in its written submission, the United States is clearly wrong on the point of principle: i.e., the finality of panel and Appellate Body findings contained in reports adopted by the DSU, which derives from Article 17.14 DSU.

11. In its First written submission the United States drew an unpersuasive distinction between "claims" and "affirmative defences" for the purposes of the application of the *res judicata* principle. In its Second written submission the United States amplifies this, contending that a complaining and a responding Member are in fundamentally different positions before a compliance panel, which in its view, has certain implications for the application of the *res judicata* principle. Accordingly, because of its "special status" a responding Member should be allowed to meet its burden of proof a second time around in these proceedings; a complaining Member, by contrast, according to the United States,

should not be allowed to reargue its case in an Article 21.5 Proceeding. For the reasons outlined by the EC this line of argumentation must fail. The Appellate Body's jurisprudence on *res judicata* is motivated by the need to treat all parties in DSU proceedings on an equal footing. The EC refers in particular to the Appellate Body report in *EC – Bed Linen (Article 21.5 – India)*, para. 96.

E. REPRESENTATIONS MADE IN THE ARTICLE 21.3 PHASE OF THE ORAL PROCEEDINGS

12. As outlined by the EC in its written submission, in the particular circumstances of this case the United States should provide a cogent explanation of why it takes the view now that contrary to earlier assertions it does not need to enact fresh legislation to comply with the DSB's rules and recommendations. In its Second written submission the United States has now provided some explanation, conceding that the legislative action which it had in mind "did not come to pass" and that it therefore had little choice "but to rely on a different means of compliance". However, the EC takes the view that this purported different means of compliance is still nothing more than an attempt by the United States at rearguing its burden of proof under the chapeau of Article XIV GATS. The explanation which the United States has provided in its Second written submission does not absolve it from its obligation under the DSU to bring the WTO-inconsistent measures into conformity.

13. Apart from the *res judicata* principle, it is important to recall that in the original proceedings it was confirmed that a Presidential statement attached to a US federal statute was insufficient to resolve the noted ambiguity between the various acts. For this reason the United States submitted before the Arbitrator that a Presidential Executive Order would not be sufficient to bring its measures into conformity. It must be doubtful therefore whether the additional explanations provided by the United States in its written or oral submissions before this Panel on the interaction between the different federal statutes could provide the requisite clarification to resolve this matter.

F. CONCLUSION

14. This Panel should confirm the findings and conclusions of the original report, as modified by the Appellate Body report.

ANNEX E-3

ORAL STATEMENT BY JAPAN
(28 NOVEMBER 2006) – EXECUTIVE SUMMARY

A. INTRODUCTION

1. Japan participates as a third party because of its systemic interest in the proper functioning of the DSU – in particular, the proper role of Article 21.5 compliance panels, and would like to briefly address, in light of the Antigua and US Second written submissions, three issues concerning the role of Article 21.5 compliance panels under the DSU:

(a) whether the DSU permits a defending Member a "second chance" to argue the substance of the underlying dispute before an Article 21.5 compliance panel;

(b) whether a defending Member's "successful demonstration" before an Article 21.5 compliance panel that a challenged measure is WTO-consistent can be deemed a "measure taken to comply," or whether some independent measure is required; and

(c) whether the new US internet gambling law, enacted after the request for the establishment of this Panel, is properly within the terms of reference.

B. NO "SECOND CHANCE" BEFORE THE 21.5 PANEL

2. The Appellate Body has conclusively ruled in this case that the United States failed to discharge its burden to demonstrate that the challenged measures satisfy the requirements of the chapeau to GATS Article XIV. The US Second written submission dismisses Antigua's argument that the United States is not entitled to a "second chance" to argue its position on the merits before this Article 21.5 Panel. But a precedent seems to support Antigua's position with respect to GATS Article XIV consistency with the measures at issue in light of the IHA. The Appellate Body established in the *EC – Bed Linen* case that there is no "second chance" for a defending Member to use the compliance phase to try to cure deficiencies in its original presentation before the panel and Appellate Body. Consistent with the rule of finality, a compliance proceeding should not be the forum to supplement the arguments on the substantive matters that were already reviewed at the original proceeding.

3. The plain language and structure of the DSU also support this conclusion. Each phase of the dispute settlement process has a distinct purpose assigned by the DSU, and the text of Article 21.5 demonstrates that the purpose of compliance panels is to determine if a new measure complies with the recommendations and rulings of the DSB ("DSB rulings").

4. Japan thus respectfully submits that this Panel must identify and assess some new US measure taken to comply with the DSB rulings. New arguments presented during the compliance phase that attempt to reopen the underlying dispute are irrelevant.

C. ARGUMENTS ARE NOT "MEASURES TAKEN TO COMPLY"

5. The second issue we would like to address is related to the first. The United States in its Second written submission appears to ask this Panel to find that the United States has "successfully demonstrated," during this compliance phase, that its domestic laws subject to the underlying DSB rulings do meet the test in the GATS Article XIV chapeau. However, the US claimed "successful demonstration" is an argument concerning the consistency of domestic US laws with GATS

Article XIV, hence it would not be considered a "measure taken to comply" for purposes of Article 21.5. Both the GATS itself and WTO jurisprudence impose the minimum requirement that a "measure" be some independent act of the Member. There is no question that Members enjoy broad discretion in determining what type of independent measure to take in attempting to comply with DSB rulings. The United States is therefore not necessarily locked into a legislative action, yet there must be some independent act taken for the purpose of the Article 21.5 compliance panel. During this phase of the proceeding, the United States has an obligation to clearly demonstrate how it carried out an independent act to comply with the DSB rulings.

D. THE PANEL'S TERMS OF REFERENCE

6. Finally, we would like to provide our view of the Panel's terms of reference as they relate to the new US legislation, the Unlawful Internet Gambling Enforcement Act of 2006, which was enacted after the Panel was established. Antigua and the United States in their Second written submissions differ on whether this law falls under the Panel's terms of reference.

7. First, in this case, Antigua's request for the establishment of a panel referred to the proposed legislation. Antigua cites two cases – *Australia – Salmon* and *US – Softwood Lumber* – which it claims support its view that the new US law falls within this Panel's terms of reference. Japan notes that the panel in *Australia-Salmon*, in analyzing whether certain measures were within its terms of reference, applied an "adequate notice" analysis. In this analysis, the panel concluded that certain new measures were within the terms of reference because they were so closely related to the specifically challenged measures that Australia could reasonably be found to have received "adequate notice" of the scope of Canada's claims. According to this analysis, it seems that the Panel would be able to conclude that the new US law was so closely related to the measures challenged by Antigua that the United States had "adequate notice" that this compliance proceeding encompasses it. The fact that Antigua described the US legislative proposals in its request to establish this Panel makes this argument even stronger.

8. Second, we would also like to direct the Panel's attention to the decision of the Article 21.5 panel in *Australia – Automotive Leather*. That panel examined whether it had authority to review a measure identified by the United States in its request for establishment of the panel, but Australia claimed that was not relevant. Rejecting Australia's attempt to construe the panel's terms of reference so narrowly, the panel concluded that the new measure identified by the United States was "inextricably linked" to the steps taken by Australia in response to the DSB rulings, in terms of its timing and its nature, hence within the panel's terms of reference. The present case also seems to concern an "inextricable linkage" between the proposed legislation referenced in Antigua's request for the establishment of this Panel and the legislation ultimately enacted.

9. Third, the Appellate Body in *US – Softwood Lumber* fully embraced and applied the principles of *Australia – Automotive Leather* concerning a panel's power to determine the scope of its own mandate in an Article 21.5 proceeding, and took a view that an Article 21.5 panel has broad power to determine what measures are properly before it, and which of them, if any, achieve compliance with DSB rulings.

10. Fourth, the United States stresses in its Second written submission that the new law is not covered by the terms of reference because it was enacted later than the request establishing the panel. However, Japan notes that the relevant jurisprudence does not necessarily mandate this conclusion. The recent decision of the Appellate Body in *EC – Customs Matters* explains that there are situations in which a panel is authorized to review measures enacted after a panel is established where the "essence" of the identified measure is reflected in the new measure. Further, the recent analysis by Article 21.5 panel, such as in *Australia – Salmon*, suggests that the measures to be considered in the 21.5 panel proceeding should be based on the unique circumstances of each case. Timing is not

necessarily conclusive because it could be anticipated at the time of the request for establishment of this Panel that the legislative proposals described by Antigua would soon be enacted into law.

11. Consistent with the recent analysis of the Appellate Body in *EC – Customs Matters*, and in the specific context of Article 21.5, the panel in *Australia-Salmon* noted that measures taken after the establishment of an Article 21.5 panel should not automatically be excluded from the panel's mandate, and depending on the case, there may be compelling reasons to examine measures introduced during the proceedings. Japan is therefore of the view that the particular situation of each case should be taken into account in assessing the terms of reference of the panel.

ANNEX F

REPLIES BY THE PARTIES AND THIRD PARTIES TO QUESTIONS POSED BY THE PANEL

ANNEX F-1

**REPLIES BY ANTIGUA AND BARBUDA
TO QUESTIONS POSED BY THE PANEL
(8 DECEMBER 2006)**

[Question 1 (US)]

Question 2 (ANT, US): 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. As a general proposition, there must be some action subsequent to the adoption of a DSB recommendation in order for there to be a "measure taken to comply" for purposes of Article 21.5 of the DSU. Pursuant to the general rule of interpretation provided for in Article 31 of the Vienna Convention, the terms "measures taken to comply" must be interpreted in accordance with their ordinary meaning, in their context and in the light of the DSU's object and purpose. That context includes, *inter alia*, the DSU's text, its preamble and, above all, the other provisions of Article 21. Article 21 sets out a system for "Surveillance of Implementation of Recommendations and Rulings." The basic rationale underlying the system of Article 21 is clearly set out in its first paragraph: "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." Article 21 further contains a number of mechanisms to achieve that objective of compliance:

(a) If prompt compliance is "impracticable," the implementing Member can request a reasonable period of time pursuant to Article 21.3.

(b) The DSB keeps the implementation process under surveillance pursuant to Article 21.6, which provides that the implementing Member must report on "its progress in the implementation of the recommendations or rulings."

(c) If there is disagreement as to the existence or consistency of measures taken to comply, the issue can be addressed via an Article 21.5 proceeding.

2. The system of "surveillance of implementation" of Article 21 is clearly based on the supposition that the implementing Member must do something, namely, take one or more new measures to comply. If the implementing Member could comply merely by referring to a measure that already existed at the time of the original proceeding, this would make the surveillance procedure of Article 21 meaningless. There would be no need to request a reasonable period of time and there would be no "implementation process" for the DSB to keep under surveillance and "progress" for the implementing Member to report on. Because Article 21.5 of the DSU is part of this surveillance system, the terms "measures taken to comply" must be interpreted in light of their immediate context, which clearly points towards new measures, specifically taken to comply with the DSB recommendation.

3. In this respect it should be noted (pursuant to Article 32 of the Vienna Convention) that the primary objectives of the negotiators of the DSU were (i) to strengthen the dispute settlement process and, (ii), more specifically, "the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations."[1] This

[1] Ministerial Declaration of Punta Del Este, 20 September 1986.

confirms that it is a fundamental principle of the DSU that adopted recommendations must be implemented and that the procedure of Article 21.5 is intended to decide on whether or not there has been implementation. The procedure of Article 21.5 is not intended to give a responding party a "second chance" to argue that it was already in compliance at the time of the original proceeding.

4. This interpretation has been confirmed by the Appellate Body, most notably in *Canada – Aircraft (Article 21.5 – Brazil)* where it said:

> "Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB. In our view, the phrase 'measures taken to comply' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been 'taken to comply with the recommendations and rulings' of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the 'measures taken to comply' which are – or should be – adopted to *implement* those recommendations and rulings."[2]

Sub-question (a): Does the word "measures" have the same meaning as when used in Article 4.2 and 4.4, Article 6.2 and elsewhere of the DSU?

5. Yes. There is no basis either in the text or otherwise for any difference in the meaning of the word in the various places in which it is used in the DSU. Because a term must be interpreted in light of the text of the treaty of which it forms a part, a term will normally have the same meaning when it is used in different provisions of the same treaty. In Antigua's view that would only be different if the treaty itself clarified that the same term is used with different meanings. In its report in this dispute the Appellate Body clearly stated that "the DSU and the GATS focus on 'measures' as the subject of a challenge in WTO dispute settlement"[3] and that a distinction has to be made between "measures" and their effects.[4] Therefore, when assessing "the existence (…) of measures taken to comply," a compliance panel must focus on the existence of an "instrument containing rules or norms"[5] that was "taken to comply." A compliance panel cannot find the implementing Member to be compliant on the basis of the effect of a measure that already existed at the time of the original proceeding.

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

6. "Take" is a verb and in virtually every usage in the dictionary involves active, rather than passive, activity.[6] The word "taken" in Article 21.5 of the DSU, interpreted in light of the context of Article 21 as a whole, implies a positive action in that it requires the implementing Member to do something (as explained above). That interpretation is confirmed by the Spanish text which refers to

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[2] Appellate Body report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36 (emphasis in original).
[3] Appellate Body report on *US – Gambling*, para. 123.
[4] *Id*., para. 122.
[5] Appellate Body report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-82, 88.
[6] "Take." Dictionary.com Unabridged (v 1.0.1). Random House, Inc. 05 Dec. 2006. <Dictionary.com http://dictionary.reference.com/browse/take> Of 83 different usages of "take" as a verb with an object in the cited source, just a handful are passive, and generally involve the receipt of information, visually or otherwise, such as "to take at his word" or to "take a joke."

measures intended to achieve compliance. This necessarily implies that the implementing Member takes a measure, following the recommendations of the DSB.

Sub-question (c): Does the measure need to be specifically aimed at the issue addressed by the DSB recommendation?

7. This would normally be the case. However, it may be possible – although perhaps unlikely – that an implementing Member takes a new measure that (i) is aimed at another issue than the one addressed by the DSB recommendation, but (ii) nevertheless has the effect of achieving compliance.

[Questions 3, 4, 5 (US)]

Question 6 (ANT, US): 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?

8. Once a panel report or an Appellate Body report is adopted by the DSB, under Article 17.14 of the DSU, the report is "unconditionally accepted by the parties to the dispute." This rule has been consistently interpreted by the Appellate Body to provide for the finality of Appellate Body reports, as well as the finality of panel reports that are not appealed. Although the doctrine has been articulated on a number of occasions[7], it has been most comprehensively delineated in *EC – Bed Linen (Article 21.5 – India)*,[8] which has been discussed in written submissions by Antigua[9] as well as the European Communities[10] and Japan.[11] This doctrine has never been rejected and continues to be relied upon by panels operating under Article 21.5 of the DSU.[12]

9. As a general proposition, all judicial or other dispute resolution systems require a concept of finality of the process at some stage. For example, under United States law, a dispute in the federal court system is finally resolved upon determination of the United States Supreme Court.[13] Under the legal system of Antigua, a decision of the Judicial Committee of the Privy Council marks the final end of a dispute.[14] The need for finality in any system is without real question. Article 17.14 of the DSU incorporates this concept into dispute resolution at the WTO.

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[7] *See, e.g.*, Appellate Body report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 89-96; Appellate Body report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 78-79.

[8] Appellate Body report on *EC – Bed Linen (Article 21.5 – India)*, paras. 90-97.

[9] First written submission of Antigua and Barbuda, *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 (25 September 2006) (the "AB First Submission"), para.32; Rebuttal submission of Antigua and Barbuda, *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 (30 October 2006) (the "AB Second written submission"), paras. 24-28.

[10] Third party submission of the European Communities, *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 (23 October 2006), paras. 42-47.

[11] Third party submission of Japan, *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 (23 October 2006), paras. 7-15.

[12] See, e.g. Panel report on *United States – Oil Country Sunset Reviews (Article 21.5 – Argentina)*, paras. 7.93-7.94.

[13] U.S. CONST. art. III; L. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 160 (1960).

[14] Antigua and Barbuda Constitution Order 1981, Chapter IX, Section 122, Para. 1.

Question 7 (ANT, US): 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?

10. This issue has been definitively resolved by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* as well, where the question was taken square on. The Appellate Body held that there was no difference whether a claim failed for failure to establish a prima facie case or whether it was rejected after a full hearing.[15]

[Questions 8, 9, 10 (US)]

Question 11 (ANT, US): Is the rule in Article 17.14 of the DSU, that an adopted Appellate Body report "shall be unconditionally accepted by the parties", absolute? For example, would it apply where a recommendation was inconsistent with Article 19.2 of the DSU? Or where a report exceeded the scope set out in Article 17.6 of the DSU?

11. Antigua agrees with the comments in this regard made by the representative of China at the Panel's session with the third parties held on 28 November 2006. At that meeting, China indicated in the context of Article 19.2 of the DSU that the provision should be viewed as a directive aimed at the Appellate Body in conducting its review and making its determinations, rather than some stand-alone doctrine. Article 17.6 of the DSU is best viewed in that light as well, although Article 17.6 can also be seen as a directive to the parties to an appeal themselves.

12. The real problem with any other approach is that who is to make a "determination" that (i) "a recommendation with inconsistent with Article 19.2" or (ii) "a report exceeded the scope set out in Article 17.6?" To the extent that such a determination can be made at all, under the DSU, this function can only be exercised by the DSB pursuant to Article 17.14. Obviously, it cannot be for a party to a dispute to unilaterally determine whether a report of the Appellate Body that has been adopted by the DSB has been determined correctly and in compliance with the DSU.

13. In a case of an Appellate Body report that was clearly wrong to such a material respect that a party to a dispute felt the report should not be adopted by the DSB, Article 17.14 of the DSU would appear to give the party the ability to address the DSB on the issue and to convince the DSB not to adopt the offending report by consensus. Although Antigua is unaware of this ever occurring since the inception of the WTO in 1995, it does appear to be possible under a literal reading of Article 17.14.

[Question 12 (US)]

Question 13 (ANT): 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?

14. Antigua does not believe that any of these provisions (or any other DSU provision, for that matter) accord an implementing Member any "special status." As the complaining party, and the party entitled to the benefit of compliance, if any party is entitled to "special status" logically it would be the complaining party. One of the main concerns of the drafters of the DSU was to ensure

[15] Appellate Body report on *EC – Bed Linen (Article 21.5 – India)*, para. 96.

effective implementation (see the response to Question 2 above). It is that concern that is at the basis of provisions of Articles 19 and 21. Not some desire to protect the implementing Member.

15. That being said, there are clearly certain provisions that focus on the implementing Member, such as Article 19.1 of the DSU and Article 21.3. Because it is the implementing Member that must do the complying, it follows that it will be the subject of some focus during the compliance process. As far as knowing "what aspects of a measure it is required to modify to comply with a DSB recommendation," under Article 19.1 of the DSU a panel or the Appellate Body may make a direct suggestion as to how recommendations may be implemented. In practice, such suggestions are the exception,[16] and in the rare instances where given, the panel or the Appellate Body are clear and specific on what the recommendations are.[17]

16. In the vast majority of cases, implementing Members are generally left to determine themselves how to comply with a recommendation.[18] However, as a general proposition when a measure is found to be contrary to a Member's obligations under a covered agreement, the offending measure is expected to be withdrawn:

> "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."[19]

17. This should not be difficult in most cases where a measure is found inconsistent with a covered agreement, as both the measure and the nature of its inconsistency will be identified and determined in the course of the proceeding, just as was the case in the original proceeding in this matter.

18. Antigua does not see anything in the DSU, nor in any related jurisprudence, that is directed towards protecting an implementing Member from "from having to face a second claim with respect to the same aspect," and, were that to be the case, there is nothing in this proceeding to which such a doctrine might be relevant.

[Questions 14 and 15 (US)]

Question 16 (ANT, US): What authority does the DSU grant the Appellate Body to extend an invitation to a Member to demonstrate a point after the conclusion of an appeal? (US FWS §44) How would such an invitation affect the recommendation by the DSB? Why did the Appellate Body not expressly suggest ways in which the U.S. could implement the recommendations?

19. Antigua submits that the DSU does not grant any such authority. Nor did the Appellate Body extend such an "invitation" to the United States in this matter. To do so would be contrary to Article 17.14 of the DSU, as that article clearly anticipates that the adoption of a final report by the DSB will result in the end of the matter–and the DSU itself does not provide for any further level of appeal, or remand procedure, that would provide any forum for such a "demonstration." Such an invitation would be illogical.

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[16] Panel report on *Korea – Certain Paper*, paras. 9.1-9.4.

[17] S*ee, e.g.*, Panel report on *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.155-6.158; Panel report on *Guatemala – Cement I*, para. 8.6; Panel report on *US – Cotton Yarn*, para. 8.5.

[18] Panel report on *US – Steel Plate*, para. 8.8.

[19] DSU Article 3.7. *See also* Panel report on *US – FSC II (Article 21.5 – EC)*, para. 7.26; Panel report on *Dominican Republic – Import and Sale of Cigarettes*, fn. 381.

20. While the Appellate Body (or the panel, for that matter) could have suggested one or more methods of compliance pursuant to Article 19.1 of the DSU, neither chose to do so for reasons that Antigua has no knowledge of.

[Questions 17 and 18 (US)]

Question 19 (ANT, US): If a respondent were entitled to a "second chance" to make out a defence would the compliance panel make its assessment on the basis of evidence presented in the compliance proceeding only, or the evidence presented in the original proceeding as well?

21. This is a particularly hypothetical question, as no WTO dispute resolution case has ever allowed a "second chance" to a respondent or to a complainant on any issue. That being said, Antigua can see no reason why evidence from the "original go-round" should not be up for consideration as well as new evidence under such a circumstance.

Question 20 (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?

22. Antigua would expect a Member under such circumstances to have raised the issue with the DSB at the time of the adoption of the applicable Appellate Body report. In the absence of such an action, once a report is adopted by the DSB, it has to be implemented. In the absence of implementation, the complainant must be allowed to suspend concessions pursuant to Article 22 of the DSU. Any "new" or "sufficient" evidence cannot lead to a modification of the original report. Therefore, such evidence can play no role in proceedings under Article 21 or 22 of the DSU because these are exclusively related to the implementation of the DSB recommendations resulting from the original panel and Appellate Body proceedings.

23. 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.

Question 21 (ANT): If a respondent were not entitled to a "second chance", would this be reasonable in a hypothetical case after a complex original dispute that presented numerous novel issues, especially if the dispute involved an under-resourced respondent who was unfamiliar with WTO dispute settlement?

24. As a general proposition, dispute settlement has developed in a more formalistic way than Antigua (and probably many other developing countries) would like to see. A good example from this case is the fact that the original Panel and the Appellate Body insisted that Antigua not just identify but also comprehensively discuss hundreds of specific United States "measures" in a very complex and opaque federal system of government, despite the fact that the United States had confirmed on numerous occasions – including in front of the DSB – that it prohibited the cross-border supply of gambling and betting services from Antigua to consumers in the United States. Another example is the fact it was only in the report of the Appellate Body that it was clarified that, when a respondent invokes a general exemption clause, it is the complainant that has to put forward less restrictive

alternatives. As a minimum, parties to a legal proceeding should be told the rules on evidence before or during a procedure – and not afterwards. These remarks have, however, no immediate bearing on this compliance proceeding. Rather, Antigua makes these points to demonstrate that the problem of the capability of under-resourced developing countries is a much broader one than the issue of giving them a "second chance" in a compliance proceeding.

25. That being said, Antigua agrees with the European Communities in this respect, and expects that each party to a dispute advance its best possible case and bear the consequences. That is truly a hallmark of virtually every legal system, where the participants themselves bear the responsibility for the quality and prosecution of their cases. If, as no doubt happens frequently, such a result ends in injustice or a faulty result it is unfortunate, but to distort the dispute resolution process itself to accommodate such a circumstance would be appalling. If a need exists to change the system, then that is for the Members to decide and to remedy as a systemic issue.

26. Just as it is clear from Article 17.14 of the DSU that an Appellate Body report adopted by the DSB is final and binding on the parties, it is just as clear in Article 21.5 that the role of a compliance panel is limited to – notwithstanding how broad may be their scope of examination in the process – compliance with the recommendations and rulings of the DSB. To do otherwise, including to give the implementing Member a "second chance" to establish their case-in-chief, would be manifestly outside the scope of the compliance panel's authority.

[Question 22 (US)]

Question 23 (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.

27. Antigua's "case" on the Interstate Horseracing Act is simply that it permits domestic interstate remote gambling on horse racing in the United States, as well as regulating certain aspects of intrastate remote gambling on horse racing when the applicable race takes place in another state. 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. Operators who offer horse racing services under the auspices of the state laws and regulations of the state in which they operate are immune from IGBA prosecutions, because, to establish an IGBA violation, the government must establish as a "predicate offence" that the defendant has violated state gambling law. In simple terms, the IHA is an integral component of United States federal and state law that collectively permit domestic remote gambling operators to offer services without risk of criminal prosecution under the IGBA. Antiguan operators who offer the same services, on the other hand, are generally subject to prosecution under the IGBA due to the IHA's discriminatory treatment of foreign operators.

[Questions 24 and 25 (US)]

Question 26 (ANT, US): Does the fact that statements are made in the context of Article 21.3(c) of the DSU require that they be given different weight from that accorded to any other statements of a party concerning an issue in dispute?

28. The fact that express representations were made by the United States to the WTO-appointed arbitrator, as well as to Antigua, during the course of the arbitration in this matter under Article 21.3 of the DSU should be accorded substantial weight by this Panel in assessing the United States' compliance with the recommendations and rulings of the DSB. In particular, Articles 21.3 and 21.5 are both part of the implementation surveillance system of the DSU and accordingly, statements made in the Article 21.3 context should be given special weight. These are not just statements made in a

random context – rather, they are statements made in the very specific context of the implementation surveillance system. If a WTO Member were able to change its position randomly or without justification when going through the implementation surveillance process, this would make the entire process a futile exercise.

29. With this in mind, the representations should be accorded substantial weight in assessing the claim of the United States that its original measures have been in compliance from the beginning of the process, without need for any further action on the part of the United States. As the United States had conceded, as well as argued, that legislative action of some type was necessary for the United States to comply with the DSB rulings, the fact that it now comes before this Panel having done nothing but nonetheless asserting compliance should serve as probative evidence that the United States is not in compliance.

30. The statements should be accorded substantial weight by virtue of being made, and repeated, by the United States during the course of dispute resolution proceedings. As the panel in *United States – Sections 301-310 of the Trade Act of 1974* concluded in assessing the consequence of representations regarding domestic law made by the United States to the panel during the course of the dispute:

> "We are equally satisfied, as a matter of fact, that the statements made to us were intended to be part of the record in the full knowledge and understanding that they could, as any other official submission, be made part of our Report; that they were made with the intention not only that we rely on them but also that the EC and the third parties to the dispute as well as all Members of the DSB – effectively all WTO Members – place reliance on them."[20]

31. Antigua agrees with the European Communities that such solemn representations by a party to a dispute cannot for ever be held to them, but if a party is to change its position it must provide a reasonable explanation to all concerned as to why its position has changed and what its justification is. Again, Antigua agrees with the European Communities that the American argument that it has been in compliance all along is *per se* unreasonable.

[Questions 27 to 31 (US)]

Question 32: 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).

> **Sub-question (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?**

32. This question illustrates the difficulty in separating United States law from practice that Antigua has (by and large unsuccessfully) raised throughout the course of this dispute. Indeed, this difficulty is one of the primary reasons why Antigua argued that the United States' own admission as to its prohibition on the cross-border supply of gambling and betting services such as those provided from Antigua – combined with its enforcement efforts in that regard – should of itself have been capable of assessment by the original panel in the underlying proceeding. The reality is that the text of the United States' laws do not necessarily support the United States government's interpretations of them, nor are the laws of the various states consistent in their reference or interaction with federal law.

[20] Panel report on *US – Section 301*, para. 7.124 (emphasis added).

33. To the extent that these state laws authorise remote gambling within state boundaries, they are not contrary to the Wire Act or any of the other federal legislation. To the extent that they permit remote gambling that crosses a state border, then they arguably might violate either the Wire Act, the Travel Act, the IGBA or two or more of them. With respect to the Wire Act, the United States takes the position that the Wire Act prohibits all betting that crosses a state or international border, regardless of whether the betting is otherwise legal in both jurisdictions, and that Section 1084(b) of the Wire Act applies only to "information" pertaining to betting and not to actual bets or wagers themselves.[21] Outside the context of the IHA, this position is consistent with the decision of the United States federal appellate court in the *United States v. Cohen* case.[22]

34. Thus, to the extent any of these state laws allow a bet to cross a state line, that law would be contrary to the Wire Act under the reading given it by the United States, but for the application of the IHA. Of the 18 states that currently allow remote gambling on horse racing, the laws of eight of them expressly permit remote wagering under certain circumstances where the punter is located in a state other than that in which the gambling service provider is located.[23]

35. Under the view that the IHA permits interstate remote wagering as long as the conduct is legal in both states, neither the Travel Act nor the IGBA would have application, as the conduct would not violate state law, nor would it (in the context of the Travel Act) violate any federal law.

> **Sub-question (b) (ANT): Some of these laws and regulations do not refer to the IHA, some relate to wagering not only on horseracing but also on other sports such as greyhound racing, some allow wagers placed from foreign jurisdictions, and all apply to intrastate wagering. To what extent then do these laws depend on some authority granted by the IHA?**

36. As noted above, to the extent they sanction wholly-intrastate remote gambling, the state statutes do not need the IHA to be lawful. Under the United States' reading of the Wire Act, all states must rely on the IHA to the extent they permit the remote wagers to cross state borders. Interestingly, some of the state laws appear to be structured to attempt to bring themselves within the scope of Section 1084(b) of the Wire Act, notwithstanding the position of the United States and the decision of the court in the *Cohen* case. For example, the California advance deposit wagering statute clearly appears to be viewed this way, with the "entity holding the account" of the punter be considered to be making the wager "pursuant to wagering instructions issued by the owner of the funds communicated by telephone call or through other electronic media."[24] Under this approach, the IHA would arguably not be necessary to legitimise the conduct and the wagering would not necessarily have to be limited to horse racing contests.

> **[Sub-questions (c) and (d) (US)]**

Question 33 (ANT, US): Does the IHA only allow domestic suppliers to operate wagering services on horseracing, or can foreign suppliers in some way operate under its auspices? If

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[21] First written submission of the *United States, 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 (16 October 2006), para. 8.

[22] *United States of America v. Jay Cohen*, 260 F.3d 68 (2 Cir. 2001), *cert. denied*, 536 U.S. 922 (2002).

[23] These states are California, Idaho, Kentucky, Louisiana, Maryland, Nevada, Oregon and Wyoming. WEST'S ANN.CAL.BUS.&PROF.CODE § 19604 *[Exhibit AB-34]*; IDAHO CODE §54-2512 *[Exhibit AB-36]*;KY.REV.STAT.ANN.§§230.777(2) *[Exhibit AB-37]*; LA.ADMIN.CODE tit. 35, pt. XIII, § 12003(A) *[Exhibit AB-38]*; MD. REGS. CODE tit. 09, § 10.04.24(C)(2) *[Exhibit AB-39]*; NEV. GAM. REG. 26C.160 *[Exhibit AB-41]*; OR. ADMIN. R. 462-210-0020 to -0030 *[Exhibit AB-47]*; WYO. RULES & REG. DEP'T COMMERCE, PC Ch. 9, § 2 *[Exhibit AB-51]*.

[24] WEST'S ANN. CAL. BUS. & PROF. CODE § 19604(b). *See Exhibit AB-34*.

Antiguan operators entered into revenue-sharing arrangements with racetracks, would they still be liable to prosecution?

37. As Antigua pointed out in its First written submission,[25] the express language of the IHA permits cross-border wagering only between states – thus, Antigua could not qualify under its terms regardless of whether its operators entered into agreements with the tracks or not.

[Question 34 (US)]

Question 35: Regarding Youbet.com, TVG, XpressBet.com, Capital OTB and the other U.S. domestic operations described by Antigua (Exhibits AB-65 to AB-73):

> **Sub-question (a) (ANT): Do they engage in any form of wagering other than pari-mutuel wagering on horseracing?**

38. To Antigua's knowledge, of the referenced companies, only one – "US Off-Track" – allows betting on a sport other than horse racing.[26] While the favouritism shown for horse racing may be curious, it is in the end irrelevant to the dispute in this case, where the focus is solely on the distinction between "remote" and "non-remote" gambling and betting services. The United States has acknowledged that the precise nature of the betting is not relevant.[27]

> **Sub-question (b) (ANT): Do these operators knowingly use a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or communications entitling persons to receive money or credit as a result of bets or wagers? Or do they only transmit information assisting in the placing of bets or wagers that falls within the safe harbour provision of 18 U.S.C. 1084(b)?**

39. Antigua does not know the answer to this question, but suspects that most of the operators "knowingly use a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers" under the view that the IHA exempts their activities from the scope of Wire Act coverage.[28] Given the reaction of the horse racing industry to the passage of the new United States prohibition law, this would appear to be the case.[29]

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[25] AB First written submission, paras. 50-51.

[26] Antigua has pointed out in this proceeding that there are operators, such as Stations Casino in Nevada, that offer telephone and online remote account wagering on professional and amateur sporting events [*Exhibit AB-80*]. The Stations Casino remote betting sports book service is sanctioned by Nevada law. Moreover, like the horse race wagering companies listed in *Exhibits AB-65 to AB-73*, it has not been threatened with or prosecuted for violations of federal or state criminal laws.

[27] Award of the Arbitrator, WT/DS285/13 (19 August 2005), para. 9.

[28] YouBet.com Frequently Asked Questions [*Exhibit AB-65*] ("Youbet.com® is in full compliance with all applicable state and federal laws."); *see also* YouBet.com 2005 Form 10-K (13 March 2006), p. 8 [*Exhibit AB-65*] ("We also accept pari-mutuel wagers from subscribers in other states where existing state laws purport to prohibit or restrict our ability to accept pari-mutuel wagers from such states. However, we believe accepting such wagers is permitted pursuant to the Interstate Horseracing Act of 1978, as amended, state laws, and certain other laws and legal principles and doctrines, including those contained in the U.S. Constitution."); Magna Entertainment Corp 2005 Form 10-K (16 March 2006), p. 42 [*Exhibit AB-67*] ("In December 2000, legislation was enacted in the United States that amends the Interstate Horseracing Act of 1978. We believe that this amendment clarifies that inter-track simulcasting, off-track betting and account wagering, as currently conducted by the U.S. horse racing industry, are authorized under U.S. federal law.").

[29] AB Second written submission, para. 56, fn. 101.

Sub-question (c) (ANT): What is Antigua's view of the legality of wagering covered by the Wire Act that falls outside the scope of the IHA, such as wire transmission of non-horse-racing sports betting, and non-sports betting? Is it illegal?

40. Antigua believes that the Wire Act does not apply to non-sports gambling, and thus from a federal law perspective, cross-border gambling on non-sports betting is not *de jure* prohibited. This view is supported by federal case law. In 2002, a United States federal appellate court ruled that the Wire Act does not apply to online casino gambling.[30] In that particular case, the plaintiffs filed a civil suit to avoid credit card debts incurred as gambling losses at online casinos. To establish their claim, the plaintiffs sought to establish that the online casino gambling violated the criminal provisions of the Wire Act. The federal appellate court held that the Wire Act concerns only gambling on sporting events or contests, and did not apply to casino gaming.[31] The United States Department of Justice disagrees with this ruling and is of the view that the Wire Act applies to the remote provision of non-sports gambling and betting services as well.

Sub-question (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 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?

41. Antigua is uncertain as to why the United States has not prosecuted domestic operators offering services under the auspices of the IHA. It is certainly not because of the "nature of what these operators actually transmit by wire," because as Antigua demonstrated in its First written submission[32] and as is apparent from accessing these sites, they operate in all material respects like a typical Antiguan operator.

42. The non-prosecution of these operators has been offered in this proceeding by Antigua to support its contention that the IHA authorises domestic remote gambling in the United States. Taking collectively (i) the language of the IHA; (ii) the interpretation given to it by legal authorities and commentators; (iii) the language in the new United States prohibition legislation with respect to "activity allowed by the IHA"; (iv) the numerous state legislative and regulatory schemes for remote gambling on horse racing, a number of which expressly reference the IHA; (v) the extent of current sanctioned remote gambling in the United States on horse racing; and (vi) the complete lack of prosecutions of these operators, Antigua believes it is impossible for the United States to meet any burden of proof that the IHA does not permit domestic remote gambling.

43. Further, as the language of the new federal prohibition law has demonstrated, it should now be clear that the Wire Act does not prohibit wholly-intrastate remote gambling. As Antigua demonstrated in its First written submission,[33] the State of Nevada has in place a regulatory scheme for intrastate remote gambling on sports and other contests and at least one operator is currently in business and utilising this scheme.[34] Additionally, there is significant, state-sanctioned remote gaming in lotteries in the United States.[35]

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[30] In Re Mastercard International Inc., 313 F.3d 257 (5th Cir. 2002).
[31] 313 F.3d at 262.
[32] AB First written submission, paras. 89-103; Schedule 2.
[33] *Id*., paras. 118-122.
[34] *Id*. *See Exhibit AB-80*.
[35] *Id*., paras. 123-129. *See Exhibit AB-83*.

44. Because the United States took the position with respect to the chapeau of Article XIV of the GATS that the United States permitted no remote gambling at all, Antigua does not believe that the legal basis for the remote gambling is as important with respect to the chapeau as is the fact of the domestic remote gambling. In particular, Article XIV is concerned primarily about the application of measures–Antigua's point is that in actual application, the Wire Act, the Travel Act and the IGBA are applied in a discriminatory manner because domestic, sanctioned remote gambling exists in the United States. Thus, whatever it is that the federal statutes say, by prohibiting services from Antigua and allowing domestic industry, the United States cannot possibly demonstrate compliance with the chapeau of Article XIV.

[Sub-question (e) (US)]

[Questions 36 and 37 (US)]

Question 38: With respect to the question whether the three Federal criminal statutes at issue are, on their face, non-discriminatory.

Sub-questions (a) (ANT, US): Did the Appellate Body have competence to make the finding at paras. 354 and 357 of its report when this was not covered in the Panel report or a legal interpretation developed by the Panel, and it was contested by Antigua (original first oral statement, para. 92; original Second written submission, paras. 33-34)?

45. As a practical matter, in light of Article 17.14 of the DSU it probably does not much matter. However, there is no question that the panel itself made no finding that either the Wire Act, the Travel Act or the IGBA were facially non-discriminatory[36] but that the Appellate Body did so determine.[37] Arguably, as there was no such legal finding by the panel, under Article 17.6 the Appellate Body did not have jurisdiction to make the conclusion on its own. However, there is also authority to the effect that the Appellate Body has the power and authority to review such legal matters and make such legal determinations as is necessary in order to fulfil its mandate with respect to a matter before it.[38]

Sub-question (b) (ANT): Does Antigua challenge the evidence that the original Panel considered relevant to the chapeau of Article XIV of GATS in paras. 6.584 and following of its report - which does not include the wording of the three Federal criminal statutes on their face? Why did Antigua not raise this point at the interim review stage? Did Antigua raise it on appeal? (Antigua SWS §9)

46. In Antigua's view the original panel should not have developed such an extensive discussion on Article XIV in the absence of a full debate on the issue. A full debate on this complex factual matter was the only way in which the panel could have made a fully informed decision. In the absence of such a full debate, Antigua believes that the original panel should have limited its assessment of Article XIV to those issues that were specifically discussed by the parties. These were indeed very limited, but the limited nature of the debate was entirely attributable to the fact that the United States chose not to develop its Article XIV defence in the original proceeding. Having only raised the Article XIV defence in its final submission – after Antigua's final submission had been made as well, the United States precluded the panel from making a coherent analysis of the purported

[36] *See* Panel report on *US – Gambling*, paras. 6.360-3.380.
[37] Appellate Body report on *US – Gambling*, para. 354.
[38] Appellate Body report on *EC– Hormones (Canada)*, para. 132; Appellate Body report on *US – Gasoline*, pages 22-29; Appellate Body report on *Canada – Periodicals*, pages 20-23.

defence.[39] In that respect, Antigua fundamentally disagreed with the approach adopted by the original panel. Such a fundamental disagreement could not, in Antigua's opinion, be fruitfully resolved at the interim review stage. Antigua appealed this issue to the Appellate Body but its appeal was rejected.

47. Antigua did not of course raise the issue regarding the three federal criminal statutes on appeal because the Panel had not made a finding with respect to them being facially discriminatory or not.

[Sub-question (c) (US)]

[39] Antigua also strongly disagrees with the proposition apparently advanced by the Appellate Body that Antigua should have requested an extension of the original proceedings in order to adequately address the Article XIV issues. Appellate Body report on *US – Gambling*, paras. 274-276. A complaining party should not be forced into a Hobson's choice late during the course of a proceeding by a respondent's litigation tactic.

ANNEX F-2

REPLIES BY THE UNITED STATES TO QUESTIONS POSED BY THE PANEL (8 DECEMBER 2006)

Question 1 (US): The DSB recommended that the U.S. "bring its measures into conformity" with its obligations under the GATS. Does the U.S. consider that it has already brought its measures into conformity, or that it did not need for certain reasons to bring its measures into conformity? If so, what are these reasons?

1. The United States considers that its measures are consistent with its obligations under the GATS, and that the United States has complied with the recommendations and rulings of the DSB by presenting new evidence and arguments during this proceeding which meet the US burden of proof to show that the US measures meet the criteria of the Article XIV chapeau.

2. The language cited in the Panel's question – "bring its measures into conformity" – is set out in, and required by, Article 19 of the DSU. It is important to view that language within the context of the entire article:

> "Article 19: Panel and Appellate Body Recommendations
>
> 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.
>
> 2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

3. The language about "bringing a measure into conformity" is in the same sentence, and follows upon, a reference to what the panel or Appellate Body has concluded with regard to the inconsistency found by the Panel or Appellate Body with a covered agreement. The United States submits that what it means in a particular dispute to "bring a measure into conformity" cannot be considered in the abstract, but must depend on the specific circumstances of the dispute, and most importantly the specific findings of the Panel or Appellate Body.

4. As the United States has explained in its written and oral submissions, in this dispute the Appellate Body explicitly noted that it was not making a finding as to whether the IHA provides an exemption from the three federal criminal statutes at issue. Rather, the Appellate Body found that the United States had not met its burden of proving this point, and thus had not met its burden of establishing an affirmative defence. In this context, one option for the United States to bring its measures "into conformity" was to proceed to meet its burden of proof to show that those measures were within the scope of the GATS Article XIV(a) exception.

Question 2 (ANT, US): 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:

5. As the United States will elaborate in the answers to the subparts below, the United States does not consider that the "measure" in the phrase "measure taken to comply," as used in Article 21.5 of the DSU, must necessarily be more recent than the original proceeding. Article 21.5 does not itself specify a temporal element or limitation on the date that the measure is "taken." Indeed, it is not difficult to conceive of a number of situations in which the measure at issue in an Article 21.5 proceeding is the same as the measure at issue in the original proceeding. Some examples would be:

(a) a measure that on its own terms expires or terminates at a certain time or under certain conditions. Where as a result the measure is no longer in existence as of the time of the Article 21.5 proceeding, the measure will no longer be inconsistent with the DSB recommendations and rulings, but that will not be because the measure taken to comply was more recent than the original proceeding.

(b) a measure that is brought into consistency not through a change to the measure but due to a change in the underlying explanation or basis for the measure. For example, a sanitary or phytosanitary measure for which the risk assessment was found not to have adequately explained a particular element and is revised to comply with the SPS Agreement or an antidumping duty for which the inconsistency was a lack of adequate explanation for how the administering authority took evidence into account the evidence.

(c) a measure that is brought into consistency through an external event, such as a sanitary or phytosanitary measure for which an international standard is adopted after the DSB recommendations and rulings that brings the measure into conformity with the SPS Agreement or an actionable subsidy for which external factors have resulted in there no longer being adverse effects.

6. Article 21.5 must be read together with DSU Article 19, which describes the recommendations and rulings with respect to which the Member concerned must "comply." In particular, Article 19 does not provide that a Member concerned must adopt a new measure in order to achieve compliance. Rather, Article 19.1 states: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." To be sure, in many cases the Member concerned will choose to bring its measure into conformity by adopting a new or amended measure. (And in that case, the new or amended measure would be subsequent to the original proceeding.) However, Article 19 leaves open the possibility of bringing a measure into compliance through means other than adopting a new or amended measure. Whether this option is available to the Member concerned in a particular dispute will depend on the specific findings of the panel and/or Appellate Body and the particular circumstances of the case.

Sub-question (a): Does the word "measures" have the same meaning as when used in Article 4.2 and 4.4, Article 6.2 and elsewhere of the DSU?

7. While the DSU does not define the word "measures," the United States is not aware of a basis for believing that the term "measures" in Article 21.5 would have a different meaning than when used in other articles of the DSU.

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

8. The United States understands that the thrust of this question is whether phrase "taken to comply" means something along the lines of "adopted by the Member concerned for the purpose of compliance." The phrase "taken to comply" would include this meaning, but it is not so limited. The

Appellate Body in *US – Softwood Lumber IV* explained its views on the ordinary meaning of the word "taken" as used in DSU Article 21.5:

> "66. In examining the meaning of 'measures taken to comply' in Article 21.5, we begin with the word 'taken'. There is a wide range of dictionary meanings of the word 'taken', which is the past participle of the verb 'take'. The meanings of 'take' include, for example, '[b]ring into a specified position or relation'; '[s]elect or use for a particular purpose.'"[1]

9. The first definition cited by the Appellate Body "bring into a specified position or relation" has a sense, perhaps, of the "positive action" referred to in the Panel's question. But the second meaning – "select or use for a particular purpose" – is not limited to the sense of adopting a new measure for a particular purpose. Under this latter meaning of the verb "take," a pre-existing measure would fit within the meaning of DSU Article 21.5. In other words, under this meaning, the original measure considered in the underlying proceeding would be "selected or used for a particular purpose" – namely, the purpose of showing compliance with the recommendations and rulings.

10. One of the illustrative sentences used in the New Shorter Oxford English Dictionary shows this second meaning of the term taken. That sentence is "That great genius is taken as the standard of perfection."[2] Here, the "great genius" is not in any sense actively adopted, or moved from one place to another. Rather, the person who is the "great genius" is used for a particular purpose, which is to establish a "standard of perfection." Similarly, in the context of the current dispute, the original measure has not been newly adopted for the purpose of compliance, but rather is being used for the particular purpose of establishing compliance with the DSB recommendations and rulings.

11. The DSU used the word "taken," rather than more limiting phrases such as "measure adopted for the purpose of achieving compliance." In fact, "take" appears to be one of the broadest verbs in the English language, with 9 major categories of definitions, plus dozens of shades of meaning within those categories.[3] If the drafters of the DSU wished to have a more limited definition of the phrase "measures taken to comply," they would have used language that more precisely limited the measures to be considered under Article 21.5.

12. Moreover, as the United States has explained above and in its prior oral and written submissions, the context of the phrase "measures taken to comply" must include the rest of the DSU, including Article 3.2 and Article 19.2. First, both of those articles provide that the recommendations and rulings of the DSB cannot add to or diminish rights and obligations under the covered agreements. Those rights include the right to adopt measures that fall within the scope of the GATS Article XIV exception. To be consistent with Article 3.2 and Article 19.2, a finding that a measure may or may not fall within GATS Article XIV cannot require a Member to abolish or amend such a measure. In this context, the only sensible way to read "measure taken to comply" in Article 21.5 is for such a "measure" to include the measure examined in the original proceeding that may, or may not be, within the scope of GATS Article XIV.

13. In addition, Article 21.5 must be read in the context of DSU Article 19.1, which describes the recommendations and rulings with respect to which the Member concerned must "comply." Article 19.1, however, does not provide that a Member concerned must adopt a new measure in order to achieve compliance. Rather, the Member concerned must bring the measure into conformity with

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[1] Appellate Body report on *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 (*US - Softwood Lumber IV*), at para. 66.

[2] New Shorter Oxford English Dictionary (1993), page 3207.

[3] *Id.* at 3206-3209.

that agreement." Article 19.1 does not necessarily require that a new measure be adopted in order to bring the pre-existing measure into conformity.

14. Finally, the United States notes Article 3.2 of the DSU:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

15. The dispute settlement system would not be providing "security and predictability" to the multilateral trading system if Members were foreclosed for procedural reasons from establishing in an Article 21.5 proceeding that the measures subject to the recommendations and rulings are in fact consistent with the covered agreements. Furthermore, such an interpretation of Article 21.5 would not serve to "preserve the rights and obligations under the covered agreements." Rather, it could, as would be the case if Antigua prevailed on its procedural argument in this dispute, "add to" the obligations of a Member by requiring it to replace or modify a measure even when that measure is already consistent with the covered agreements, and would "diminish" the right of a Member to maintain a measure that in fact is in accordance with the covered agreements.

Sub-question (c): Does the measure need to be specifically aimed at the issue addressed by the DSB recommendation?

16. As explained above, the United States does not consider that the measure taken to comply must be newly and specifically adopted for the purpose of compliance. Rather, under the ordinary meaning of Article 21.5, in context, and in light of the object and purpose of the DSU, the original measure may be used for the purpose of establishing compliance with the recommendations and rulings of the DSB.

17. Moreover, the United States notes that the Appellate Body in *US – Softwood Lumber IV* expressly found that a measure plainly not aimed at compliance nonetheless fell within the scope of a "measure taken to comply" under DSU Article 21. The Appellate Body noted that: "The fact that Article 21.5 mandates a panel to assess 'existence' and 'consistency' tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of*, or *have the objective of achieving*, compliance."[4]

Question 3 (US): Can you further elaborate on the relevance of US-Shrimp for our deliberation with respect to "measures taken to comply"?

18. The United States respectfully refers the Panel to the US answer to Question 16 below.

Question 4 (US): What other circumstances, apart from the "unusual" situation in this dispute, could justify treating the same measures in the original dispute as the "measures taken to comply"? (US oral statement, paras. 5 and 9)

19. The United States submits that no "special" justification is required. Instead, the United States submits that this is allowed for under the DSU, and whether or not the original measure is the

[4] Appellate Body report on *US – Softwood Lumber IV*, at para. 67 (emphasis in the original).

measure "taken to comply" will depend on the specific facts and circumstances of a particular dispute. The United States provides examples of such circumstances in paragraph 5 above.

Question 5 (USA): Do you argue that new evidence, the presentation of new evidence or re-arguing a defence constitute your "measure taken to comply" for the purposes of Article 21.5 of the DSU in this dispute?

20. The United States is relying on the original measure in dispute as its "measure taken to comply" under Article 21.5. The new evidence and arguments in the US written and oral submissions are not "measures," but instead are the means chosen by the United States to bring its measures into compliance by clarifying the relationship between the IHA and the three federal criminal statutes.

Question 6 (ANT, US): 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?

21. Indeed, the United States is relying in this proceeding on the finality of the Appellate Body report adopted by the DSB in the original proceeding. The Appellate Body expressly noted that due to the limited factual record, neither the Panel nor the Appellate Body was able to determine whether or not the challenged US measures met the requirements of the Article XIV chapeau. The United States is not asking the Panel to revisit this finding. Rather, the United States is requesting that the Panel proceed to examine the issues under the Article XIV chapeau based on new evidence and arguments not previously available to the Panel or Appellate Body.

Question 7 (ANT, US): 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?

22. The question of whether or not a Member has complied with the recommendations and rulings in a particular dispute depends on the specific facts and circumstances of that dispute. Accordingly, the reasoning and findings of the panel or Appellate Body must be examined closely. Where, as here, the Appellate Body notes that an affirmative defence may or may not be available when examined under a more complete factual record, the sensible means to achieve a resolution of the dispute is for the panel in the Article 21.5 proceeding to examine the affirmative defence under the complete factual record.

23. This dispute does not present a situation in which a defence was rejected outright. It would not be appropriate for the United States to speculate in the abstract on a hypothetical situation where a defence is rejected outright, but certainly it could make a difference, for example, if the DSB were to have ruled that a measure did not fall within the policy purpose of "necessary to protect human, animal or plant life or health." Again, whether the Member concerned had complied would turn on the specific facts and circumstances of the dispute.

Question 8 (US): The U.S. is arguing that even if a respondent fails to establish an affirmative defence in the original proceeding the respondent has a right to maintain the measure that has been found to be inconsistent with an obligation. Where does such a right stem from? How could any right exist when the respondent has failed to establish a justification for such measure? (US oral statement, para. 29)

24. The obligations of WTO Members (and consequently the rights of other WTO Members) are set out in the applicable covered agreements. A Member is free to maintain any measure that is not inconsistent with its obligations under the covered agreements - it does not need an affirmative "right" to be provided in the covered agreements for it to maintain that measure. In this case,

Article XIV of the GATS makes clear that the United States may maintain measures necessary to protect public morals or to maintain public order. Articles 3.2 and 19.2 explicitly provide that neither recommendations and rulings of the DSB, nor findings of panels or the Appellate Body, can "add to or diminish the rights and obligations provided in the covered agreements."

25. In this case, the United States is arguing that it does not need to modify a measure that is already consistent with the covered agreements. The United States does not believe that there is a right to maintain measures that are inconsistent with a covered agreement. Rather, this case involves findings by the Appellate Body that explicitly note that the measure may, or may not be, consistent with a covered agreement, and that the factual record was not sufficient to make such a determination.

Question 9 (US): Does the U.S. consider that measures consistent with covered agreements can be required to be brought into compliance?

26. Where the DSB recommendations and rulings require that a Member establish the applicability of an affirmative defence, the Member needs to do so in order to demonstrate that, by virtue of that affirmative defence, its measure is not inconsistent with the relevant provisions of the covered agreements. The Interstate Horseracing Act never provided any carve outs from the three criminal laws at issue, and thus the US measures fell within the scope of Article XIV of the GATS. The United States has complied with the DSB recommendations and rulings by making a factual showing in this proceeding that in fact the US statutes at issue meet the requirements of Article XIV.

Question 10 (US): The U.S. refers to a situation where a complaining party could not expect the responding party to adopt any substantively different measure, "because the original measure was already in compliance". (US FWS §46) Who would have made the determination that the original measure was already in compliance?

27. As an initial matter, the United States notes that this sentence would be better phrased as "because the original measure was already consistent with the covered agreements." This phrasing avoids confusion between the substantive obligations set out in the covered agreements, and the provisions of the DSU that call for compliance with DSB recommendations and rulings.

28. Turning to the Panel's question, the United States is not asserting that there was any special, formal "determination" that the measure is consistent with a covered agreement. Rather, in this case, the United States – as for most WTO Members with respect to most of their measures – believes its criminal gambling laws to be consistent with US obligations under the GATS. In this case, the Appellate Body found that the United States did not sufficiently establish an affirmative defence under Article XIV of the GATS, but the Appellate Body did not find that the criminal laws, if considered under a full factual record, failed to meet the requirements of Article XIV.

29. Furthermore, it is essential to emphasize that the failure of the United States to establish in the initial proceeding an affirmative defence did not turn on a disputed issue of interpretation of the WTO Agreement. Rather, the availability of the affirmative defence depended on the proper interpretation of US domestic law.

Question 11 (ANT, US): Is the rule in Article 17.14 of the DSU, that an adopted Appellate Body report "shall be unconditionally accepted by the parties", absolute? For example, would it apply where a recommendation was inconsistent with Article 19.2 of the DSU? Or where a report exceeded the scope set out in Article 17.6 of the DSU?

30. The United States would hope that the DSB would not agree to adopt an Appellate Body report under the circumstances described. Although it would not be appropriate for the United States to comment on these hypothetical situations, the United States agrees that it would be important to

bear in mind the limitations in the DSU. It is doubtful that Members intended the language in Article 17.14 to be read to override those express limitations, particularly since Members were careful in Article 3.2 of the DSU to specify that DSB recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements."[5] In any event, the United States in this proceeding is **not** requesting that the Panel reconsider any factual or legal findings made by the Appellate Body in this dispute.

Question 12 (US): Please refer to Article 17.14 of the DSU and the Appellate Body's decision in EC - Bed Linen. In your view, are these expressions of a principle that at some point disputes should be treated as finally settled so that potentially endless cycles of litigation are avoided not only with respect to claims but also with respect to defences and specific issues considered in disputes, and both with respect to arguments that are rejected and those that fail for lack of evidence?

31. The United States notes that this question contains a number of premises that are not presented by the circumstances of this dispute. The Panel and Appellate Body reports cannot be said to result in a "final settlement", because as the Appellate Body noted, it was not able to determine whether or not the US measures met the requirements of the Article XIV chapeau. Moreover, nothing in this case presents an endless cycle of litigation. To the contrary, under the procedural agreement entered into by the United States and Antigua, should Antigua prevail in this 21.5 proceeding, it may proceed to request authorization to suspend concessions under Article 22.2.

32. The United States is not aware of any basis for asserting that, as a general matter, a WTO Member cannot present new evidence when it previously failed to establish a claim due to a lack of evidence. In fact, the 21.5 proceedings in the *Canada - Dairy* dispute illustrate otherwise.[6] In that case, the complaining parties' initial recourse to Article 21.5 failed due to a lack of evidence on the cost of production of the products at issue. The complaining parties proceeded to a second recourse to Article 21.5, during which they proceeded to support their claims through new evidence not submitted in the first proceeding. The complaining parties prevailed in the second recourse to Article 21.5, and the Appellate Body upheld the finding. Thus, the *Canada - Dairy* dispute shows that there is no basis for viewing the Appellate Body reasoning in *EC - Bed Linen* or Article 17.14 as providing some general principle precluding the introduction of new evidence when a claim previously failed due to an absence of evidence.

33. As the United States explained in its Second written submission, *EC - Bed Linen* addresses a specific question regarding the claims that a complaining party may reargue in a 21.5 proceeding. The Appellate Body's finding turned on the limited scope of a 21.5 proceeding, and not on any purported general rule that parties are foreclosed from presenting new evidence when a claim previously failed for lack of evidence. Indeed, nothing would have prevented India from bringing a new regular proceeding against the measure at issue. *EC - Bed Linen* simply provided that the special, expedited procedures of Article 21.5 were not available for those claims. As a result, neither *EC - Bed Linen* nor Article 17.14 would stand for a principle of preventing additional litigation.

[Question 13 (ANT)]

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[5] And the DSU is itself a covered agreement.

[6] Appellate Body report on *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, 11 July 2001 (*Canada Dairy 21.5*); Appellate Body report on *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003 (*Canada Dairy 21.5 (II)*).

Question 14 (US): Please refer to the following passages in the Panel and Appellate Body reports:

- **para. 6.599 of the Panel report, which states that:**
  "there is ambiguity as to the relationship between, on the one hand, the amendment to the IHA and, on the other, the Wire Act, the Travel Act and the Illegal Gambling Business Act";
- **para. 6.607 of the Panel report, which contains the following reference:**
  "in light of the ambiguity relating to the Interstate Horseracing Act";
- **and para. 368 of the Appellate Body report which states that:**
  "The second instance found by the Panel was based on 'the ambiguity relating to' the scope of application of the IHA and its relationship to the measures at issue. We have upheld this finding."

Why are these findings not final?

34. The United States is not challenging these findings. These findings refer to "ambiguity" in the federal statues; the findings do not include any statement – explicit or implicit – that such ambiguity results in an inconsistency with the GATS. Indeed, some statutory ambiguity is inevitable in any legal system, and few measures would escape scrutiny if ambiguity resulted in *per se* violation of obligations under the WTO Agreement. And, despite this ambiguity, there is in fact a right or wrong answer to the question of whether or not the IHA provides a carve out from federal criminal laws.

35. The Panel and Appellate Body noted the ambiguity in the context of finding that the United States – on the basis of the record available in the original proceeding – had failed to meet its burden of proving an affirmative defence. And again, this is a finding that the United States does not dispute in this proceeding. Rather, in this proceeding the United States submits that it has now shown, based on a more complete factual record, that the right answer to the ambiguous issue is that the IHA provides no carve outs from the criminal laws at issue, and thus that it has successfully established its affirmative defence under GATS Article XIV. Nothing in the US position in any way disturbs the finality of the findings by the Panel and Appellate Body regarding statutory ambiguity.

Question 15 (US): Please refer to para. 371 of the Appellate Body report, last sentence, which states that: "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 other wise be prohibited by the Wire Act, the Travel Act, and/or the IGBA".

> **Sub-question (a): Was this simply an expression of deference, indicating that the Appellate Body did not presume to know the meaning of a Member's domestic law better than the Member itself?**

36. The United States does not believe that this is a correct understanding of the Appellate Body findings. In fact, the Appellate Body did not give deference to the US understanding of its own statute. To the contrary, the Appellate Body gave deference to the findings of the Panel in its fact-finding under DSU Article 11.

37. Moreover, the Appellate Body's reasoning explicitly notes that it could make no definitive finding on the US law due to the limited factual record:

> "363. Thus, the Panel had before it conflicting evidence as to the relationship between the IHA, on the one hand, and the measures at issue, on the other. We have already referred to the discretion accorded to panels, as fact-finders, in the assessment

> of the evidence. As the Appellate Body has observed on previous occasions, "not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts."
>
> 364. In our view, this aspect of the United States' appeal essentially challenges the Panel's failure to accord sufficient weight to the evidence submitted by the United States with respect to the relationship under United States law between the IHA and the measures at issue. The Panel had limited evidence before it, as submitted by the parties, on which to base its conclusion. This limitation, however, could not absolve the Panel of its responsibility to arrive at a conclusion as to the relationship between the IHA and the prohibitions in the Wire Act, the Travel Act, and the IGBA. The Panel found that the evidence provided by the United States was not sufficiently persuasive to conclude that, as regards wagering on horseracing, the remote supply of such services by domestic firms continues to be prohibited notwithstanding the plain language of the IHA. In this light, we are not persuaded that the Panel failed to make an objective assessment of the facts."[7]

38. Furthermore, in its conclusion, the Appellate Body reiterated that it was not making a definitive finding on the correct interpretation of US law: "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."[8]

> **Sub-question (b): Does this sentence, clarifying what the Panel and Appellate Body did not find, affect what the Panel did find regarding "'the ambiguity relating to' the scope of application of the IHA and its relationship to the measures at issue", which was upheld by the Appellate Body?**

39. As the United States explained in its response to Question 14, a finding of ambiguity is not equivalent to a finding that the IHA does in fact provide a carve out from the criminal laws at issue. There is a right answer and wrong answer to that question under US law. The United States submits that it has shown in this proceeding that the right answer is that no carve outs exist, and thus that the US measures do not result in discrimination under the chapeau of GATS Article XIV.

Question 16 (ANT, US): What authority does the DSU grant the Appellate Body to extend an invitation to a Member to demonstrate a point after the conclusion of an appeal? (US FWS §44) How would such an invitation affect the recommendation by the DSB? Why did the Appellate Body not expressly suggest ways in which the U.S. could implement the recommendations?

40. As the United States explained at the hearing, the United States submits that it would be a misplaced focus to treat the phrase "invitation" (used in the first US submission) as some special test, principle, or procedure that must be analyzed and evaluated. In using this phrase, the United States was not intending to imply that the Appellate Body was making a specific recommendation with respect to how the United States should bring its measures into compliance. We note that Article 19.1 of the DSU provides that panels or the Appellate Body "may" make suggestions on implementation; we are not suggesting that the Appellate Body has done so in this case.

41. Rather, the United States was using "invitation" as a shorthand for the following type of reasoning commonly used in Article 21.5 proceedings: where the Appellate Body (or panel) finds a particular aspect of a measure to be inconsistent with a covered agreement, the other side of such a

[7] Appellate Body report on *US – Gambling*, para. 363-364 (emphasis added).
[8] Id., para. 371.

finding may provide specific guidance on how the responding Member may bring its measure into compliance.

42. The *US – Shrimp* dispute (referred to in Question 3 above) is an instructive example. In that dispute, like the current one, the Appellate Body agreed with the responding party that the measure provisionally fell under an exception – GATT Article XX(g) in *US – Shrimp*. However, the Appellate Body, as in this case, found that in certain specific ways, the requirements of the chapeau were not met with respect to "arbitrary or unjustifiable discrimination."

43. In *US – Shrimp*, one aspect of this discrimination was that the Appellate Body found that the United States had entered into negotiations with some countries, but not with the complaining parties in the dispute. The United States looked carefully at this finding: the other side of the finding, and thus a means of compliance, was for the United States to enter into negotiations with the complaining parties. The United States proceeded to enter into such negotiations during the compliance period. These negotiations were not "measures" and so they were not "measures taken to comply."

44. The Appellate Body in *US – Shrimp* also found that the United States, in implementing its shrimp import ban, did not provide due process to the complaining parties. The United States looked carefully at this finding, and proceeded to adopt new implementing guidelines that remedied the defects in due process identified by the Appellate Body.

45. Based on the specific Appellate Body findings, the United States believed that such steps would bring its measure into compliance, and that no changes would be required in the statute subject to the DSB recommendations and rulings. A complaining party in *US – Shrimp* was not satisfied with the US implementation; it argued in an Article 21.5 proceeding that the United States must amend or repeal its statute and lift the import prohibition. The Appellate Body agreed with the United States, finding that the United States had complied with the DSB recommendations and rulings – without amending the US statute – by addressing the specific aspects of discrimination previously found by the Appellate Body in the Article XX chapeau.

46. The United States believes that the same approach for compliance applies to the current dispute. Here, the Appellate Body explicitly noted both (i) that the United States did not establish or show that the IHA does not exempt domestic suppliers from providing certain remote betting activities prohibited under three federal criminal statutes, but (ii) that the Appellate Body could not determine from the factual record whether or not the IHA in fact provided such an exemption. In this case, the other side of the Appellate Body finding is that the United States may comply with the DSB recommendations and rulings by showing that the IHA in fact does not provide an exemption from the federal criminal statutes. This kind of reasoning is what the United States intended by the statement that the Appellate Body "invited" the United States to demonstrate that the measures met the requirement of the Article XIV chapeau.

Question 17 (US): The U.S. refers to a respondent required to adopt new measures when it is already in compliance with its obligations. (US FWS §45) Is this not true of any respondent whose measures may well satisfy an exception but who fails to raise that exception before a Panel? Or a respondent who does not succeed in demonstrating that its measure satisfies an exception?

47. The United States submits that it has shown in this proceeding that the US criminal laws fall within the scope of GATS Article XIV, and are thus not inconsistent with the obligations of the United States under the GATS. The United States is not aware of any past dispute in which a WTO-consistent measure has been found in an Article 21.5 proceeding to be not in compliance with DSB recommendations and rulings. Thus, although this question is phrased in terms of "any respondent," the United States submits that the circumstances presented by this dispute are indeed unusual.

48. As the United States explained in its past submissions, this unusual situation arose due to Antigua's choices in presenting its claim. In particular, because Antigua was unable or unwilling to specify the statutes at issue, neither the Panel nor the United States were able to identify the measures at issue until the case had reached the Interim Review stage. Consequently, neither the parties nor the Panel were in a position to develop fully the factual record and the argumentation with respect to how each measure that might possibly be covered in the dispute would fit within each of the criteria set out in GATS Article XIV.

Question 18 (US): Does the U.S. consider that any responding party that has a valid affirmative defence that did not succeed only because of a lack of a full factual showing in the original proceeding has a right to make a full factual showing of the same defence in a compliance proceeding? What would be the systemic implications of such a view? What incentive would a respondent have to fully argue its affirmative defence before the original panel? (US oral statement, para. 31)

49. As discussed in the response to Question 17, there were particular, unusual circumstances in this dispute that prevented the United States from presenting the same level of argument and evidence on Article XIV with respect to these measures. These circumstances should be taken into account; they would be unlikely to occur in other disputes (unless of course it were established that a complaining party benefited from the same type of lack of specificity in its claims and arguments as were present in the original proceeding).

50. It is also important to bear in mind that there is a fundamental difference in the situations of a complaining and responding party concerning findings that a party has failed to make a full showing to meet its burden of proof. Where a complaining party fails to present evidence and argument sufficient to meet its burden of proof, that complaining party has the ability to bring a new dispute and have an opportunity to present additional evidence and argumentation. The situation is different for a responding party. The responding party is unable to bring a new proceeding and so would be denied the opportunity to present additional evidence and argumentation to meet its burden of proof for an affirmative defence, unless the responding party may make this fuller showing in a compliance proceeding.

51. The United States understands that in the context of this question, "systemic implications" refers to the prospect that responding Members would, as a tactical matter, decide in future cases to withhold factual information in support of affirmative defences until the Article 21.5 proceeding. The United States submits that there is no basis for believing that such "systemic implications" would arise.

52. The reason is simple: The responding Member would obtain no benefit of purposely saving evidence in support of an affirmative defence until the Article 21.5 proceeding. To the contrary, the responding party has a strong interest in obtaining during the original proceeding a definitive finding as to the validity of an affirmative defence. If the finding is affirmative (i.e., if the defence applies), the responding Member would not be subject to future proceedings. If the finding is negative, the responding Member would be entitled to a reasonable period of time for compliance during which it could address the problems identified with respect to its affirmative defence.

53. In contrast, a responding Member who waited until the Article 21.5 proceeding to present a full affirmative defence is in a far worse position. Even if it prevails on the defence, it will have subjected itself to an additional proceeding. And, moreover, if it fails to establish the affirmative

defence, it faces the prospect of an immediate request for authorization to suspend concessions, without any further reasonable period of time for compliance.[9]

Question 19 (ANT, US): If a respondent were entitled to a "second chance" to make out a defence would the compliance panel make its assessment on the basis of evidence presented in the compliance proceeding only, or the evidence presented in the original proceeding as well?

54. As in other proceedings under the DSU, the Article 21.5 panel should base its findings on the evidence and arguments presented by the disputing parties. To the extent that evidence introduced in the original proceeding remained relevant, the disputing parties are of course free to incorporate or to refer to such evidence.

[Questions 20 and 21 (ANT)]

Question 22 (US): If the U.S. is permitted to demonstrate that its measures satisfy the requirements of the Article XIV chapeau, what is Antigua entitled to demonstrate? What would limit the Panel's assessment to the IHA? Could the Panel's assessment include any issue as to whether the Federal criminal statutes satisfy the requirements of the Article XIV chapeau, such as whether they are non-discriminatory on their face?

55. As the United States explained in detail in paragraphs 28 to 31 of its Second written submission, the scope of an Article 21.5 proceeding is limited. The DSB recommendations and rulings serve as the instructions to the Member concerned for the steps it is required to take during the reasonable period of time in order to comply with those recommendations and rulings. If a complaining party were entitled to reargue claims that were considered and rejected in the original proceeding, the Member concerned could be in the untenable position of being found out of compliance even though it had relied on and complied with the findings of the Panel and/or Appellate Body. This is the basis for the Appellate Body's finding in *EC – Bed Linen* that complaining parties cannot reargue failed claims in an Article 21.5 proceeding.

[Question 23 (ANT)]

Question 24 (US): Please refer to the Award of the Arbitrator pursuant to Article 21.3(c) of the DSU which states that "the United States emphasizes that the only means of implementation that will achieve the necessary clarification is legislative means" (para. 37) and that "implementation will occur by legislative means" (para. 64). Can these statements in the Award be reconciled with the US submission that "[l]egislation to clarify the interaction between the IHA and Wire Act was a possible means - but not the only means - for compliance"? (US FWS §55) If the U.S. disagrees with the statements in the Award of the Arbitrator, could it please comment on the statements attributed to it in the transcript of the Arbitrator's oral hearing on pages 31-32 ("legislation is required") and page 34 ("we need legislation")? Could the U.S. clarify why it referred on pages 59-60, 60-61 and 72-73 to action by Congress - what could it have contemplated there if not legislation?

56. As the United States explained during the hearing, the United States respectfully disagrees with the arbitrator's characterization of the US views on the possible means of implementation. First, neither the US written submission, nor its presentations during the arbitration hearing (as reflected in

[9] The United States notes that the DSB has adopted a panel report that stated that an additional reasonable period of time may be available depending on whether a compliance panel has made a new recommendation. *See* Panel report on *United States – Tax Treatment for "Foreign Sales Corporations": Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW2 (30 Sep. 2005), para. 7.44.

the transcript) support this characterization. Second, it is important to understand the context of the arbitrator's statement within the discussions held during the arbitration. The United States sought a reasonable period of time that would allow for implementation through the adoption of new legislation. Antigua agreed that the United States should adopt legislation, but also argued that partial compliance with respect to "non-sports betting" could be achieved by Executive Order. The United States responded that even if an Executive Order were a legally available possibility, this hypothetical, partial means of compliance was not relevant because – as both parties agreed – the arbitrator still needed to determine the reasonable period of time to adopt legislation. In other words, when the United States discussed the need for legislation, this was in response to Antigua's claim that the United States should get a shorter reasonable period of time because (according to Antigua) partial compliance could be achieved by Executive Order.

57. Moreover, there was no discussion during the Article 21.3 arbitration of a legislative means of compliance in the context of a discussion of which alternative means of compliance were available to the United States (except partial compliance through an Executive Order). Thus, to the extent the arbitrator's statement is read as suggesting that there had been a discussion of various alternative means of compliance, and that during this discussion the United States had dismissed all alternatives except legislation, this is clearly a misreading. Finally, nowhere in the record of the arbitration does the United States ever assert or imply that a full factual showing based on legislative history and relevant case law would be insufficient to meet the US burden of showing that the IHA does not create carve outs from criminal statutes.

58. With respect to the first two specific statements cited in the question ("legislation is required" and "we need legislation"), the record of the arbitration clearly shows the context described above.

59. The starting point is Antigua's written submission, which lays out Antigua's idea about differing periods of compliance for sports and non-sports betting:

> "11. Antigua submits that it is possible for the United States to comply with the DSB recommendations and rulings (i) immediately via presidential executive order with respect to the provision of non-sports related and horse racing gambling and betting services and (ii) with respect to the provision of other sports gambling and betting services, within six months of the adoption of the Report and the Panel Report by the DSB via either an amendment to each of the Wire Act, the Travel Act and the Illegal Gambling Business Act or the passage of new legislation that would either repeal or supersede the Federal Trio with respect to the provision of these services from Antiguan operators."[10]

60. During the arbitration hearing, the arbitrator asks about this distinction:[11]

> "In your submission you draw a distinction between 'on-sports related and hoseracing gambling and betting services' on the one hand and 'other sports gambling and betting services' on the other. What is the basis for that distinction if one looks at the Panel and Appellate Body reports and what they have said?"

61. Antigua then describes its view of the distinction, without immediately tying the distinction back to Antigua's idea of a shorter RPT for non-sports betting:

> "In neither report do they really consider the different types of gambling. ...

[10] Antigua Article 21.3 submission, para. 11.
[11] Arbitration Transcript, page 30.

> We referred to a number of discussions in our submissions that that [the distinction between sports and non-sports gambling] is a pretty widely held belief by gambling law commentators throughout the United States."[12]

62. The United States proceeds to respond to Antigua's argument, both with respect to the purported distinction between various types of gambling under federal criminal law, and with respect to the effect that such distinction should have on the calculation of the RPT:

> "I guess there are two ways of responding. The first is that which we took in our statement – that at the end of the day even if there were such a distinction, and we disagree that there is, it is not []relevant to the ultimate decision here since legislation is required and legislation does not really relate to any purported distinction between sports and non-sports betting."[13]

63. In this context, the phrase "legislation is required" is used to rebut Antigua's claim that the RPT is somehow affected by an alleged ability of the United States to address non-sports betting with an Executive Order. As shown above, Antigua expected the United States to adopt legislation to address sports betting, and the above statement simply means that the RPT for legislation is not affected by a purported ability to address non-sports betting through an Executive Order. In context, this statement cannot possibly be read as an overarching assertion that the only means of compliance available to the United States was through legislation.

64. The second phrase ("we need legislation") cited in the question is also made in this same context. Antigua first asserts that the United States can come into compliance through some sort of administrative action with respect to non-sports betting.

> "We are saying here that under the United States law as it actually exists there really is no need to amend these other statutes with respect to non sports betting because it simply is an administrative position of the United States government that these types of services are prohibited as well."[14]

65. The United States then responds, with a similar point as previously made.

> "Again, I think our first response would be that in the end you do not have to reach the issue [of the RPT required to adopt an Executive Order or other administrative action addressed to non sports betting] because Antigua acknowledges that the actions it is requesting us to take with regard to non sports [] betting will not by themselves bring us into compliance, we need legislation on other matters, and therefore, given that the actions they are requesting we take with regard to [] non sports betting would require less time than the legislation, the legislation ultimately is what is driving the determination of the reasonable period of time, so it is an issue that need not even be reached."[15]

66. Again, the US statement cannot be read as making a point about legislation versus every other possible means of compliance. Rather, it is simply a response to Antigua's argument that the

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[12] *Id.* at 31.
[13] *Id.* (Emphasis added).
[14] *Id.* at 33-34.
[15] *Id.* at 34 (emphasis added). The United States notes that this sentence in the transcript twice uses the phrase "sports and non sports", which does not make sense in context and appears to be either a transcription error or garbling of words. This is the type of correction that would have been corrected if, as in many types of legal proceedings, the transcript had been subject to verification. In any event, this in no way changes the context of the phrase "we need legislation."

purported option of adopting administrative action on non-sports betting could somehow reduce the reasonable period of time.

67. Finally, the question requests that the US clarify why it referred on pages 59-60, 60-61 and 72-73 of the transcript to action by Congress. As explained above, the United States sought a reasonable period of time that would allow for the adoption of a legislative clarification. Accordingly, much of the arbitral proceeding focused on the question of how long it would take to obtain the passage of such legislation. Nowhere in the cited passages (nor elsewhere in the US presentations to the arbitrator), however, does the United States assert that legislation was the only means of compliance.

Question 25 (US): The U.S. has referred to Bill HR 4777. Antigua has referred to Bill HR 4411. What was the relationship between these Bills and the internet gambling law that was passed in October 2006? Was there ever legislation pending that would have brought the U.S. into compliance with the DSB recommendations in this dispute? (US SWS §38) Is there anything in writing to demonstrate that such legislation was under consideration in the Congress?

68. H.R. 4777 was a bill sponsored by Representative Goodlatte. This bill would have amended 18 U.S.C. 1084 and would have prohibited the acceptance of certain forms of payment for certain gambling activities over the Internet. H.R. 4411 was a bill sponsored by Representative Leach. As introduced, H.R. 4411 also prohibited the acceptance of certain forms of payment for unlawful Internet gambling.

69. H.R. 4411 was merged with H.R. 4777 to include the revisions to 18 U.S.C. § 1084 and the merged bill was passed by the House of Representatives and sent to the Senate for its consideration. The House and Senate, in conference, revised the provisions of the merged bill and incorporated portions of it into the Safe Port Act, Public Law 109-347, which was signed into law by the President in October 2006.

70. The Internet gambling provisions in the Safe Port Act are referred to as the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), Title VIII of Public Law 109-347, and they pertain only to the acceptance of payments for unlawful Internet gambling. Those provisions are similar to the prohibitions contained in H.R. 4411 as introduced. This statute does not amend Section 1084. The provisions pertaining to horse racing are similar to those contained in H.R. 4411 as the bill was passed by the House of Representatives and sent to the Senate.

71. The horse racing provisions in H.R. 4411 (which, as noted, was an amendment to the Wire Act) address the issue of the relationship between the IHA and the Wire Act, but the legislation as adopted by the House did not clarify the relationship. If the Executive Branch had achieved its goal of obtaining a legislative clarification, this language would have been modified to achieve the clarification. Although the United States is aware that various formulations of the horse racing provisions were discussed, it is not aware of any formally-introduced amendment other than those described above.

Question 26 (ANT, US): Does the fact that statements are made in the context of Article 21.3(c) of the DSU require that they be given different weight from that accorded to any other statements of a party concerning an issue in dispute?

72. Article 21.3(c) has a particular, limited purpose, and as numerous arbitrators have explained, their role is not to discuss the particulars of a Member's implementation. The weight accorded to statements made in the context of Article 21.3(c) proceedings should take into account the specific, limited purpose of those proceedings. Furthermore, there is no basis for assigning any special weight

to statements made by a party during an Article 21.3 proceeding, as compared to, for example, public statements by a party or statements made by a party to WTO committees.

73. The United States notes that statements of a party could have evidentiary value in interpreting the factual question of the meaning or existence of a party's measure. However, it is hard to see how such statements might arise in an Article 21.3 proceeding. And in the circumstances of this case, the United States had no call to make any statements regarding the substantive, factual issue of the relationship between the IHA and the three criminal statutes. Rather, the Article 21.3 proceeding addressed an entirely different issue, namely, the amount of time required to obtain a legislative clarification of that relationship.

Question 27 (US): The U.S. has referred to the "safe harbor" provision that is available for the transmission of information assisting in the placing of wagers (US FWS §§7-10; SWS §19) Is an "interstate off-track wager", as defined in the IHA, a "bet or wager" or "information assisting in the placing of wagers" within the meaning of 18 U.S.C. 1084(a)?

74. A wager placed in one state, but not transmitted to another state, with respect to the outcome of a race taking place in another state is a "bet or wager" which may be legal if authorized by the laws of the state in which it is placed. A "pari-mutual wager . . . placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in . . . another State" is the transmission of a "bet or wager" and is a violation of the Wire Act. The transmission of information relating to the formation of a wagering pool is "information assisting in the placement of bet[s] or wager[s]" so long as a wager itself is not transmitted by wire communication in interstate or foreign commerce.

Question 28 (US): The U.S. submits that no language of permission exists in the IHA. (US FWS §33) Can this be reconciled with the following language of Section 5 IHA, cited in the Appellate Body report at para. 361: "An interstate off-track wager may be accepted by an off-track betting system only if consent is obtained from - the horse racing association" [followed by extensive conditions and provisos] (emphasis added)

75. As the United States explained in paragraphs 20-25 of its First written submission, the IHA contains no "language of permission" relating to criminal liability under United States law. To the extent that the IHA includes any "language of permission," it relates only to the allowance of the receipt of certain bets without being subject to civil liability under the IHA itself. It has nothing to do with what is allowed under the criminal law of the United States. Section 4 of the IHA, 15 U.S.C. § 3003, contains the general rule imposing liability for the acceptance of interstate off track wagers not in accordance with the IHA. Section 5 of the IHA, 15 U.S.C. § 3004, specifies those limited circumstances in which wagers may be accepted on horse races. Section 6 of the IHA, 15 U.S.C. § 3005, imposes civil liability on persons accepting wagers on horse races without complying with Section 5's requirements of various agreements with affected parties. Section 7, 15 U.S.C. § 3006, sets forth the parameters of any civil action for damages for non-compliance with the IHA. The IHA must be read as a whole, and nothing in that act grants permission to transmit wagers using wire communication facilities in interstate or foreign commerce, or provides an exception to the criminal law prohibiting such transmission.

Question 29 (US): The U.S. has explained that the IHA and the Wire Act have separate effects with respect to wagering that breaches both Acts. (US FWS §35) Please explain the separate effects of the two Acts with respect to wagering conducted in accordance with Section 5 of the IHA but not in accordance with the Wire Act.

76. If a person living in one state transmits, by wire communication, a wager on a horse race to an off-track betting facility located in another state and the host racing association and the off-track

betting facility have the agreements required by the IHA in place, then the host racing association will not have a basis to file an IHA law suit against the off-track betting facility. However, the off-track betting facility would still be subject to prosecution for violating the Wire Act. What the IHA does is to merely protect the right of the entity staging a horse race to enjoy the receipt of all of the revenue from their product, that is, the horse race. What the Wire Act does is punish any person who, being in the business of betting or wagering, uses a wire communication facility for the transmission of bets or wagers in interstate or foreign commerce or for the transmission of information assisting in the placement of bets or wagers on a sporting event or contest. However, if certain conditions which are outlined in subsection (b) of the Wire Act exist, a person can be protected with respect to the transmission of information assisting in the placement of bets or wagers on a sporting event or contest, but he or she still may not use a wire communication facility for the transmission of the bets or wagers themselves.

Question 30 (US): If there were a positive repugnancy between the IHA and the Wire Act (which the U.S. does not concede), would the U.S. disagree with the rules of statutory construction that allow more recently enacted and specificstatutes tocontrol or prevail to the extent of a conflict, as described by Antigua? (Antigua FWS §§58-59)

77. The United States agrees that US law includes a judicially-created doctrine of repeal by implication. However, the United States does not agree with Antigua's characterization of that doctrine. A more accurate summary of the doctrine is contained in paragraphs 26-31 and Annex I of the first US submission.

Question 31 (US): Please refer to the Unlawful Internet Gambling Enforcement Act of 2006 (Exhibit AB-113).

> **Sub-question (a): Even if this Act is not within the terms of reference of this Panel, do you consider that it can constitute evidence relevant to the matter before the Panel?**

78. The United States believes that Panels are not barred from considering evidence (including the fact that a new measure was adopted) that comes into existence after the initiation of panel proceedings. The United States submits, however, that the UIGEA does not shed light on the issues in this dispute, because the law does not amend or alter any statutes at issue, and instead establishes a separate enforcement mechanism aimed at particular activities already unlawful under federal or state law.

> **Sub-question (b): Why does 31 U.S.C. 5362(10)(D)(i) provide that the term "unlawful Internet gambling" shall not include any activity that is allowed under the Interstate Horseracing Act of 1978?**

79. On September 29, 2006, Representative Leach, one of the original sponsors of the legislation, submitted a statement on the Internet gambling provisions of the Unlawful Internet Gambling Enforcement Act of 2006 into the Congressional Record.[16] That statement, which is part of the legislative history of the Act, provides that Section 5362(10)(D)(I) "addresses transactions complying with the Interstate Horseracing Act (IHA) which will not be considered unlawful because the IHA only regulates legal transactions that are lawful in each state involved." Importantly, the statute does not change what types of betting operations are "legal transactions." In order to be a "legal transaction," the wager must be made in compliance with both state and federal law. Since the IHA did not repeal Section 1084, the wager must also comply with the provisions of Section 1084.

[16] Statement of Representative Leach, Congressional Record, pages H8029-H8030 (Sep. 29, 2006) (Ex. US-15.)

Sub-question (b) [continued]: What activities are allowed under the IHA that would otherwise fall within the definition of the term "unlawful Internet gambling"?

80. None. The transmission in interstate or foreign commerce of bets or wagers on horse races using wire communication facilities, even if the specific agreements required by the IHA are in place, would constitute "unlawful Internet gambling" because such transmission would violate the Wire Act, may possibly violate other provisions of federal and state law, would therefore not constitute a "legal wager" as required by the IHA, and thus could not be in compliance with the IHA.

Sub-question (c): What are the "existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes" referred to in 31 U.S.C. 5362(10)(D)(iii)? Whom are the disagreements between? Can such disagreements be reconciled with the US submission to this Panel that under fundamental principles of US law, the IHA does not provide an exemption from the three Federal statutes? Does this indicate ambiguity in the relationship between these laws?

81. The disagreement referred to in this "sense of Congress" provision concerns whether the Interstate Horseracing Act repealed by implication pre-existing criminal statutes, thereby allowing the interstate transmission of bets on horse races. The Department of Justice has publicly stated that it does not believe that the IHA amended or repealed pre-existing criminal statutes, while the horse racing industry believes that the IHA removes the criminal prohibitions relating to the interstate transmission for bets on horse races. The disagreements are between the Department of Justice and those interests that wish to profit on interstate gambling on horseracing.

82. The "sense of Congress provision" is entirely consistent with US statements concerning the proper interpretation of US criminal statutes. The language simply notes the disagreement, it does not take a position as to how a court would in fact construe the relationship between federal criminal laws and the IHA.

83. A disagreement does not necessarily indicate an "ambiguity." Indeed, in almost every WTO dispute there is a disagreement among Members as to how to interpret particular provisions of the covered agreements, but this does not establish that there is an ambiguity in the drafting of those provisions. However, as the Panel notes, the Appellate Body did not disturb the original Panel's finding of an "ambiguity," and the United States is not disputing that ambiguity in this proceeding. Rather, the United States has explained that despite any ambiguity, there is a right and wrong answer to the question of the relationship between the IHA and the three federal criminal laws at issue. And, based on the evidence and arguments presented in this proceeding, the United States has met its burden of showing that the IHA does not provide exemptions from federal criminal laws.

Sub-question (d): If the US Congress does not wish to resolve any existing disagreements over this question of interpretation at this stage, is the US delegation to this Panel entitled under US law to take a definitive view on it? Is the US delegation asking the Panel to take a definitive view on a question of interpretation that the US Congress has chosen not to resolve?

84. The United States delegation is entitled under US law to take a definitive view on the disagreement. The official position of the Department of Justice – the agency which is responsible for applying federal criminal law – is that the IHA provides no exemptions from federal criminal laws. The United States delegation submits that it has shown in this proceeding that the DOJ view of US criminal statutes is correct under fundamental principles of US statutory construction.

85. The United States is not asking the Panel to take any "definitive view" on questions of domestic US law that might have any domestic effect within the United States. To the contrary, the role of this Panel is to resolve the legal and factual issues in this dispute. The key factual issue in this dispute is whether the United States has met its burden of showing that the IHA does not result in discriminatory carve outs from federal criminal statutes, and thus has met its burden of showing that the US measures meet the criteria of the Article XIV chapeau. A Panel finding on this factual issue has no effect on domestic US law.

> **Sub-question (e): Can the U.S. comment on the statements by the National Thoroughbred Racing Association that "[t]he legislation contained language that recognizes the ability of the horse racing industry to offer account wagering under the Interstate Horseracing Act of 1978 as amended" (Exhibit AB-118) and by Youbet.com that the "legislation ... exempts Youbet.com and other advanced deposit wagering companies in the horse racing industry from internet gaming prohibitions"? (Exhibit AB-120)**

86. The UIGEA made no amendments to the Wire Act or any other federal criminal law, and thus simply could not have the effect claimed in the above statement. As noted, however, horseracing interests contend that the IHA provides carve outs from federal criminal law, and it is not surprising that they would make this type of baseless claim about the UIGEA.

Question 32: 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).

> **[Sub-questions (a) and (b) (ANT)]**
>
> **Sub-question (c) (US): Many of these State laws appear to authorize account wagering by telephone and other electronic means. How does this relate to the prohibition in the Wire Act?**

87. Even if a state laws would appear to authorize account wagering by telephone or other electronic means, they cannot override the Wire Act to the extent that they authorize transmission of wagers by means of a wire communication facility in interstate or foreign commerce. Account wagering, itself, is not a violation of the Wire Act or other federal law to the extent that the state does not authorize the transmission by means of a wire communication facility in interstate or foreign commerce of bets or wagers. If a business is accepting bets or wagers by means of a wire communication in interstate or foreign commerce, the business is violating the Wire Act.

> **Sub-question (d) (US): Why do some of these State laws refer to the Interstate Horseracing Act 1978?**

88. The various states of the United States, being sovereign, maintain their own statutory schemes subject only to those matters expressly reserved to the Federal Government by the Constitution. Federal authorities are not in a position to speculate on the reasons state laws are written in any particular way. However, a state would naturally want to require compliance with the IHA for legal off-track account wagering on horse races, that is, account wagering occurring wholly within the state itself that does not involve the transmission in interstate or foreign commerce of the bets or wagers.

Question 33 (ANT, US): Does the IHA only allow domestic suppliers to operate wagering services on horseracing, or can foreign suppliers in some way operate under its auspices? If

Antiguan operators entered into revenue-sharing arrangements with racetracks, would they still be liable to prosecution?

89. So far as we can determine, Antiguan gambling operators, or gambling operators from any other country, would be legally able to enter into the relevant agreements specified in the IHA in the United States so that they could accept wagers on those horse races without fear of being held civilly liable for the payment of damages to the host racing association and others under the provisions of the IHA. However, both domestic and foreign gambling operators would be subject to prosecution for violating the Wire Act if they, being in the business of betting or wagering, knowingly used a wire communication facility in interstate or foreign commerce for the transmission of bets or wagers.

Question 34 (US): Has the U.S. ever prosecuted under the Wire Act wagering on horseracing conducted in accordance with the IHA? If not, why not?

90. None of the federal indictments concerning Internet gambling of which we are aware concern wagering on horseracing that was conducted in accordance with the IHA. There is no reporting requirement for gambling indictments and the statistics maintained by the Executive Office for United States Attorneys only track the number of prosecutions brought under the statute but do not specify the types of bets or wagers. The decision of whether to bring charges in any particular case rests on 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 defence were raised, the Department of Justice believes such a defence would be legally unsuccessful.

Question 35: Regarding Youbet.com, TVG, XpressBet.com, Capital OTB and the other U.S. domestic operations described by Antigua (Exhibits AB-65 to AB-73):

> **[Sub-questions (a) to (d) (ANT)]**
>
> **Sub-question (e) (US): Has the U.S. launched a criminal prosecution against any of these operators? What is the current status of the prosecution proceedings against Youbet.com that were pending at the time of the original dispute (WT/DS285/R, para. 6.588)?**

91. The Department of Justice is unable to comment on the pendency of proceedings which are not otherwise public. The Department is not aware of any public pending prosecution of Youbet.com or the other entities listed above.

Question 36 (US): Do the recent prosecutions of foreign operators listed in Antigua's First written submission at paras. 106-107 concern the provision of pari-mutuel wagering on horseracing or other wagering services or both?

92. The prosecutions listed in paragraphs 106 and 107 of Antigua's First written submission are the May 2006 indictment *United States v. William Scott, et al.*, No CR 05-122 (D.D.C) and the July 2006 indictment *United States v. BETONSPORTS PLC, et al*., No. 4:06 CR00337 CEJ (E.D. Missouri). The *Scott* indictment alleged in paragraph 6 that the defendants "unlawfully engaged in illegal internet casino gambling and accepts information to facilitate betting as well as accepting bets and wagers from persons in the United States who place bets on baseball, basketball, football, hockey and other sports through the internet and telephone."

93. The *BETONSPORTS PLC* indictment alleged that the defendants accepted "sports wagers from gamblers in the United States" (paragraph 1), "offered gamblers in the United States illegal wagering on professional and college football and basketball, as well as many other professional and

amateur sporting events and contests." (paragraph 2). The overt acts allege that the company "accepted a sports bet" but does not provide any further information on the type of sporting event. The Section 1084 counts in the indictment allege the transmission of bets but do not specify the type of bet. While the indictment does not specifically mention pari-mutual wagering, the defendants did accept pari-mutual wagers, and such wagers are included in the indictment's reference to "other . . . sporting events and contests."

94. The United States has recently brought several more prosecutions of illegal gambling businesses that took bets on horse races as well as a variety of other sporting events. In *United States v. Arthur Gianelli, et al.*, (District of Massachusetts), and *United States v. Herbert David Meyers, et al.*, (District of Maryland), United States-based gambling operations employed the services of foreign gambling businesses to receive, record, and tabulate wagers from the United States on various sporting events, including horse racing. In *United States v. Gerard Uvari, et al.*, (Southern District of New York), United States bookmakers transmitted numerous illegal wagers on horse races interstate. None of the defendants in these cases entered into the agreements required by the IHA or otherwise conformed their conduct to the IHA's provisions.

Question 37 (US): Please refer to the statement of Bruce G. Ohr of the US Department of Justice as set out in Exhibit AB-32.

Sub-question (a): Can the U.S. confirm that this is the statement referred to in the US April 2006 status report to the DSB (WT/DS285/15/Add.1)?

95. Yes, this is the same statement.

Sub-question (b): What is the current status of "the civil investigation relating to a potential violation of law" to which Mr. Ohr referred?

96. The civil investigation is still pending. Beyond that the Department of Justice is unable to make any statement about any matter which is not public.

Sub-question (c): What was the law potentially violated? Why was it a civil, rather than a criminal, investigation? How is it relevant to the question of how the three Federal criminal statutes at issue are applied?

97. The Department of Justice is unable to make any specific statement concerning the investigation. The decision to proceed criminally or civilly is, under United States legal practice, committed to the sound discretion of the prosecutor based on a variety of considerations. A civil injunctive suit would be relevant to the application of the criminal statutes because such an injunctive action would require, among other things, a demonstration that the federal criminal statutes at issue were, or were about to be, violated, and that such violation would continue into the future.

Sub-question (d): Has the US Department of Justice ever initiated a criminal prosecution of the interstate transmission of wagers conducted in accordance with the IHA? Can this pattern of prosecution be taken into account in ascertaining the Department's interpretation of the statute that it administers?

98. As set forth in response to question 34, we are not aware of any federal prosecutions concerning Internet gambling concerning the transmission of wagers conducted in accordance with the IHA. With regard to the second half of this question, the Appellate Body in the original

proceeding found that the Panel had erred in relying on evidence of a lack of prosecution in support of an interpretation of the federal criminal statutes.[17]

Sub-question (e): Hasn't the original Panel already considered the interpretation of the US Department of Justice of the IHA as amended, as expressed in the Presidential signing statement, and found it unpersuasive? (Panel report, paras. 6.597 and 6.600) Is the interpretation given in Mr. Ohr's statement any different from that expressed in the Presidential signing statement?

99. As the United States understands the original panel findings, the Panel found that the Presidential signing statement was not sufficient to meet the US burden of establishing an affirmative defence. However, the signing statement and the testimony of Mr. Ohr are official statements regarding the interpretation of US criminal statutes, and are cumulative evidence in support of the US position. Moreover, under the *Skidmore* doctrine discussed in the first US submission, such statements would be considered by US courts on the issue of statutory interpretation that the Panel is examining in this dispute.

Sub-question (f): Did the US Department of Justice strongly object to the 2000 amendment to the IHA? If so, does this affect the weight to be given now to its interpretation of the relationship between that Act, as amended, and the Federal criminal statutes at issue?

100. The 2000 Amendment to the Interstate Horseracing Act was inserted at the last minute by Congress in an appropriations bill providing funding for the Department of Justice and other agencies of government. The Department of Justice did not learn that this amendment had been inserted until after the bill had been passed by both houses of Congress and transmitted to the President for signature. In sum, the Department of Justice was not afforded an opportunity to comment on the amendment until after it had already been adopted by Congress. However, the Department's position on the effect of the amendment with respect to federal criminal laws was made clear in the Presidential signing statement.

Question 38: With respect to the question whether the three Federal criminal statutes at issue are, on their face, non-discriminatory.

Sub-questions (a) (ANT, US): Did the Appellate Body have competence to make the finding at paras. 354 and 357 of its report when this was not covered in the Panel report or a legal interpretation developed by the Panel, and it was contested by Antigua (original first oral statement, para. 92; original Second written submission, paras. 33-34)?

101. Yes, the Appellate Body had competence to make this finding. In doing so, the Appellate Body was attempting to complete the analysis in the dispute, after the Appellate Body had vacated certain Panel findings regarding the application of the Article XIV chapeau to the facts of this case. The wording of the statutes was not in dispute, and the Appellate Body acted properly in applying the legal criteria of the GATS to the undisputed facts concerning the content of the statutory language.

[Sub-question (b) (ANT)]

Sub-question (c) (US): Without prejudice to whether the Panel should review this issue, can the U.S. elaborate on its view that the text of those laws does not contain provisions

[17] Appellate Body report on *US – Gambling*, para. 356-357.

that discriminate between countries, when the Wire Act refers to "interstate or foreign commerce", but not to intrastate commerce? (US FWS §17) ***)***

102. The source of federal jurisdiction for the federal gambling statutes at issue is the Commerce Clause of the United States Constitution, which allows Congress to pass laws only where there is an effect on interstate or foreign commerce. The reference to interstate or foreign commerce in the Wire Act is an example of the jurisdictional requirement imposed by the Constitution, and does not define the class of individuals who may be prosecuted under the statute. Once this requisite effect on interstate or foreign commerce is satisfied, the criminal prohibitions are applied equally to anyone, without discrimination, regardless of nationality or country of origin, that violates the statute.

103. Thus, the fact that the statutes do not address intrastate commerce reflects no "discrimination" in the operation of US federal laws, it simply reflects the US constitutional scheme governing federal regulation of commerce. Moreover, the absence of a federal prohibition on intrastate activity in no way indicates that state gambling statutes (which do govern intrastate commerce) are discriminatory. For these reasons, the Appellate Body was correct in finding that the federal statutes were non-discriminatory on their face.

ANNEX F-3

REPLIES BY CHINA TO QUESTIONS POSED BY THE PANEL (8 DECEMBER 2006)

Question 1: Article 3.7 of the DSU provides that "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." Article 22.8 of the DSU applies until "such time as the measure found to be inconsistent with a covered agreement has been removed" (emphasis added). How, in your view, do these provisions affect the interpretation of the phrase "measures taken to comply" as used in Article 21.5 of the DSU?

1. In China's view, there is no direct relationship between these two provisions and the interpretation of the phrase "measures taken to comply" as used in Article 21.5 of the DSU.

[Question 2 (EC)]

[Question 3 (Japan)]

Question 4: 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?

2. In China's view, whether a defence is rejected outright or is simply not established for lack of evidence, the result is the same: the DSB will generally recommend the defending party bring its measure into conformity with the covered agreements, although these two different occasions under a specific dispute may affect the reasoning in which the panel or the Appellate Body comes to its conclusions.

Question 5: Is the rule in Article 17.14 of the DSU, that an adopted Appellate Body report "shall be unconditionally accepted by the parties", absolute? For example, would it apply where a recommendation was inconsistent with Article 19.2 of the DSU? Or where a report exceeded the scope set out in Article 17.6 of the DSU?

3. As China mentioned in the oral statement, both the words "shall" and "unconditionally" indicates that the disciplines under Article 17.14 is of mandatory nature. China cannot see any inherent conflicts between the mandatory disciplines under Article 17.14 with Article 19.2 and Article 17.6 of the DSU. Article 17.14 stipulates the disciplines on the disputed parties, while both Article 19.2 and 17.6 of the DSU provides for the obligation which should be abided by the Appellate Body.

[Question 6 (EC, Japan)]

Question 7: Please refer to Article 17.14 of the DSU and the Appellate Body's decision in *EC - Bed Linen*. In your view, are these expressions of a principle that at some point disputes should be treated as finally settled so that potentially endless cycles of litigation are avoided not only with respect to claims but also with respect to defences and specific issues considered in disputes, and both with respect to arguments that are rejected and those that fail for lack of evidence?

4. The plain reading of Article 17.14 of the DSU and the jurisprudence made by the Appellate Body' in *EC - Bed Linen*, to some extent, show the principle that disputes should be treated as finally

settled so that potentially endless cycles of litigation are avoided. This principle applies not only claims but also to defences. Furthermore, China believes that this principle is the same both with respect to arguments that are rejected and those that fail for lack of evidence. In this regard, China would like to invite the panel to refer to the Appellate Body report in *EC - Bed Linen*, in which para. 96 states that,

> "… In our view, the effect, for the parties, of findings adopted by the DSB as part of a panel report is the same, regardless of whether a panel found that the complainant failed to establish a prima facie case that the measure is inconsistent with WTO obligations, that the Panel found that the measure is fully consistent with WTO obligations, or that the Panel found that the measure is not consistent with WTO obligations."

[Question 8 (EC)]

Question 9: 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?

5. Under WTO dispute settlement mechanism, it is the defending party who undertakes the obligation to implement the DSB's rulings and recommendations, not the complaining party. Since Articles 19 and 21 of the DSU stipulate the panel and Appellate Body recommendations and surveillance of implementation of recommendations and rulings, these two provisions focus on the implementing Member. However, whether the panel and Appellate Body will finally make recommendations and what recommendations to be made depend on the specific circumstances of a specific case. China sees no text of the DSU that requires the DSB recommendation should taking into consideration whether it can help the respondent knows what aspects of a measure it is required to modify to comply with a DSB recommendation, and so that protect the respondent from having to face a second claim with respect to the same aspect.

Question 10: Do you consider unusual the comments and clarification in the Appellate Body report in this dispute that have been highlighted by the U.S. (US FWS §42)? How do you interpret these comments? Do you think that it was the intention of the Appellate Body that the U.S. could implement by showing / demonstrating / establishing a second time what it could not show / demonstrate / establish the first time? In what other reports has the Appellate Body made similar comments or clarifications?

6. It is true that, the comments and clarification in the Appellate Body report in this dispute are to some extent special, as compared with other various Appellate Body reports. China notes that the reason is the nature of the discipline under GATS Article XIV chapeau. The burden is on the respondent to prove it has abided by the rules. However, nothing in the Appellate Body report indicates a clear intention by the Appellate Body that the US could implement by establishing a second time what it could not demonstrate in the original disputes.

[Question 11 (Japan)]

Question 12: How can a Member bring a measure into conformity with its obligations when (a) it has been found that the measure is provisionally justified under a paragraph in a general exception provision; and (b) it has not been found that the measure satisfies the chapeau of the general exception provision.

7. For a general exception provision, as WTO jurisprudence has clarified, a sub-paragraph in a general exception provision and the chapeau of the general exception provision mandate different and separate obligations. The panel or the Appellate Body would enter into so called "two-tiered analysis" when dealing with such an assessment. In the case that a specific measure is justified by a sub-paragraph, but fails the text under the chapeau of that provision, the defending party shall still undertake the obligation to bring the measure into conformity with WTO rules. As to how can a Member bring its measure into conformity, China views that it is an issue of case by case and the implementing member enjoy discretion to shape the "measures taken to comply". Put in other way, the implementing member may choose to remove its measure thoroughly and totally, or simply choose to make its measure consistent with the chapeau of the general exception provision, or take some other actions which could implement the DSB's rulings and recommendations.

Question 13: If a respondent were entitled to a "second chance" to make out a defence, would the compliance panel make its assessment on the basis of evidence presented in the compliance proceeding only, or the evidence presented in the original proceeding as well?

8. China notes that Article 11 of the DSU stipulates that a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case. Further, Article 13 of the DSU provides the panel with the right to seek information. In performing its functions, a panel would have a wide scope of discretion in assessing the facts before it.

Question 14: 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?

Question 15: If a respondent were not entitled to a "second chance", would this be reasonable after a complex original dispute that presented numerous novel issues, especially if the dispute involved an under-resourced respondent who was unfamiliar with WTO dispute settlement?

9. *[Answer to questions 14 and 15]* China thinks that both questions 14 and 15 are systematic issues for this panel in this proceeding. However, China would not provide more comments on them. China would like to see any clarifications and conclusions by this panel.

[Question 16 (EC)]

Question 17: Does the fact that the statements are made in the context of Article 21.3(c) of the DSU require that they be given different weight from that accorded to any other statements of a party concerning an issue in dispute? If so, what weight should they be given?

Question 18 (China): How should the "appropriate balance" be struck between the discretion of an implementing Member to shape the measures taken to comply and the principle of good faith? (China oral statement, para. 8)

10. *[Answer to questions 17 and 18]* As China has highlighted in its oral statement, it is a systematic and complicated issue with regard to whether an appropriate weight should be given to the Article 21.3 arbitration proceeding. China agrees that the intention or statement to act in a specific way to implement the DSB's recommendations and rulings presented during the Article 21.3 proceeding could not be construed as legally binding upon the implementing party. However, the good faith principle under Article 3.10 should not be disregarded in that the good faith principle is of vital importance in maintaining the proper function of the dispute settlement mechanism. As to how should the "appropriate balance" be struck between the discretion of an implementing Member to shape the measures taken to comply and the principle of good faith, it is not easy to provide a general

and definite answer. China would like to let this panel note what it concerns and is looking forward to any clarifications and jurisdictions may be put forward by this panel on these systematic issues.

ANNEX F-4

REPLIES BY THE EUROPEAN COMMUNITIES TO QUESTIONS POSED BY THE PANEL (8 DECEMBER 2006)

Question 1: **Article 3.7 of the DSU provides that "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." Article 22.8 of the DSU applies until "such time as the measure found to be inconsistent with a covered agreement has been removed" (emphasis added). How, in your view, do these provisions affect the interpretation of the phrase "measures taken to comply" as used in Article 21.5 of the DSU?**

1. In the present case, both the panel and the Appellate Body ruled that the United States had acted inconsistently with its obligations under the GATS. The Appellate Body confirmed the panel's findings relating to the Interstate Horseracing Act (IHA), ruling that the relationship between the IHA and the three criminal statutes at issue in the original proceedings was ambiguous. The ambiguity which was found to exist relates to whether remote gambling on horse races by domestic service providers has been exempted from the prohibitions contained in the three aforementioned criminal statutes. The panel found and the Appellate Body confirmed that on its face, the IHA permitted domestic United States service suppliers to supply remote betting services for horseracing, and that consequently, the United States had not met the requirements of the chapeau of Article XIV GATS. Accordingly, the Appellate Body recommended that the DSB request the United States to bring its measures, found to be inconsistent with the GATS, into conformity with its obligations under that agreement (para. 374).

2. It follows from the foregoing that as a result of the adoption by the DSB of the panel and the Appellate Body reports in relation to the original proceedings, it is incumbent on the United States to remove the noted ambiguity in the relationship between the IHA and the three criminal federal statutes at issue in the original proceedings. Leaving the representations made by the United States in the Article 21.3 (c) Arbitration aside, under the DSU the United States, as implementing Member, is in principle free to choose any of the various options that may exist to bring about compliance.

3. In the EC's view the objective of the "withdrawal of the measures concerned" set out in Article 3.7 DSU will be met in relation to the present dispute when the United States takes (a) measure(s) to comply (Article 21.5 DSU) that eliminate(s) the WTO violation. The measure(s) taken to comply must, in accordance with the DSB's rulings and recommendations, consist of a removal of the ambiguity in the relationship between the IHA and the three criminal federal statutes at issue in the original proceedings. WTO case law confirms that the words underlined in the question do not mean that a Member must always abrogate the disputed legal act. What matters is that the WTO violation is eliminated. To that end, amendments clarifying the meaning of a measure may be sufficient.[1]

Question 2 (EC): What kind of "cogent reasons" or "reasonable explanation" could entitle an implementing party not to bring any new measures before a compliance panel? (European Communities Third party submission, para. 25)

[1] Panel report on *European Communities-Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (15 March 2005), para. 8.5; Panel report on *European Communities-Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R (15 March 2005), para. 8.5;

4. In response, as clarified at the meeting with third parties on 28 November 2006, the European Communities is of the view that the United States, in the circumstances of this case, and particularly in view of the representations it made in the Article 21.3 (c) Arbitration phase, must justify the following: why is the United States now of the view that contrary to its earlier firm assertions on this issue, no fresh legislation needs to be enacted by it to comply with the DSB's rulings and recommendations?

5. Any explanation given by the United States must be consistent with the DSU. For the reasons set out in the European Communities written and oral submission it is not acceptable for the United States to simply reaffirm before this compliance Panel that the measures which were before the original panel are WTO-consistent, without showing any relevant change in these measures or any modification of any aspect of these measures.[2]

6. It is not for the European Communities to speculate on the form of implementation the United States' compliance measures should take. In principle, as repeated above, it is up to the United States as implementing Member, to choose a suitable method of compliance. In general, compliance can consist of legislative or non-legislative measures. The European Communities notes however that the United States in the Article 21.3 (c) Arbitration phase asserted that the only way for it to comply was by enacting fresh legislation.[3] In addition, it was confirmed in the original proceedings that a Presidential executive statement or executive order would be insufficient to resolve the ambiguity in the relationship between the various acts.

7. The European Communities does not believe that it is incumbent upon it to suggest a cogent explanation but hypothetically, in the particular circumstances of this case, if there had been a recent Supreme Court ruling that satisfactorily clarifies the interaction between the various federal statutes at issue, and that removes the noted WTO-inconsistent ambiguity, this might be a possible cogent explanation for this United States' change of mind regarding the need for enactment of fresh legislation. A more general hypothetical example could be a change of the constitutional arrangements in a Member, giving the executive new powers to enact measures which previously could be adopted only by the legislature.

[Question 3 (Japan)]

Question 4: 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?

8. In response, the European Communities respectfully refers to the observations which it made on this question in its Third party written submission[4] and oral statement.[5]

9. The first point to note is that the (*res judicata*) principle according to which adopted reports must be regarded as a final resolution of the dispute between parties in relation to a particular (aspect of a) claim applies with equal force to affirmative defences. It makes no difference for the application of the (*res judicata*) principle, whether a complaining party's claim or a responding party's affirmative defence was rejected because of failure to meet a burden of proof or for any other reason, as long as it is established that the claim or the affirmative defence was ruled upon. This follows clearly from the

[2] EC Third party written submission, Section II, paras. 8-15; Section III, paras. 22-26; Section IV, paras. 30-34, paras. 42-47; EC Third party oral statement, paras. 5, 6 & 7, 14-21.
[3] EC Third party written submission, Section V, paras. 58-66
[4] EC Third party written submission, Section IV (2), paras. 42-47.
[5] EC Third party oral statement, paras. 15-21.

Appellate Body's ruling in Bed Linen quoted in paragraph 47 of the European Communities' oral statement.[6]

10. Further, the European Communities notes that in this particular case the Appellate Body reviewed the circumstances under which the panel considered the United States' affirmative defence under Article XIV GATS.[7] As noted in the Appellate Body report, according to the United States, "the Panel properly considered the United States' defence under Article XIV" and emphasised that "Antigua had sufficient opportunity to respond" to the defence after the United States invoked Article XIV in its Second written submission to the Panel.[8]

11. The United States did not argue in the original proceedings that it was not offered sufficient opportunity to present evidence in support of its affirmative defence. The European Communities submits that the United States could not have raised such an argument successfully as it was the United States itself that decided on the (late) timing of the invocation of its affirmative defence before the panel. This was precisely the reason why Antigua appealed to the Appellate Body, claiming that the Panel had erred in its decision to consider the United States' affirmative defence in the original proceeding.[9]

12. Consequently, in the European Communities' view, there is no ground for this Article 21.5 Panel to consider the United States' argument that it was not offered sufficient opportunity to present evidence in support of its affirmative defence. In this regard, the European Communities notes that the Appellate Body in the original proceeding held that for reasons of good faith and due process both the complaining and the responding party need to put forward their case during the first stage of the panel proceedings.[10] More specifically, the Appellate Body held as follows:

> "(….) under the standard working procedures of panels, complaining parties should put forward their cases - with "a full presentation of the facts on the basis of submission of supporting evidence"- during the first stage of panel proceedings. We see no reason why this expectation would not apply equally to responding parties (…);[11]

Question 5: Is the rule in Article 17.14 of the DSU, that an adopted Appellate Body report "shall be unconditionally accepted by the parties", absolute? For example, would it apply where a recommendation was inconsistent with Article 19.2 of the DSU? Or where a report exceeded the scope set out in Article 17.6 of the DSU?

13. In response, the European Communities confirms that once the DSB has adopted the panel and the Appellate Body reports in relation to a particular dispute, the principle, which finds an expression in Article 17.14 DSU, according to which findings and conclusions contained in these reports are final, is indeed, without exception.

14. Further, in the present case neither party has argued that the Appellate Body report's findings and/or conclusions are in breach of Article 17.6 or 19.2 DSU. The European Communities respectfully submits that there is no ground for such concern in this case, and that therefore this question is entirely hypothetical. [12]

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[6] Appellate Body report on *EC-Bed Linen* (Article 21.5 – India), para. 96.
[7] Appellate Body report, para. 114 (D) (i).
[8] Appellate Body report, para. 91.
[9] Appellate Body report, para. 268.
[10] Appellate Body report, paras. 271, 272.
[11] Appellate Body report, para.271
[12] See too: the EC's response to question 14 below.

15. In addition, the European Communities does not believe it would ever be appropriate for a 21.5 panel to hold that a previously adopted panel and/or Appellate Body report in the same dispute settlement procedure makes findings or draws conclusions that would be in breach of one or the other provision of the DSU.

Question 6 (EC, Japan): Please refer to the Appellate Body report in European Communities - Bed Linen. Why in your view does this report mean that a responding party to a dispute cannot use a compliance proceeding to obtain a "second chance"? (European Communities oral statement, para. 20; Japan oral statement, para. 2)

16. The European Communities confirms that it is of the view that the reason why parties are not entitled to a 'second' chance at rearguing their case in an Article 21. 5 proceeding is based on the general principle of *res judicata* which finds its expression in Article 17.14 DSU. The European Communities refers in this regard to the submissions which it made earlier,[13] and to its answer to question 7 below.

17. 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.[14] Its argument in that paragraph that "it would be incompatible with the function and purpose of the WTO dispute settlement system if a claim could be reasserted in Article 21.5 proceeding after the original panel or the Appellate Body has made a finding […]" applies with equal force to a defence that would be re-asserted on the same grounds as in the original proceedings.

Question 7: Please refer to Article 17.14 of the DSU and the Appellate Body's decision in European Communities - Bed Linen. In your view, are these expressions of a principle that at some point disputes should be treated as finally settled so that potentially endless cycles of litigation are avoided not only with respect to claims but also with respect to defences and specific issues considered in disputes, and both with respect to arguments that are rejected and those that fail for lack of evidence?

18. In response the European Communities confirms its view that the Appellate Body's ruling in *EC – Bed Linen*, which is consistent with other WTO case law, reflects a general fundamental principle that a matter may not be re-litigated once it has been judged on the merits.[15] As the Appellate Body has confirmed, this principle finds its expression in the obligation set out in Article 17.14 DSU for WTO Members to "unconditionally accept" findings contained in adopted

[13] EC Third party written submission, Section IV, paras. 30-34; 42-47; EC Third party oral statement, paras. 8-21.

[14] For an emphasis on the importance of a "fair , prompt and effective resolution of trade disputes" see also the Appellate Body on *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS/108/AB/R (20 March 2000), para.166.

[15] The European Communities has referred to this principle using the Latin expression of *res judicata*, meaning "the thing has been decided". It should be noted that Japan has in is Third party submissions in these proceedings used the notion of "finality" of adopted panel and Appellate report findings. Both *res judicata* and the notion of "finality" refer to the same fundamental principle underlying domestic and international litigation, i.e. a final judgement of a competent court is conclusive upon the parties in any subsequent litigation involving the same cause of action.

panel and Appellate Body reports. The European Communities refers in this regard to the submissions which it made earlier.[16]

19. In relation to the present case the European Communities is of the view that the ruling of the Appellate Body in *EC - Bed Linen*, is particularly on point, as the Appellate Body was dealing with an appeal from an Article 21.5 compliance panel and effectively held that the *res judicata* principle applies regardless of the ground on which a party failed to prevail:

> "(…) In our view, the effect, for the parties, of findings adopted by the DSB as part of a panel report is the same, regardless of whether a panel found that the complainant failed to establish a *prima facie* case that the measure is inconsistent with WTO obligations, that the Panel found that the measure is fully consistent with WTO obligations, or that the Panel found that the measure is not consistent with WTO obligations. A complainant that, in an original proceeding, fails to establish a *prima facie* case should not be given a "second chance" in an Article 21.5 proceeding, and thus be treated more favourably than a complainant that did establish a *prima facie* case but, ultimately, failed to prevail before the original panel, with the result that the panel did not find the challenged measure to be inconsistent with WTO obligations. Nor should a defending party be subject to a second challenge of the measure found not to be inconsistent with WTO obligations, merely because the complainant failed to establish a *prima facie* case, as opposed to failing ultimately to persuade the original panel. Once adopted by the DSB, both findings amount to a final resolution to the issue between the parties with respect to the particular claim and the specific aspects of the measure that are the subject of the claim."[17]

Question 8 (EC, Japan): Where is the risk of a "potentially endless loop"? Is there an endless loop where, as in this dispute, there is a procedural agreement that provides that if the compliance panel finds against the respondent, the complainant may proceed to request suspension of concessions under Article 22.2 of the DSU? (Japan Third party written submission, para. 8)

20. The European Communities understands Japan's reference to a "potentially endless loop" as pointing to a risk of repetition of substantive arguments rather than to a risk of repetition of procedure. The finality of a DSB ruling means that absent any factual development issues are not to be re-opened between the same parties on the same matter irrespective of the specific procedure at hand.

21. As recent experience shows, the fact of moving on to the next procedural stage after a compliance panel, i.e. the authorisation of suspension of concessions, does not necessarily end the dispute between the parties. A WTO Member found to have breached the WTO Agreement normally has an interest in ending any suspension of concessions applied against it by bringing about compliance. In any subsequent WTO litigation, the parties would risk entering an "endless loop debate" if they were allowed to rely on facts and arguments previously advanced, but rejected by a binding panel or Appellate Body decision.

Question 9: 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

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[16] EC Third party written submission, Section IV, paras. 30-34; 42-47; EC Third party oral statement, paras. 8-21.

[17] Appellate Body report on *EC-Bed Linen (Article 21.5 – India)*, para. 96.

modify to comply with a DSB recommendation, and protect the respondent from having to face a second claim with respect to the same aspect?

22. In the European Communities' view, while it can be said that Articles 19 and 21 of the DSU are specifically addressed to the responding Member, these provisions do not imply any "special status" of that Member let alone any privileged position vis-à-vis the application of the *res judicata* principle. The *res judicata* principle applies in an equal manner to either party to a dispute. It protects the responding Member from having to face a second claim with respect to the same aspect as much as it protects the complaining Member from having to re-argue that same claim.

Question 10: Do you consider unusual the comments and clarification in the Appellate Body report in this dispute that have been highlighted by the U.S. (US FWS §42)? How do you interpret these comments? Do you think that it was the intention of the Appellate Body that the U.S. could implement by showing / demonstrating / establishing a second time what it could not show / demonstrate / establish the first time? In what other reports has the Appellate Body made similar comments or clarifications?

23. In response, the European Communities does not believe that the language used by the Appellate Body on which the United States seeks to rely is unusual. When the Appellate Body holds that a party has not "shown" or "demonstrated" the Appellate Body has made a negative assessment as to whether the arguments and evidence put forward by a particular party were sufficiently persuasive for it to prevail. For the systemic reasons outlined by the European Communities, use of these terms cannot be understood as inviting the party that failed to persuade the panel/Appellate Body to make its case again before an Article 21.5 panel. Use of the phraseology "has not shown", "has not demonstrated" is tantamount to a judgement that the party concerned "has not established".

24. In the European Communities' view the above clearly follows by analogy from the Appellate Body's ruling in *EC – Bed Linen* [18] cited in para. 47 of the European Communities' Third party written submission, and in para. 20 above in response to question 6. In the ruling in question the Appellate Body states that the *res judicata* principle applies regardless of the ground on which a party failed to prevail, emphasising that the principle applies in cases not only where the complainant "failed to establish" a prima facie case, but also where the complainant "did establish" a prima facie case, but ultimately "failed to prevail" or where the complainant "ultimately" "failed to persuade the original panel".

[Question 11 (Japan)]

Question 12: How can a Member bring a measure into conformity with its obligations when (a) it has been found that the measure is provisionally justified under a paragraph in a general exception provision; and (b) it has not been found that the measure satisfies the chapeau of the general exception provision.

25. As set out above in response to question 2, it is not for the European Communities as a third party to speculate on the form of implementation the United States' compliance measures should take. In principle, as repeated above, it is up to the United States as implementing Member, to choose a suitable method of compliance. In general, compliance can consist of legislative or non-legislative measures. Any measure taken to comply in this particular dispute must however, in any event, remove the WTO-inconsistent ambiguity in the interaction between the various federal statutes at issue so as to meet the requirements of the chapeau of Article XIV GATS.

[18] Appellate Body report on *EC-Bed Linen (Article 21.5 – India)*, para. 96.

26. For the reasons set out in the EC's written and oral submissions,[19] the United States cannot be considered in compliance if it merely re-argues its point of view (rejected by the panel and the Appellate Body reports) that there is no ambiguity in the interaction between the various federal statutes at issue, in the absence of any relevant change in the contested measure or in the absence of any new measure having been taken.

27. As noted by the European Communities in paragraph 63 of its Third party written submission, in the Article 21.3(c) Arbitral Award it is noted that the United States had not explained in any precise manner how it intended to implement the recommendations and rulings of the DSB. However, this lack of precision by the United States only related to the question of "whether legislative implementation would be achieved by 'confirming' or 'clarifying' the prohibitions on the remote supply of gambling and betting services, rather than in the direction of authorizing, even in part, the supply of such services". This was in the United States' view an issue for the United States' legislator to resolve. The lack of precision did not concern the question of whether, from the US' point of view, legislative action was optional. This is confirmed moreover, by the Arbitrator's summary of the grounds put forward by the United States which he accepted as "particular circumstances" for the determination of the reasonable period of time.[20]

Question 13: If a respondent were entitled to a "second chance" to make out a defence, would the compliance panel make its assessment on the basis of evidence presented in the compliance proceeding only, or the evidence presented in the original proceeding as well?

28. In response the European Communities respectfully confirms its view that for the systemic reasons outlined by the EC, this Panel should not allow either party to re-open issues ruled upon in reports adopted by the DSB. The European Communities makes five points in this regard.

29. A first, rather fundamental, point is that the DSU does not provide for a further instance in the dispute settlement proceedings, whereby conclusions of the original panel, modified as the case may be, by the Appellate Body, might after adoption by the DSB, somehow be appealed to a compliance panel. The European Communities respectfully recalls that under the DSU, findings of the original panel can be appealed only once and only in relation to issues of law covered in the panel report and legal interpretations developed by the panel (Article 17.6 DSU).

30. Secondly, as pointed out by the European Communities in its written submission,[21] the Appellate Body has in *US-Shrimp* confirmed that the obligation of the Appellate Body under Article 21.5 is :

> "surveillance of implementation of the recommendations and rulings made by the DSB rather than a de novo review of the rulings themselves and therefore the Appellate Body report shall be treated by the parties to a dispute as a final resolution of that dispute".[22] (emphasis added)

31. The European Communities submits that the same tenet also applies to a panel in an Article 21.5 proceeding.

32. Thirdly, as the European Communities has pointed out before, the Appellate Body jurisprudence on the legal effect of adopted panel and Appellate report findings (i.e. that once adopted

[19] EC Third party written submission, Section III, paras. 22-26; Section IV, paras. 30-34, paras. 42-47; EC Third party oral statement, paras. 7, 14-21.

[20] EC Third party written submission, Section V, para. 63 and references contained therein.

[21] EC Third party written submission, para. 31.

[22] Appellate Body report on *US –Shrimp (Article 21.5 –Malaysia)*, para. 97.

by the DSB, such findings amount to a final resolution to the issue between the parties with respect to the particular claim and the specific aspects of the measure that are the subject of the claim) leaves no room for this Panel to offer either party a 'second chance'.

33. Fourthly, as the Appellate Body has emphasised[23], Article 21 DSU deals with events "subsequent" to the DSB's adoption of recommendations and rulings in a particular dispute. Even if a compliance panel has a broad mandate,[24] it is not the task of a compliance panel to review the rulings and recommendations which the DSB made on the basis of the conclusions of the panel and the Appellate Body reports. Therefore, the task this Panel is to asses whether the United States has implemented the rulings and recommendations of the DSB in relation to the original proceedings.

34. A fifth point is that the European Communities would note that the Appellate Body in the original proceeding held that, for reasons of good faith and due process, both the complaining and the responding party should put forward their cases with "a full presentation of the facts on the basis of submission of supporting evidence" – during the first stage of the panel proceedings. [25]

35. It was on the basis of the above considerations that the European Communities addressed the question of admissibility of new evidence in compliance proceedings. The European Communities suggested in its written submission and oral statement that a distinction should be made between two hypotheses: first, where a new measure is brought before a compliance panel; second, where no new measure has been taken. In relation to the first hypothesis, the European Communities generally holds the view that if there is a new measure before a compliance panel, this entails the emergence of new factual circumstances and thus a broad right to bring new claims, arguments and factual circumstances against the new measure and all its elements. The second hypothesis however, presents more difficult systemic questions. The European Communities is of the view that the question of whether reopening of an issue is allowed on the basis of alleged fresh evidence, in the absence of new measures, is a delicate matter, for two main reasons: firstly, the DSU contains no provisions on admission of fresh evidence in Article 21.5 proceedings; secondly, allowing admission of fresh evidence where no new measure has been presented may be regarded as undermining the *res judicata* principle.[26]

36. For the above reasons, the European Communities respectfully declines to enter into a debate about what evidence might be admissible if either party were, contrary to the settled jurisprudence of the Appellate Body, entitled to re-litigate any such issue.

Question 14: 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?

37. In response the European Communities respectfully refers to its answer to question 13. It submits that it must be doubtful whether the hypothesis that lies at the basis of this question (i.e., "where a respondent has sufficient evidence to demonstrate its case in a compliance proceeding") is one that a compliance panel should contemplate under the current rules of the DSU.

38. To begin with, the European Communities would note that the DSU sets up a system of binding dispute settlement for WTO members. This dispute settlement, as set out in Article 3.2 of the DSU, is a central element in providing security and predictably of the multilateral trading system. Article 3.7 DSU emphasises that in the absence of a mutually agreed solution the objective of the

[23] Appellate Body report on *US-Softwood Lumber IV (Article 21.5 – Canada),* para. 70
[24] EC Third party written submission, Section III, paras. 16-19.
[25] Appellate Body report, paras. 271-272.
[26] EC Third party written submission, Section IV; EC Third party oral statement, paras. 8-21.

DSU is to secure the withdrawal of measures inconsistent with the covered agreements. When in the absence of a mutually agreed solution, a panel has been established by the DSB, Article 19 (1) provides that in case the panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, "it shall recommend that the Member concerned bring the measure into conformity with the agreement".

39. In the present case, it is clear that both the panel and the Appellate Body concluded that the measures at issue in the original proceeding were not consistent with the US' obligations under the GATS. Accordingly, the Appellate Body recommended that the DSB request the United States to bring its measures, found to be inconsistent with the GATS, into conformity with its obligations under that agreement (para. 374). Both the Panel and the Appellate Body report were adopted by the DSB under Article 17.14 DSU and both parties must therefore 'unconditionally' accept the ensuing rulings and recommendations. The European Communities respectfully submits that this Panel is also bound by this provision.

40. It follows that the United States is obliged to implement the rulings and recommendations of the DSB, and that the Panel should confirm that obligation in the present proceeding.

Question 15: If a respondent were not entitled to a "second chance", would this be reasonable after a complex original dispute that presented numerous novel issues, especially if the dispute involved an under-resourced respondent who was unfamiliar with WTO dispute settlement?

41. In response the European Communities respectfully submits that none of the parties to this dispute claim that they should be entitled to present fresh evidence in an Article 21. 5 panel on the ground that they are or were somehow, under-resourced.

42. However on the theoretical and systemic issue referred to in this question the European Communities has made the following observations in its written submission:

> "38. In the EC's view the question of whether a party should be allowed to re-open a debate on the basis of alleged new evidence, where no new measure has been taken, is a delicate issue. The first point to note is that the DSU does not contain provisions allowing for the admission of fresh evidence during the course of proceedings. This is in contrast to some international tribunals that have rules of procedure and evidence on the admission for fresh evidence in the course of the proceedings, or that have accepted this in the course of developing their case law.
>
> 39. To the extent that adducing of new evidence is allowed, and especially in the context of appellate proceedings in international litigation, this right is often circumscribed by strict parameters. Generally, the party wishing to bring fresh evidence would need to demonstrate that this evidence was not available at the first instance; either because it did not exist or, if it did exist, it could not have been discovered through the exercise of due diligence.
>
> 40. In the EC's view, it is an entirely different question however, whether in the WTO dispute settlement system a panel under Article 21.5 DSU should be required to be open to admission of allegedly fresh evidence. The European Communities sees a clear tension here with the (res judicata) principle referred to above: i.e., adopted reports must be regarded as a final resolution of the dispute between parties in relation to a particular claim. At the same time, the European Communities acknowledges that the discovery of pertinent fresh evidence that was not available at the first instance could possibly be regarded as an exception to this rule, because of the broad mandate a compliance panel is entrusted with.

> 41. In the circumstances of this case the European Communities suggests that the Panel may also consider that the time when the allegedly fresh evidence came to light is relevant for this assessment (emphasis added, footnotes omitted)."[27]

43. Therefore, the European Communities submits that admission of fresh evidence in an Article 21. 5 proceeding in the absence of a new measure taken to comply is a delicate issue, as there are no express rules in the DSU allowing for this possibility; and further, because of the clear tension with the (*res judicata*) principle that governs findings and conclusions contained in adopted panel and Appellate Body reports. Nevertheless, the European Communities has also suggested that a "due diligence" standard may be applied in these matters including consideration of the time when the allegedly fresh evidence came to light.

44. Finally and with regard in particular to possible resource problems of developing country Members, the European Communities points out also that the DSU contains provisions allowing the Panel to modify its procedures to take account of the needs of a developing country Member (e.g., Article 12.10 DSU). Accordingly, such a Member should be required to signal any possible resource problems at the original panel stage. For the same reason, potential resource problems that allegedly hamper a Member at making its case in relation to the original measures cannot validly be invoked for the first time in a compliance proceeding.

Question 16 (EC): What is the authority for the proposition that "[u]nder the DSU every Party is required to bring its best case forward in the original proceedings"? (European Communities Third party submission, para. 46)

45. As the European Communities has pointed out before the Appellate Body jurisprudence on the legal effect of adopted panel and Appellate report findings (i.e. that once adopted by the DSB, such findings amount to a final resolution to the issue between the parties with respect to the particular claim and the specific aspects of the measure that are the subject of the claim) leaves no room for this Panel to offer either party a 'second chance'. [28]

46. Further, the European Communities would note again that the Appellate Body in the original proceeding held for reasons of good faith and due process that both the complaining and the responding party should put forward their cases with "a full presentation of the facts on the basis of submission of supporting evidence" – during the first stage of the panel proceedings.[29]

47. Consequently on the basis of the foregoing principles there is no room for allowing a party to reopen issues settled by adopted reports. Further, as the European Communities has observed too, new arguments and evidence relating to issues dealt with in the original proceedings could only be acceptable for a compliance panel if they relate to a new measure taken to comply.[30]

Question 17: Does the fact that the statements are made in the context of Article 21.3(c) of the DSU require that they be given different weight from that accorded to any other statements of a party concerning an issue in dispute? If so, what weight should they be given?

48. The European Communities confirms that, as outlined in its written submission, there are important systemic reasons why this Panel must in its assessment of whether the United States has

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[27] EC Third party written submission, Section IV, paras. 38-41.

[28] EC Third party written submission, Section IV, paras. 30-34; EC Third party oral statement, paras. 11-13.

[29] Appellate Body report, paras. 271-272.

[30] EC Third party written submission, Section IV, paras. 35-41; EC Third party oral statement, paras. 9-13.

complied with the DSB's rulings and recommendations, take into account the representations made by the United States in the Article 21.3 (c) phase of the proceedings: [31]

(a) The principle of good faith requires complainants and respondents to engage in the DSU procedures in good faith and in an effort to resolve the dispute (Article 3.10 DSU);

(b) The DSU requires "prompt compliance" with DSB rulings and recommendations (Article 21.1 DSU);

(c) A reasonable period of time can only be granted to an implementing Member only where "prompt compliance" is impractical (Article 21.3 DSU);

(d) Article 21.3 (c) proceedings form part of the process of multilateral surveillance of implementation of recommendations and rulings;

(e) Representations made by an implementing Member before an Article 21.3 (c) Arbitrator must be regarded as forming an integral part of the surveillance of implementation following the DSB's rulings and recommendations, by analogy to the Appellate Body's ruling in *US-Softwood Lumber IV*. [32]

49. In the Article 21.3 (c) phase, which is a binding form of arbitration, the implementing Member must justify why "prompt" compliance is impractical and why it needs a certain period of time to achieve compliance. The award of a reasonable period of time has the effect of allowing the Member to remain in violation of its WTO obligations for a limited period of time and of sheltering it from the suspension of concessions.

50. The European Communities can see no systemic reason why representations made by an implementing Member in the Article 21.3 (c) phase of the proceedings should not be given, at the very least, the same weight as declarations made by an implementing Member before the DSB by analogy to the Appellate Body's ruling in *US - Softwood Lumber IV*. [33] The European Communities submits that the representations made by an implementing Member in the context of an Article 21.3 (c) arbitration are particularly relevant to the issue at hand, i.e., the question of compliance.

51. The foregoing does not mean that if an implementing Member has in the course of an Article 21.3(c) arbitration declared that it could only achieve compliance by enacting fresh legislation, that Member is irrevocably legally bound by this representation. As outlined before, the European Communities does not contest that even in this phase of the DSU the implementing Member may have valid reasons to refrain from using a particular method of compliance it had previously referred to.

52. However, the purpose of an Arbitral award under Article 21.3 (c) cannot be to grant a Member a further period of time to continue breaching its international obligations under the covered agreements.

53. If, as in the present case, the implementing Member was granted a reasonable period of time on the sole ground that the only way for it to comply was by enacting fresh legislation, the DSU

[31] EC Third party written submission, Section IV, paras. 49-54.
[32] See *per analogiam*, Appellate Body report on *US-Softwood Lumber IV (Article 21.5- Canada)*, para. 70, referred to by the EC in its Third party written statement, paras. 53-54.
[33] *Idem.*

would be undermined if that Member were allowed at the expiry of the reasonable period of time to get away with taking no measures to comply at all, let alone legislative measures.

54. It is for that reason that the European Communities insists that in the particular circumstances of this case, this Panel should require that the United States provides a cogent explanation. As outlined again in response to question 2 above, in view of the representations it made in the Article 21.3 (c) Arbitration phase, the United States must provide an explanation for why it is now of the view that contrary to its earlier firm assertions on this issue, no fresh legislation needs to be enacted by it to comply with the DSB's rulings and recommendations. Any such explanation must be consistent with the DSU. As set out in the European Communities' written statement and oral submission, the European Communities does not believe that the United States has provided such a cogent explanation.

55. In addition, the European Communities points out that other panels have also attached legal significance to considered statements made before them by representatives of a Member appearing before them, particularly in case the representations were made not in a casual manner or in the heat of legal argument but in a "deliberative manner, for the record, repeated in writing".

56. For example, the findings of the Panel in *US - Sections 301-310 of the Trade Act of 1974* are particularly instructive:

> "7.118 Attributing international legal significance to unilateral statements made by a State should not be done lightly and should be subject to strict conditions. Although the legal effects we are ascribing to the US statements made to the DSB through this Panel are of a more narrow and limited nature and reach compared to other internationally relevant instances in which legal effect was given to unilateral declarations, we have conditioned even these limited effects on the fulfilment of the most stringent criteria. A sovereign State should normally not find itself legally affected on the international plane by the casual statement of any of the numerous representatives speaking on its behalf in today's highly interactive and inter-dependant world nor by a representation made in the heat of legal argument on a State's behalf. This, however, is very far from the case before us.
>
> 7.119 At this juncture, it is also worth recalling that under Article 11 of the DSU it is our duty to "… make an objective assessment of the facts of the case … and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements" (emphasis added).
>
> 7.120 As regards these statements we find, thus, as follows: (….)
>
> 7.122 The representations and statements by the representatives of the US appearing before us were solemnly made, in a deliberative manner, for the record, repeated in writing and confirmed in the Panel's second hearing. There was nothing casual about these statements nor were they made in the heat of argument. There was ample opportunity to retract. Rather than retract, the US even sought to deepen its legal commitment in this respect.
>
> 7.123 We are satisfied that the representatives appearing before us had full powers to make such legal representations and that they were acting within the authority bestowed on them. Panel proceedings are part of the DSB dispute resolution process. It is inconceivable except in extreme circumstances that a panel would reject the power of the legal representatives of a Member to state before a panel, and through the panel to the DSB, the legal position of a Member as regards its domestic law read

> in the light of its WTO obligations. The panel system would not function if such a power could not be presumed.
>
> 7.124 We are equally satisfied, as a matter of fact, that the statements made to us were intended to be part of the record in the full knowledge and understanding that they could, as any other official submission, be made part of our Report; that they were made with the intention not only that we rely on them but also that the European Communities and the third parties to the dispute as well as all Members of the DSB – effectively all WTO Members – place such reliance on them.
>
> 7.125 Accordingly, we find that these statements by the US express the unambiguous and official position of the US representing, in a manner that can be relied upon by all Members, an undertaking that the discretion of the USTR has been limited so as to prevent a determination of inconsistency before exhaustion of DSU proceedings. (….)." (emphasis added, footnotes omitted)[34]

57. The European Communities would note again that the question of the method of implementation of the DSB's recommendations and rulings was extensively litigated in the Article 21.3(c) arbitral phase of this case. As pointed out by the European Communities in its written submission and oral statement, before the arbitrator the United States declared that the only option for it was to enact fresh legislative measures, and firmly rejecting any suggestion that there would any possibility of implementation by any other means.[35] These were not casual statements, but representations made in a deliberative manner by authorised representatives before an arbitrator appointed in accordance with Article 21. 3 (c) of the DSU. This Panel must accord such statements appropriate weight and legal significance.

[34] Panel report on *United States- Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (22 December 1999), paras. 7.115-7.125.

[35] EC Third party written submission, Section V, paras. 55-66; EC Third party oral statement, paras. 22-25.

ANNEX F-5

**REPLIES BY JAPAN TO QUESTIONS POSED BY THE PANEL
(8 DECEMBER 2006)**

Question 1: **Article 3.7 of the DSU provides that "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." Article 22.8 of the DSU applies until "such time as the measure found to be inconsistent with a covered agreement has been removed" (emphasis added). How, in your view, do these provisions affect the interpretation of the phrase "measures taken to comply" as used in Article 21.5 of the DSU?**

1. The phrase "measures taken to comply" used in Article 21.5 of the Dispute Settlement Understanding ("DSU") means the measures taken by the respondent to comply with the recommendations and rulings of the DSB. Therefore, the "measures taken to comply" will depend on the specific content of the recommendations and rulings of the DSB at issue and differ in each case. In this sense, the respondent is not necessarily required to "withdraw" or "remove" the whole measure at issue provided that it is not necessary to do so for the purpose of complying with the relevant recommendations and rulings of the DSB.

[Question 2 (EC)]

Question 3 (Japan): Does Japan consider that there could ever be circumstances that would entitle an implementing party not to rely on any new measures or any "independent act" before a compliance panel? What is meant by an "independent act"? (Japan Third party submission, para. 4; oral statement, para. 5)

2. Japan is not aware of any circumstances that entitled an implementing party not to rely on any new measures or any independent act in order for it to comply with the recommendations and rulings of the DSB.

3. The expression of an "independent act" in our written submission and oral statement means a new and different measure, which itself was not at issue in the original panel proceeding, taken after the adoption of the panel and the Appellate Body reports wherein the recommendations and rulings are contained. We are of the view that the ordinary meaning of the word "taken" and the structure of Article 21 of the DSU suggest that "measures taken to comply" refers to measures taken subsequent to the conclusion of the original proceedings. The Appellate Body has also indicated in *United States – Import Prohibitions of Certain Shrimp and Shrimp Products* that "Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel." Of course, Japan does not deny implementing Member's discretion regarding how it complies with the recommendations and rulings by taking some kind of an independent act.

Question 4: 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?

4. Recommendations and rulings of the DSB will depend on the specific findings of a panel and the Appellate Body in each case, including those relating to the defense asserted by a respondent. Where a panel or the Appellate Body finds that a complainant has established a *prima facie* case with regard to its claim and the respondent fails to rebut, then the panel or the Appellate Body will find the measure at issue to be inconsistent with a covered agreement and will recommend the DSB to request

the respondent to bring that measure into conformity with the agreement. If a panel or the Appellate Body finds, for another instance, that a complainant has not established a *prima facie* case or that it is unable to complete its analysis due to lack of evidence, it will issue appropriate recommendations and rulings based on its analysis conducted in the course of the proceeding.

Question 5: Is the rule in Article 17.14 of the DSU, that an adopted Appellate Body report "shall be unconditionally accepted by the parties", absolute? For example, would it apply where a recommendation was inconsistent with Article 19.2 of the DSU? Or where a report exceeded the scope set out in Article 17.6 of the DSU?

5. The parties to the dispute are obliged under Article 17.14 of the DSU to unconditionally accept an Appellate Body report adopted by the DSB unless the DSB decides not to do so within a specified period of time. Neither party is allowed under the DSU to unilaterally refuse the acceptance of an Appellate Body report duly adopted by the DSB, and serious procedural confusion would arise if such an action were permitted. In any event, with respect to this case, DSB recommendations and rulings do not seem to be inconsistent with Article 19.2 of the DSU or the Appellate Body report does not seem to have exceeded the scope set out in Article 17.6 of the DSU.

Question 6 (EC, Japan): 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 cannot use a compliance proceeding to obtain a "second chance"? (EC oral statement, para. 20; Japan oral statement, para. 2)

6. As we have stated in paragraph 10 of our written submission, the Appellate Body explained in paragraph 93 of its report in *EC-Bed Linen (21.5)* that adopted rulings of the DSB "must be accepted by the parties as a final resolution to the dispute between them … with respect to the particular claim and the specific component of the measure that is subject to the claim." This statement of the Appellate Body, in our view, means that a responding party to a dispute can not use a compliance proceeding to obtain a "second chance". In fact, we are of the view that the report in *EC-Bed Linen (21.5)* should be read to allow neither party a "second chance" at the 21.5 panel proceeding.

Question 7: Please refer to Article 17.14 of the DSU and the Appellate Body's decision in *EC - Bed Linen*. In your view, are these expressions of a principle that at some point disputes should be treated as finally settled so that potentially endless cycles of litigation are avoided not only with respect to claims but also with respect to defences and specific issues considered in disputes, and both with respect to arguments that are rejected and those that fail for lack of evidence?

7. Article 17.14 of the DSU provides that an Appellate Body report adopted by the DSB shall be unconditionally accepted by the parties to the dispute. As it is clearly stated in the provision, this obligation is imposed on both parties to the dispute. Therefore, any recommendations or rulings contained in an Appellate Body report must be unconditionally accepted by both parties regardless of whether such recommendations or rulings are related to claims, defence or arguments brought by the complainant or the respondent.

Question 8 (EC, Japan): Where is the risk of a "potentially endless loop"? Is there an endless loop where, as in this dispute, there is a procedural agreement that provides that if the compliance panel finds against the respondent, the complainant may proceed to request suspension of concessions under Article 22.2 of the DSU? (Japan Third party written submission, para. 8)

8. The risk of a "potentially endless loop" surfaces once a party is allowed to readdress an argument on the concluded substantive issues after the conclusion of a panel proceeding, as the other

party would inevitably seek a fair and appropriate opportunity to counter-argue, which would then prompt further counter-argument on the part of the other party. This situation would hinder prompt settlement of a dispute for the effective functioning of the WTO, which is one of the objectives of the dispute settlement system. There should therefore be an end to the parties' argument in sequence at some point, and that point is at the adoption of a panel / the Appellate Body report. The existence or inexistence of a procedural agreement providing the complainant to proceed to request suspension of concessions under Article 22.2 of the DSU is irrelevant to the issue of "potentially endless loop", as such suspension is a "temporary measure available in the event that the recommendations and rulings are not implemented", as provided for in Article 22.1 of the DSU, and does not "settle" a dispute.

Question 9: 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?

9. Recommendations and rulings are directed to the implementing Member, as that Member is requested to bring its measures found to be inconsistent with the provision of the covered agreements into conformity with its obligations. Therefore, in this sense, our understanding is that the recommendations and rulings of the DSB as well as the procedures for surveillance of their implementation focus on the respondent rather than the complainant.

10. Indeed the recommendations and rulings usually do not require the implementing Member any specific manner of implementation, and the implementing Member may choose a measure to comply with the recommendations and rulings as it finds appropriate. The protection of the respondent from facing a second claim with respect to the same aspect is however a different matter. It is considered that the recommendations and rulings of the DSB and the procedures for surveillance of implementation thereof are not, in principle, expected to function as protection for respondent from such a second claim.

Question 10: Do you consider unusual the comments and clarification in the Appellate Body report in this dispute that have been highlighted by the U.S. (US FWS §42)? How do you interpret these comments? Do you think that it was the intention of the Appellate Body that the U.S. could implement by showing / demonstrating / establishing a second time what it could not show / demonstrate / establish the first time? In what other reports has the Appellate Body made similar comments or clarifications?

11. In our view, the wording of paragraph 374 of the Appellate Body report is clear, and such recommendations and rulings were made in light of the comments and clarification in the Appellate Body report. According to the recommendations and rulings contained in the said paragraph of the Appellate Body report, implementing Member is requested to bring its measures found to be inconsistent with the GATS into conformity with its obligations under that agreement, and we do not consider that the implementing Member was invited to show / demonstrate / establish a second time what the implementing Member could not show / demonstrate / establish the first time during the course of 21.5 panel proceeding without taking any new measures to comply with such recommendations and rulings.

Question 11 (Japan): 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)

12. Consistent with the rule of finality of the DSB rulings and recommendations as aforementioned, the appropriate forum should be the original proceeding.

Question 12: How can a Member bring a measure into conformity with its obligations when (a) it has been found that the measure is provisionally justified under a paragraph in a general exception provision; and (b) it has not been found that the measure satisfies the chapeau of the general exception provision.

13. In a situation described in this question, an implementing Member will be able to comply with its obligations, for example, by rectifying the element contained in the measure at issue which has been found to be inconsistent with the chapeau.

Question 13: If a respondent were entitled to a "second chance" to make out a defence, would the compliance panel make its assessment on the basis of evidence presented in the compliance proceeding only, or the evidence presented in the original proceeding as well?

14. We are of the view that no "second chance" should be given to either party, thus regard this question irrelevant.

Question 14: 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?

15. Japan is of the view that, if a respondent has sufficient evidence to demonstrate, by invoking a general exception provision, that its measures are consistent with the covered agreements, then it is expected to establish a *prima facie* case to support its legal claim in the original course of the dispute. When the respondent fails to establish such a *prima facie* case and a panel or the Appellate Body recommends the respondent to bring its measures in conformity with the covered agreements at the end of the original proceeding, the respondent needs to take certain measures to comply with the recommendations in a manner which it considers appropriate.

Question 15: If a respondent were not entitled to a "second chance", would this be reasonable after a complex original dispute that presented numerous novel issues, especially if the dispute involved an under-resourced respondent who was unfamiliar with WTO dispute settlement?

16. The procedural fairness and the finality of the DSB rulings are underscored in the DSU, and the resource, the familiarity with the dispute settlement of a Member as well as the extent of complexity of the original proceeding does not, collectively or on its own, constitute a reason to make exceptions to the procedures prescribed in the DSU, unless otherwise provided in the agreement. This is in line with our argument on the issue of finality of the DSB rulings as contained in paragraphs 7 to 10 of our written submission and paragraphs 2 to 4 of our oral statement.

[Question 16 (EC)]

Question 17: Does the fact that the statements are made in the context of Article 21.3(c) of the DSU require that they be given different weight from that accorded to any other statements of a party concerning an issue in dispute? If so, what weight should they be given?

17. The statements made in the course of arbitration referred to in Article 21.3(c) of the DSU needs to be weighed and examined by the arbitrator for the purpose of determining the reasonable period of time for the respondent to implement the DSB recommendations and rulings. If this question concerns how much weight ought to be given to the said statements in the course of the 21.5

panel proceeding in examining the existence of the measures taken by a respondent to comply with the recommendations and rulings, or the consistency of such measures with the covered agreements, Japan notes that no provision in the DSU provides that a binding effect be given to the statements made at the arbitration so as to lock the implementing member into the intended measure referred to at the 21.3(c) arbitration stage.

ANNEX G

COMMENTS BY THE PARTIES ON REPLIES TO QUESTIONS POSED BY THE PANEL

ANNEX G-1

COMMENTS* BY ANTIGUA AND BARBUDA ON REPLIES TO QUESTIONS[1] POSED BY THE PANEL (14 DECEMBER 2006)

Question 1 (US): The DSB recommended that the US "bring its measures into conformity" with its obligations under the GATS. Does the US consider that it has already brought its measures into conformity, or that it did not need for certain reasons to bring its measures into conformity? If so, what are these reasons?

1. The United States considers that its measures are consistent with its obligations under the GATS, and that the United States has complied with the recommendations and rulings of the DSB by presenting new evidence and arguments during this proceeding which meet the US burden of proof to show that the US measures meet the criteria of the Article XIV chapeau.

A read of this one sentence answer highlights the failure of the United States' efforts to demonstrate compliance with the DSB Rulings, as its "compliance" is dependent upon "presenting new evidence and arguments" and not by any action on its part at all.

With the caveat that Antigua does not believe the United States is entitled to reargue its failed case before this Article 21.5 compliance Panel,[2] it is important to point out that the United States has in fact not presented "new evidence and arguments" at all – rather, every argument that have made in this proceeding was made in the original proceeding and rejected by the original Panel and by the Appellate Body.[3] Even the argument that the IHA did not "repeal by implication" the Wire Act was floated and rejected in the original proceeding. All that the United States has done in this proceeding is refer to a number of United States court cases, each easily distinguishable from the situation involving the IHA and the Wire Act,[4] to support its contention that the IHA did not "repeal by implication" the Wire Act. Antigua of course has its own interpretation of how this doctrine should be applied under the circumstances, and a number of cases to support its position.[5]

Further, as compared to the recycling by the United States of its old arguments with no further proof or evidence, Antigua has shown in this proceeding:

- *The clear language of the IHA itself ("... a legal wager placed or accepted in one State ... placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State ...").[6]*

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[*] NB: The comments made by Antigua and Barbuda on US replies appear in italics.

[1] The failure of Antigua to provide a comment to any certain United States answer or response should not be taken as acceptance of or agreement with the particular answer or response, in whole or in part. Rather, Antigua considers some of the answers not worthy of comment and others the subject of earlier, extensive discussion that does not require further elaboration.

[2] This very important caveat applies to the comments throughout.

[3] See AB First written submission, paras. 36-41.

[4] None of the cases cited by the United States has a fact pattern like that involved with the IHA and Wire Act–the former statute clearly permitting a specific activity done in accordance with its terms that, otherwise, would have come under the more general coverage of the older statute. Further, none of these cases are, in fact, "new." They are old cases that the United States simply failed or chose not to submit to the original panel.

[5] See AB First written submission, paras. 57-61; AB Second written submission, paras. 37-45.

[6] Id., paras. 50, 54.

- *The only specific legislative history regarding the adoption of the 2000 amendment to the IHA ("I want Members of this body to be aware that [the amendment] would legalize interstate pari-mutual gambling over the Internet. Under current interpretation of the [IHA], this type of gambling is illegal, although the Justice Department has not taken steps to enforce it. This provision would codify legality of placing wagers over the telephone or other electronic media like the Internet.").*[7]

- *Commentary, including an opinion of a state Attorney General, supporting Antigua's reading of the IHA.*[8]

- *Numerous state laws and regulatory schemes endorsing remote gambling under the IHA.*[9]

- *Numerous, high profile domestic operators – including operators owned by government entities – openly and continuously offering remote gambling services in the United States.*[10]

- *Admitted complete lack of prosecution by the United States of remote gambling operators in the United States offering services under various state regulatory schemes, contrasted with significant prosecution efforts directed towards Antiguan operators.*[11]

- *The language of the new federal prohibition law (removing from the definition of "unlawful Internet gambling" "any activity that is allowed under the [IHA].").*[12]

In the face of all of this evidence adduced by Antigua, it would be impossible under any reasonable analysis to conclude that the United States had met its "burden of proof" under the chapeau of Article XIV of the GATS.[13]

2. The language cited in the Panel's question – "bring its measures into conformity" – is set out in, and required by, Article 19 of the DSU. It is important to view that language within the context of the entire article:

> "Article 19: Panel and Appellate Body Recommendations
>
> 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

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[7] Id., para. 55. Note that the United States has no legislative history supporting its interpretation at all, relying instead on the absence of any express statement by Congress that the amendment was intended to "repeal" the Wire Act – something that was not, in the event, required. See US First written submission, paras. 38-40.

[8] AB First written submission, para. 57. The United States, however, has supplied no independent support for its interpretation.

[9] Id., paras. 65-68.

[10] Id., paras. 69-103.

[11] Id., paras. 104-107. For the admission by the United States, see Answers of the United States to Questions from the Panel, *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 (8 December 2006) (the "US Answers"), paras. 90-91.

[12] AB Second written submission, paras. 55-56.

[13] The United States, predictably, takes the position that the Panel can only take its evidence with respect to this issue, and not that of Antigua. See US Answers, para. 55; US Second written submission, para. 31.

> 2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

3. The language about "bringing a measure into conformity" is in the same sentence, and follows upon, a reference to what the panel or Appellate Body has concluded with regard to the inconsistency found by the Panel or Appellate Body with a covered agreement. The United States submits that what it means in a particular dispute to "bring a measure into conformity" cannot be considered in the abstract, but must depend on the specific circumstances of the dispute, and most importantly the specific findings of the Panel or Appellate Body.

4. As the United States has explained in its written and oral submissions, in this dispute the Appellate Body explicitly noted that it was not making a finding as to whether the IHA provides an exemption from the three federal criminal statutes at issue. Rather, the Appellate Body found that the United States had not met its burden of proving this point, and thus had not met its burden of establishing an affirmative defence. In this context, one option for the United States to bring its measures "into conformity" was to proceed to meet its burden of proof to show that those measures were within the scope of the GATS Article XIV(a) exception.

The United States continues to make much of its assertion that "the Appellate Body explicitly noted that it was not making a finding as to whether the IHA provides and exemption from the three federal criminal statutes at issue." But the United States also continues to ignore that it was not the burden of the Appellate Body or the original panel to come to such a conclusion – rather, the burden of proof was on the United States to convince the original panel and the Appellate Body that the IHA did not provide such an exemption. As the United States failed to meet its burden of proof, there was absolutely no need or reason for either the original panel or the Appellate Body to make any further "finding" at all.

Question 2 (ANT, US): 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:

5. As the United States will elaborate in the answers to the subparts below, the United States does not consider that the "measure" in the phrase "measure taken to comply," as used in Article 21.5 of the DSU, must necessarily be more recent than the original proceeding. Article 21.5 does not itself specify a temporal element or limitation on the date that the measure is "taken." Indeed, it is not difficult to conceive of a number of situations in which the measure at issue in an Article 21.5 proceeding is the same as the measure at issue in the original proceeding. Some examples would be:

(a) a measure that on its own terms expires or terminates at a certain time or under certain conditions. Where as a result the measure is no longer in existence as of the time of the Article 21.5 proceeding, the measure will no longer be inconsistent with the DSB recommendations and rulings, but that will not be because the measure taken to comply was more recent than the original proceeding.

(b) a measure that is brought into consistency not through a change to the measure but due to a change in the underlying explanation or basis for the measure. For example, a sanitary or phytosanitary measure for which the risk assessment was found not to have adequately explained a particular element and is revised to comply with the SPS Agreement or an antidumping duty for which the inconsistency was a lack of adequate explanation for how the administering authority took evidence into account the evidence.

(c) a measure that is brought into consistency through an external event, such as a sanitary or phytosanitary measure for which an international standard is adopted after the DSB recommendations and rulings that brings the measure into conformity with the SPS Agreement or an actionable subsidy for which external factors have resulted in there no longer being adverse effects.

Antigua observes that in all three of these examples, something has happened subsequent to the original findings that has either directly changed the measure or has changed its effect. In this case, there has been no change at all, at least no change that could arguably have brought the United States into compliance with the DSB Rulings.

6. Article 21.5 must be read together with DSU Article 19, which describes the recommendations and rulings with respect to which the Member concerned must "comply." In particular, Article 19 does not provide that a Member concerned must adopt a new measure in order to achieve compliance. Rather, Article 19.1 states: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." To be sure, in many cases the Member concerned will choose to bring its measure into conformity by adopting a new or amended measure. (And in that case, the new or amended measure would be subsequent to the original proceeding.) However, Article 19 leaves open the possibility of bringing a measure into compliance through means other than adopting a new or amended measure. Whether this option is available to the Member concerned in a particular dispute will depend on the specific findings of the panel and/or Appellate Body and the particular circumstances of the case.

Sub-question (a) (ANT, US): Does the word "measures" have the same meaning as when used in Article 4.2 and 4.4, Article 6.2 and elsewhere of the DSU?

7. While the DSU does not define the word "measures," the United States is not aware of a basis for believing that the term "measures" in Article 21.5 would have a different meaning than when used in other articles of the DSU.

Sub-question (b) (ANT, US): Does the word "taken" imply a positive action? Please note that the Spanish version reads "medidas 'destinadas' a cumplir."

8. The United States understands that the thrust of this question is whether phrase "taken to comply" means something along the lines of "adopted by the Member concerned for the purpose of compliance." The phrase "taken to comply" would include this meaning, but it is not so limited. The Appellate Body in *US – Softwood Lumber IV* explained its views on the ordinary meaning of the word "taken" as used in DSU Article 21.5:

> "66. In examining the meaning of 'measures taken to comply' in Article 21.5, we begin with the word 'taken'. There is a wide range of dictionary meanings of the word 'taken', which is the past participle of the verb 'take'. The meanings of 'take' include, for example, '[b]ring into a specified position or relation'; '[s]elect or use for a particular purpose.'"

9. The first definition cited by the Appellate Body "bring into a specified position or relation" has a sense, perhaps, of the "positive action" referred to in the Panel's question. But the second meaning – "select or use for a particular purpose" – is not limited to the sense of adopting a new measure for a particular purpose. Under this latter meaning of the verb "take," a pre-existing measure would fit within the meaning of DSU Article 21.5. In other words, under this meaning, the original measure considered in the underlying proceeding would be "selected or used for a particular purpose" – namely, the purpose of showing compliance with the recommendations and rulings.

10. One of the illustrative sentences used in the New Shorter Oxford English Dictionary shows this second meaning of the term taken. That sentence is "That great genius is taken as the standard of perfection." Here, the "great genius" is not in any sense actively adopted, or moved from one place to another. Rather, the person who is the "great genius" is used for a particular purpose, which is to establish a "standard of perfection." Similarly, in the context of the current dispute, the original measure has not been newly adopted for the purpose of compliance, but rather is being used for the particular purpose of establishing compliance with the DSB recommendations and rulings.

11. The DSU used the word "taken," rather than more limiting phrases such as "measure adopted for the purpose of achieving compliance." In fact, "take" appears to be one of the broadest verbs in the English language, with 9 major categories of definitions, plus dozens of shades of meaning within those categories. If the drafters of the DSU wished to have a more limited definition of the phrase "measures taken to comply," they would have used language that more precisely limited the measures to be considered under Article 21.5.

12. Moreover, as the United States has explained above and in its prior oral and written submissions, the context of the phrase "measures taken to comply" must include the rest of the DSU, including Article 3.2 and Article 19.2. First, both of those articles provide that the recommendations and rulings of the DSB cannot add to or diminish rights and obligations under the covered agreements. Those rights include the right to adopt measures that fall within the scope of the GATS Article XIV exception. To be consistent with Article 3.2 and Article 19.2, a finding that a measure may or may not fall within GATS Article XIV cannot require a Member to abolish or amend such a measure. In this context, the only sensible way to read "measure taken to comply" in Article 21.5 is for such a "measure" to include the measure examined in the original proceeding that may, or may not be, within the scope of GATS Article XIV.

Again, the United States overstates what was found by the Appellate Body. What was found was that the three federal statutes at issue were inconsistent with the GATS and the United States had not established that the statutes fell within the exception contained in Article XIV of the GATS. There was not a "finding that a measure may or may not fall within GATS Article XIV."

13. In addition, Article 21.5 must be read in the context of DSU Article 19.1, which describes the recommendations and rulings with respect to which the Member concerned must "comply." Article 19.1, however, does not provide that a Member concerned must adopt a new measure in order to achieve compliance. Rather, the Member concerned must bring the measure into conformity with that agreement." Article 19.1 does not necessarily require that a new measure be adopted in order to bring the pre-existing measure into conformity.

14. Finally, the United States notes Article 3.2 of the DSU:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

15. The dispute settlement system would not be providing "security and predictability" to the multilateral trading system if Members were foreclosed for procedural reasons from establishing in an Article 21.5 proceeding that the measures subject to the recommendations and rulings are in fact consistent with the covered agreements. Furthermore, such an interpretation of Article 21.5 would not serve to "preserve the rights and obligations under the covered agreements." Rather, it could, as

would be the case if Antigua prevailed on its procedural argument in this dispute, "add to" the obligations of a Member by requiring it to replace or modify a measure even when that measure is already consistent with the covered agreements, and would "diminish" the right of a Member to maintain a measure that in fact is in accordance with the covered agreements.

Again, the United States would apply cherry-picked provisions of the DSU only to itself, in essence saying that it will not be obtaining "security and predictability" and its "rights and obligations under the covered agreements" are being "added to" or "diminished" because, apparently, the United States believes that its laws are WTO consistent.

What the United States is really expressing is dissatisfaction with the result of the original proceeding. Antigua shares in the disappointment in a number of respects, such as the Appellate Body's failure to consider Antigua's extensive evidence on reasonable alternatives; the Appellate Body's finding that the Wire Act, the Travel Act and the IGBA are not facially discriminatory despite the clear text of the statutes themselves and Antigua's efforts throughout the original proceeding to make it clear that none of the statutes applies to intra-state remote gambling; and the Appellate Body's determination that the United States had met its burden of proof with respect to the "necessary" prong of the Article XIV defence, despite the complete lack of independent evidence supporting the claims of the United States.

The difference is that Antigua understands that it must accept the results, flawed as they may be, because that is what the rules governing the resolution of disputes in the WTO require of it. Antigua feels very much that some of these unwarranted determinations in the original proceeding have "diminished" its rights under the covered agreements. But unfortunately for Antigua, but of necessity for any dispute resolution system to function, Antigua is not the final arbitrator – the Appellate Body is.

Sub-question (c) (ANT, US): Does the measure need to be specifically aimed at the issue addressed by the DSB recommendation?

16. As explained above, the United States does not consider that the measure taken to comply must be newly and specifically adopted for the purpose of compliance. Rather, under the ordinary meaning of Article 21.5, in context, and in light of the object and purpose of the DSU, the original measure may be used for the purpose of establishing compliance with the recommendations and rulings of the DSB.

17. Moreover, the United States notes that the Appellate Body in *US – Softwood Lumber IV* expressly found that a measure plainly not aimed at compliance nonetheless fell within the scope of a "measure taken to comply" under DSU Article 21. The Appellate Body noted that: "The fact that Article 21.5 mandates a panel to assess 'existence' and 'consistency' tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that move in the direction of, or have the objective of achieving, compliance."

Question 3 (US): Can you further elaborate on the relevance of US – Shrimp for our deliberation with respect to "measures taken to comply"?

18. The United States respectfully refers the Panel to the US answer to Question 16 below.

Question 4 (US): What other circumstances, apart from the "unusual" situation in this dispute, could justify treating the same measures in the original dispute as the "measures taken to comply"? (US oral statement, paras. 5 and 9)

19. The United States submits that no "special" justification is required. Instead, the United States submits that this is allowed for under the DSU, and whether or not the original measure is the measure "taken to comply" will depend on the specific facts and circumstances of a particular dispute. The United States provides examples of such circumstances in paragraph 5 above.

Question 5 (US): Do you argue that new evidence, the presentation of new evidence or re-arguing a defence constitute your "measure taken to comply" for the purposes of Article 21.5 of the DSU in this dispute?

20. The United States is relying on the original measure in dispute as its "measure taken to comply" under Article 21.5. The new evidence and arguments in the US written and oral submissions are not "measures," but instead are the means chosen by the United States to bring its measures into compliance by clarifying the relationship between the IHA and the three federal criminal statutes.

Question 6 (ANT, US): 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?

21. Indeed, the United States is relying in this proceeding on the finality of the Appellate Body report adopted by the DSB in the original proceeding. The Appellate Body expressly noted that due to the limited factual record, neither the Panel nor the Appellate Body was able to determine whether or not the challenged US measures met the requirements of the Article XIV chapeau. The United States is not asking the Panel to revisit this finding. Rather, the United States is requesting that the Panel proceed to examine the issues under the Article XIV chapeau based on new evidence and arguments not previously available to the Panel or Appellate Body.

This response – ("The Appellate Body expressly noted that due to the limited factual record, neither the Panel nor the Appellate Body was able to determine whether or not the challenged US measures met the requirements of the Article XIV chapeau") – highlights a consistent tactic of the United States throughout the course of this proceeding – to repeat something over and over again in hopes that by sheer repetition it will gain acceptance.

What <u>was</u> found was the only finding <u>required</u> to be found with respect to the chapeau – that the United States failed to meet its burden of proof.

In its answers to the Panel's questions alone, the United States uses this phrase or something much like it, in at least ten different places.[14]

Question 7 (ANT, US): 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?

22. The question of whether or not a Member has complied with the recommendations and rulings in a particular dispute depends on the specific facts and circumstances of that dispute. Accordingly, the reasoning and findings of the panel or Appellate Body must be examined closely. Where, as here, the Appellate Body notes that an affirmative defence may or may not be available when examined under a more complete factual record, the sensible means to achieve a resolution of the dispute is for the panel in the Article 21.5 proceeding to examine the affirmative defence under the complete factual record.

See Comment to paragraph 21 above.

[14] See US Answers, paras. 4, 12, 21, 22, 25, 28, 31, 37, 38, 46.

23. This dispute does not present a situation in which a defence was rejected outright. It would not be appropriate for the United States to speculate in the abstract on a hypothetical situation where a defence is rejected outright, but certainly it could make a difference, for example, if the DSB were to have ruled that a measure did not fall within the policy purpose of "necessary to protect human, animal or plant life or health." Again, whether the Member concerned had complied would turn on the specific facts and circumstances of the dispute.

Question 8 (US): The US is arguing that even if a respondent fails to establish an affirmative defence in the original proceeding the respondent has a right to maintain the measure that has been found to be inconsistent with an obligation. Where does such a right stem from? How could any right exist when the respondent has failed to establish a justification for such measure? (US oral statement, para. 29)

24. The obligations of WTO Members (and consequently the rights of other WTO Members) are set out in the applicable covered agreements. A Member is free to maintain any measure that is not inconsistent with its obligations under the covered agreements - it does not need an affirmative "right" to be provided in the covered agreements for it to maintain that measure. In this case, Article XIV of the GATS makes clear that the United States may maintain measures necessary to protect public morals or to maintain public order. Articles 3.2 and 19.2 explicitly provide that neither recommendations and rulings of the DSB, nor findings of panels or the Appellate Body, can "add to or diminish the rights and obligations provided in the covered agreements."

25. In this case, the United States is arguing that it does not need to modify a measure that is already consistent with the covered agreements. The United States does not believe that there is a right to maintain measures that are inconsistent with a covered agreement. Rather, this case involves findings by the Appellate Body that explicitly note that the measure may, or may not be, consistent with a covered agreement, and that the factual record was not sufficient to make such a determination.

See Comment to paragraph 21 above.

Question 9 (US): Does the US consider that measures consistent with covered agreements can be required to be brought into compliance?

26. Where the DSB recommendations and rulings require that a Member establish the applicability of an affirmative defence, the Member needs to do so in order to demonstrate that, by virtue of that affirmative defence, its measure is not inconsistent with the relevant provisions of the covered agreements. The Interstate Horseracing Act never provided any carve outs from the three criminal laws at issue, and thus the US measures fell within the scope of Article XIV of the GATS. The United States has complied with the DSB recommendations and rulings by making a factual showing in this proceeding that in fact the US statutes at issue meet the requirements of Article XIV.

Question 10 (US): The US refers to a situation where a complaining party could not expect the responding party to adopt any substantively different measure, "because the original measure was already in compliance". (US FWS §46) Who would have made the determination that the original measure was already in compliance?

27. As an initial matter, the United States notes that this sentence would be better phrased as "because the original measure was already consistent with the covered agreements." This phrasing avoids confusion between the substantive obligations set out in the covered agreements, and the provisions of the DSU that call for compliance with DSB recommendations and rulings.

28. Turning to the Panel's question, the United States is not asserting that there was any special, formal "determination" that the measure is consistent with a covered agreement. Rather, in this case,

the United States – as for most WTO Members with respect to most of their measures – believes its criminal gambling laws to be consistent with US obligations under the GATS. In this case, the Appellate Body found that the United States did not sufficiently establish an affirmative defence under Article XIV of the GATS, but the Appellate Body did not find that the criminal laws, if considered under a full factual record, failed to meet the requirements of Article XIV.

See Comment to paragraph 21 above.

29. Furthermore, it is essential to emphasize that the failure of the United States to establish in the initial proceeding an affirmative defence did not turn on a disputed issue of interpretation of the WTO Agreement. Rather, the availability of the affirmative defence depended on the proper interpretation of US domestic law.

The "availability of the affirmative defence" does not depend on the "proper interpretation of US domestic law," but rather (at least with respect to the chapeau) whether the United States applies its laws in a non-discriminatory fashion. As the Appellate Body actually did observe in its report:

> *"The focus of the chapeau, by its express terms, is on the application of a measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the paragraphs of Article XIV. By requiring that the measure be applied in a manner that does not constitute 'arbitrary' or 'unjustifiable' discrimination, or a 'disguised restriction on trade in services', the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded other Members by the substantive rules of the GATS."*[15]

What Antigua has clearly shown in this proceeding is that in application and by their express language as well, the three federal statutes are trade discriminatory.

Question 11 (ANT, US): Is the rule in Article 17.14 of the DSU, that an adopted Appellate Body report "shall be unconditionally accepted by the parties", absolute? For example, would it apply where a recommendation was inconsistent with Article 19.2 of the DSU? Or where a report exceeded the scope set out in Article 17.6 of the DSU?

30. The United States would hope that the DSB would not agree to adopt an Appellate Body report under the circumstances described. Although it would not be appropriate for the United States to comment on these hypothetical situations, the United States agrees that it would be important to bear in mind the limitations in the DSU. It is doubtful that Members intended the language in Article 17.14 to be read to override those express limitations, particularly since Members were careful in Article 3.2 of the DSU to specify that DSB recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements." In any event, the United States in this proceeding is not requesting that the Panel reconsider any factual or legal findings made by the Appellate Body in this dispute.

Antigua takes issue with the last sentence in this answer. The United States is clearly asking the Panel to reconsider the factual and legal findings of the Appellate Body that the United States had not established that its GATS-inconsistent measures qualified for the special exception under Article XIV of the GATS.

Question 12 (US): Please refer to Article 17.14 of the DSU and the Appellate Body's decision in EC - Bed Linen. In your view, are these expressions of a principle that at some point disputes

[15] Appellate Body report on *US – Gambling*, para. 339 (emphasis in original).

should be treated as finally settled so that potentially endless cycles of litigation are avoided not only with respect to claims but also with respect to defences and specific issues considered in disputes, and both with respect to arguments that are rejected and those that fail for lack of evidence?

31. The United States notes that this question contains a number of premises that are not presented by the circumstances of this dispute. The Panel and Appellate Body reports cannot be said to result in a "final settlement", because as the Appellate Body noted, it was not able to determine whether or not the US measures met the requirements of the Article XIV chapeau. Moreover, nothing in this case presents an endless cycle of litigation. To the contrary, under the procedural agreement entered into by the United States and Antigua, should Antigua prevail in this 21.5 proceeding, it may proceed to request authorization to suspend concessions under Article 22.2.

See Comment to paragraph 21 above.

32. The United States is not aware of any basis for asserting that, as a general matter, a WTO Member cannot present new evidence when it previously failed to establish a claim due to a lack of evidence. In fact, the 21.5 proceedings in the *Canada - Dairy* dispute illustrate otherwise. In that case, the complaining parties' initial recourse to Article 21.5 failed due to a lack of evidence on the cost of production of the products at issue. The complaining parties proceeded to a second recourse to Article 21.5, during which they proceeded to support their claims through new evidence not submitted in the first proceeding. The complaining parties prevailed in the second recourse to Article 21.5, and the Appellate Body upheld the finding. Thus, the *Canada - Dairy* dispute shows that there is no basis for viewing the Appellate Body reasoning in *EC - Bed Linen* or Article 17.14 as providing some general principle precluding the introduction of new evidence when a claim previously failed due to an absence of evidence.

33. As the United States explained in its Second written submission, *EC - Bed Linen* addresses a specific question regarding the claims that a complaining party may reargue in a 21.5 proceeding. The Appellate Body's finding turned on the limited scope of a 21.5 proceeding, and not on any purported general rule that parties are foreclosed from presenting new evidence when a claim previously failed for lack of evidence. Indeed, nothing would have prevented India from bringing a new regular proceeding against the measure at issue. *EC - Bed Linen* simply provided that the special, expedited procedures of Article 21.5 were not available for those claims. As a result, neither *EC - Bed Linen* nor Article 17.14 would stand for a principle of preventing additional litigation.

[Question 13 (ANT)]

Question 14 (US): Please refer to the following passages in the Panel and Appellate Body reports: para. 6.599 of the Panel report, which states that: "there is ambiguity as to the relationship between, on the one hand, the amendment to the IHA and, on the other, the Wire Act, the Travel Act and the Illegal Gambling Business Act"; para. 6.607 of the Panel report, which contains the following reference: "in light of the ambiguity relating to the Interstate Horseracing Act" ; and para. 368 of the Appellate Body report which states that: "The second instance found by the Panel was based on 'the ambiguity relating to' the scope of application of the IHA and its relationship to the measures at issue. We have upheld this finding." Why are these findings not final?

34. The United States is not challenging these findings. These findings refer to "ambiguity" in the federal statues; the findings do not include any statement – explicit or implicit – that such ambiguity results in an inconsistency with the GATS. Indeed, some statutory ambiguity is inevitable in any legal system, and few measures would escape scrutiny if ambiguity resulted in *per se* violation of obligations under the WTO Agreement. And, despite this ambiguity, there is in fact a right or

wrong answer to the question of whether or not the IHA provides a carve out from federal criminal laws.

35. The Panel and Appellate Body noted the ambiguity in the context of finding that the United States – on the basis of the record available in the original proceeding – had failed to meet its burden of proving an affirmative defence. And again, this is a finding that the United States does not dispute in this proceeding. Rather, in this proceeding the United States submits that it has now shown, based on a more complete factual record, that the right answer to the ambiguous issue is that the IHA provides no carve outs from the criminal laws at issue, and thus that it has successfully established its affirmative defence under GATS Article XIV. Nothing in the US position in any way disturbs the finality of the findings by the Panel and Appellate Body regarding statutory ambiguity.

Far from having "now shown" that the IHA does not permit remote gambling, the United States has completely failed. See Comment to paragraph 1 above.

Question 15 (US): Please refer to para. 371 of the Appellate Body report, last sentence, which states that: "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."

> **Sub-question (a) (US): Was this simply an expression of deference, indicating that the Appellate Body did not presume to know the meaning of a Member's domestic law better than the Member itself?**

36. The United States does not believe that this is a correct understanding of the Appellate Body findings. In fact, the Appellate Body did not give deference to the US understanding of its own statute. To the contrary, the Appellate Body gave deference to the findings of the Panel in its fact-finding under DSU Article 11.

37. Moreover, the Appellate Body's reasoning explicitly notes that it could make no definitive finding on the US law due to the limited factual record:

> 363. Thus, the Panel had before it conflicting evidence as to the relationship between the IHA, on the one hand, and the measures at issue, on the other. We have already referred to the discretion accorded to panels, as fact-finders, in the assessment of the evidence. As the Appellate Body has observed on previous occasions, "not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts."
>
> 364. In our view, this aspect of the United States' appeal essentially challenges the Panel's failure to accord sufficient weight to the evidence submitted by the United States with respect to the relationship under United States law between the IHA and the measures at issue. The Panel had limited evidence before it, as submitted by the parties, on which to base its conclusion. This limitation, however, could not absolve the Panel of its responsibility to arrive at a conclusion as to the relationship between the IHA and the prohibitions in the Wire Act, the Travel Act, and the IGBA. The Panel found that the evidence provided by the United States was not sufficiently persuasive to conclude that, as regards wagering on horseracing, the remote supply of such services by domestic firms continues to be prohibited notwithstanding the plain language of the IHA. In this light, we are not persuaded that the Panel failed to make an objective assessment of the facts.

See Comment to paragraph 21 above.

38. Furthermore, in its conclusion, the Appellate Body reiterated that it was not making a definitive finding on the correct interpretation of US law: "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."

> **Sub-question (b): Does this sentence, clarifying what the Panel and Appellate Body did not find, affect what the Panel did find regarding "'the ambiguity relating to' the scope of application of the IHA and its relationship to the measures at issue", which was upheld by the Appellate Body?**

See Comment to paragraph 21 above.

39. As the United States explained in its response to Question 14, a finding of ambiguity is not equivalent to a finding that the IHA does in fact provide a carve out from the criminal laws at issue. There is a right answer and wrong answer to that question under US law. The United States submits that it has shown in this proceeding that the right answer is that no carve outs exist, and thus that the US measures do not result in discrimination under the chapeau of GATS Article XIV.

The United States' answer to Question 15 again invites the Panel to focus on the argument that the Appellate Body did not find that the IHA provided a "carve out" to the three federal statutes. Antigua would repeat that the Appellate Body did not need to come to this determination, as it was the burden of the United States to prove that the IHA did not provide such a carve out. Given the evidence submitted by Antigua in this proceeding, there can be little doubt now that the IHA indeed provides a "carve out," both expressly in its language and practically in its application.[16]

Question 16 (ANT, US): What authority does the DSU grant the Appellate Body to extend an invitation to a Member to demonstrate a point after the conclusion of an appeal? (US FWS §44) How would such an invitation affect the recommendation by the DSB? Why did the Appellate Body not expressly suggest ways in which the US could implement the recommendations?

40. As the United States explained at the hearing, the United States submits that it would be a misplaced focus to treat the phrase "invitation" (used in the first US submission) as some special test, principle, or procedure that must be analyzed and evaluated. In using this phrase, the United States was not intending to imply that the Appellate Body was making a specific recommendation with respect to how the United States should bring its measures into compliance. We note that Article 19.1 of the DSU provides that panels or the Appellate Body "may" make suggestions on implementation; we are not suggesting that the Appellate Body has done so in this case.

41. Rather, the United States was using "invitation" as a shorthand for the following type of reasoning commonly used in Article 21.5 proceedings: where the Appellate Body (or panel) finds a particular aspect of a measure to be inconsistent with a covered agreement, the other side of such a finding may provide specific guidance on how the responding Member may bring its measure into compliance.

42. The *US - Shrimp* dispute (referred to in Question 3 above) is an instructive example. In that dispute, like the current one, the Appellate Body agreed with the responding party that the measure provisionally fell under an exception – GATT Article XX(g) in *US – Shrimp*. However, the Appellate

[16] See Comment to answer of Question 1 above.

Body, as in this case, found that in certain specific ways, the requirements of the chapeau were not met with respect to "arbitrary or unjustifiable discrimination."

43. In *US – Shrimp*, one aspect of this discrimination was that the Appellate Body found that the United States had entered into negotiations with some countries, but not with the complaining parties in the dispute. The United States looked carefully at this finding: the other side of the finding, and thus a means of compliance, was for the United States to enter into negotiations with the complaining parties. The United States proceeded to enter into such negotiations during the compliance period. These negotiations were not "measures" and so they were not "measures taken to comply."

44. The Appellate Body in *US – Shrimp* also found that the United States, in implementing its shrimp import ban, did not provide due process to the complaining parties. The United States looked carefully at this finding, and proceeded to adopt new implementing guidelines that remedied the defects in due process identified by the Appellate Body.

45. Based on the specific Appellate Body findings, the United States believed that such steps would bring its measure into compliance, and that no changes would be required in the statute subject to the DSB recommendations and rulings. A complaining party in *US – Shrimp* was not satisfied with the US implementation; it argued in an Article 21.5 proceeding that the United States must amend or repeal its statute and lift the import prohibition. The Appellate Body agreed with the United States, finding that the United States had complied with the DSB recommendations and rulings – without amending the US statute – by addressing the specific aspects of discrimination previously found by the Appellate Body in the Article XX chapeau.

46. The United States believes that the same approach for compliance applies to the current dispute. Here, the Appellate Body explicitly noted both (1) that the United States did not establish or show that the IHA does not exempt domestic suppliers from providing certain remote betting activities prohibited under three federal criminal statutes, but (2) that the Appellate Body could not determine from the factual record whether or not the IHA in fact provided such an exemption. In this case, the other side of the Appellate Body finding is that the United States may comply with the DSB recommendations and rulings by showing that the IHA in fact does not provide an exemption from the federal criminal statutes. This kind of reasoning is what the United States intended by the statement that the Appellate Body "invited" the United States to demonstrate that the measures met the requirement of the Article XIV chapeau.

See Comment to paragraph 21 above.

The facts and circumstances in US – Shrimp are materially different than those present in this case. In US – Shrimp, the United States defence under Article XX of the GATT failed for the same basic reason it did in this case – the United States failed to meet its burden of proof under the chapeau. However, contrary to this case, in US – Shrimp the United States actually did a number of things subsequent to the adoption of the DSB recommendations and rulings. It not only adopted revised guidelines for the implementation of the measure at issue,[17] but also took a number of serious, good faith proactive steps to address the criticism of the panel and the Appellate Body over the United States' failure to engage Malaysia in discussions to resolve their difficulties.[18]

In this case, the United States did nothing.

It should also be noted that the US – Shrimp case is an excellent example of what an Article 21.5 compliance panel should in fact do when reviewing the status of compliance – it is particularly useful

[17] Appellate Body report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 3-7.
[18] Id., paras. 131-133.

given the similarities between the results of the original proceedings in the two cases. Contrary to the repeated assertions of the United States in this case that the Panel must restrict its enquiry to the letter of the recommendations and rulings of the DSB in the case,[19] the US – Shrimp report makes it clear that a wide, re-examination of the entire Article XIV defence is required in order to properly assess the status of compliance.[20]

Were the Panel to allow the United States a "second chance" in this proceeding, then it would be required under the US – Shrimp principles – recently reaffirmed by the Appellate Body in US – Softwood Lumber IV (Article 21.5 – Canada)[21] *– to determine whether the United States, in light of all circumstances, has met its entire burden of proof under Article XIV of the GATS. Not only does the United States fail to meet its burden of proof with respect to the chapeau, but also, in light of all evidence before the Panel, the United States has also failed to satisfy the first prong of the Article XIV defence – "necessity."*

Antigua has proven in this proceeding, and the United States has not contradicted, the existence of a number of state regulatory schemes for remote gambling services in the United States.[22] *Under the reasoning adopted by the Appellate Body in the original proceeding,*[23] *Antigua having identified reasonable alternatives, the burden has shifted to the United States to demonstrate why those alternatives are not reasonably available to it. This it has completely failed to do. Of course, it would be impossible for the United States to argue that a regulatory scheme such as that used by a number of states would not be "reasonably available" when such schemes are actively being used by governmental entities in the United States today.*

Question 17 (US): The US refers to a respondent required to adopt new measures when it is already in compliance with its obligations. (US FWS §45) Is this not true of any respondent whose measures may well satisfy an exception but who fails to raise that exception before a Panel? Or a respondent who does not succeed in demonstrating that its measure satisfies an exception?

47. The United States submits that it has shown in this proceeding that the US criminal laws fall within the scope of GATS Article XIV, and are thus not inconsistent with the obligations of the United States under the GATS. The United States is not aware of any past dispute in which a WTO-consistent measure has been found in an Article 21.5 proceeding to be not in compliance with DSB recommendations and rulings. Thus, although this question is phrased in terms of "any respondent," the United States submits that the circumstances presented by this dispute are indeed unusual.

48. As the United States explained in its past submissions, this unusual situation arose due to Antigua's choices in presenting its claim. In particular, because Antigua was unable or unwilling to specify the statutes at issue, neither the Panel nor the United States were able to identify the measures at issue until the case had reached the Interim Review stage. Consequently, neither the parties nor the Panel were in a position to develop fully the factual record and the argumentation with respect to how each measure that might possibly be covered in the dispute would fit within each of the criteria set out in GATS Article XIV.

Antigua finds it incredible that the United States would shoulder Antigua with the responsibility for the United States failing to meet its burden of proof under Article XIV. It was the United States, and it

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[19] See, e.g. US First written submission, para. 42.

[20] Appellate Body report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 100-106.

[21] Appellate Body report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 61-77.

[22] As Antigua demonstrated, a number of these regulatory schemes are quite similar to Antigua's own regulatory scheme for remote gambling services. See AB First written submission, paras. 139-140.

[23] Appellate Body report on *US – Gambling*, para. 311.

alone, that chose to delay its assertion of the Article XIV defence, despite Antigua having raised the possibility of such a defence in Antigua's very First written submission. Nonetheless, it is clear from the record that the United States resisted raising Article XIV throughout the proceeding, discussing Article XIV issues only in its final written submission to the original panel. Despite its discussion of Article XIV in that submission, the United States continued to resist conceding that it was raising the defence at all. Antigua recalls that at the last session of the original panel, a panel member had to repeatedly ask the representative of the United States whether the defence was indeed being raised – as the representative could not seem to bring himself to answer the question directly.

With respect to the claim that the United States raised the issue so late only because it was unclear what "measures" it was defending, the assertion is absurd. Antigua cited the Wire Act, the Travel Act and the IGBA in virtually every submission and statement it made in the original proceeding, from the original request for consultations all the way to Antigua's comments to the United States' responses to the second questions of the original panel. More precisely, those statutes were raised in the First written submission of Antigua to the original panel, and in Antigua's comments to the United States' request for preliminary rulings it was clear beyond dispute that all three of the federal statutes were alleged to prohibit the cross-border supply of gambling and betting services.[24]

Question 18 (US): Does the US consider that any responding party that has a valid affirmative defence that did not succeed only because of a lack of a full factual showing in the original proceeding has a right to make a full factual showing of the same defence in a compliance proceeding? What would be the systemic implications of such a view? What incentive would a respondent have to fully argue its affirmative defence before the original panel? (US oral statement, para. 31)

49. As discussed in the response to Question 17, there were particular, unusual circumstances in this dispute that prevented the United States from presenting the same level of argument and evidence on Article XIV with respect to these measures. These circumstances should be taken into account; they would be unlikely to occur in other disputes (unless of course it were established that a complaining party benefitted from the same type of lack of specificity in its claims and arguments as were present in the original proceeding).

See Response to paragraph 48 above.

50. It is also important to bear in mind that there is a fundamental difference in the situations of a complaining and responding party concerning findings that a party has failed to make a full showing to meet its burden of proof. Where a complaining party fails to present evidence and argument sufficient to meet its burden of proof, that complaining party has the ability to bring a new dispute and have an opportunity to present additional evidence and argumentation. The situation is different for a responding party. The responding party is unable to bring a new proceeding and so would be denied the opportunity to present additional evidence and argumentation to meet its burden of proof for an affirmative defence, unless the responding party may make this fuller showing in a compliance proceeding.

As Antigua observed in its responses to the Panel's Questions, such an aggrieved responding party would have the opportunity to bring a new dispute of its own under Article 22.8 of the DSU.[25] *Even if*

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[24] For a thorough discussion of this issue, see Appellee Submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, AB-2005-1 (1 February 2005), paras. 21-28.

[25] Responses of Antigua and Barbuda to the Questions of the Panel to the Parties, *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 (8 December 2006) (the "AB Responses"), Response to Question 20.

one were to accept the baseless argument of the United States that it alone as a responding party should be entitled to reassert its failed case, there is no logical reason why the entire failed defence should not be reconsidered in toto. If the United States laments the "limited" discussion and evidence regarding Article XIV of the GATS in the original proceeding, then no doubt it would best for the entire issue to be thoroughly discussed and considered.

51. The United States understands that in the context of this question, "systemic implications" refers to the prospect that responding Members would, as a tactical matter, decide in future cases to withhold factual information in support of affirmative defences until the Article 21.5 proceeding. The United States submits that there is no basis for believing that such "systemic implications" would arise.

52. The reason is simple: The responding Member would obtain no benefit of purposely saving evidence in support of an affirmative defence until the Article 21.5 proceeding. To the contrary, the responding party has a strong interest in obtaining during the original proceeding a definitive finding as to the validity of an affirmative defence. If the finding is affirmative (i.e., if the defence applies), the responding Member would not be subject to future proceedings. If the finding is negative, the responding Member would be entitled to a reasonable period of time for compliance during which it could address the problems identified with respect to its affirmative defence.

If the United States were to prevail in its argument, it would indeed have obtained a very significant benefit from its purposeful delay in asserting the Article XIV defence. As Antigua has stated, the late assertion of the defence placed Antigua in a very difficult situation where it had to either (i) prolong the length of the original proceeding and ask the original panel for further time to properly respond to the defence in writing or (ii) continue on the basis of an incomplete and unclear record in, as happened in the original proceeding, the belief that the panel or the Appellate Body would agree that the defence was either raised so late, or so incompletely, that the defence would fail.[26] *If the responding party were allowed the sole ability to reassert and present evidence on its failed defence in what is supposed to be a compliance assessment under Article 21.5 of the DSU, the complaining party would be very much at a material disadvantage.*

53. In contrast, a responding Member who waited until the Article 21.5 proceeding to present a full affirmative defence is in a far worse position. Even if it prevails on the defence, it will have subjected itself to an additional proceeding. And, moreover, if it fails to establish the affirmative defence, it faces the prospect of an immediate request for authorization to suspend concessions, without any further reasonable period of time for compliance.

Question 19 (ANT, US): If a respondent were entitled to a "second chance" to make out a defence would the compliance panel make its assessment on the basis of evidence presented in the compliance proceeding only, or the evidence presented in the original proceeding as well?

54. As in other proceedings under the DSU, the Article 21.5 panel should base its findings on the evidence and arguments presented by the disputing parties. To the extent that evidence introduced in the original proceeding remained relevant, the disputing parties are of course free to incorporate or to refer to such evidence.

[Questions 20-21 (ANT)]

Question 22 (US): If the US is permitted to demonstrate that its measures satisfy the requirements of the Article XIV chapeau, what is Antigua entitled to demonstrate? What would limit the Panel's assessment to the IHA? Could the Panel's assessment include any issue

[26] AB Responses, Response to Question 38(b), fn. 39.

as to whether the Federal criminal statutes satisfy the requirements of the Article XIV chapeau, such as whether they are non-discriminatory on their face?

55. As the United States explained in detail in paragraphs 28 to 31 of its Second written submission, the scope of an Article 21.5 proceeding is limited. The DSB recommendations and rulings serve as the instructions to the Member concerned for the steps it is required to take during the reasonable period of time in order to comply with those recommendations and rulings. If a complaining party were entitled to reargue claims that were considered and rejected in the original proceeding, the Member concerned could be in the untenable position of being found out of compliance even though it had relied on and complied with the findings of the Panel and/or Appellate Body. This is the basis for the Appellate Body's finding in *EC – Bed Linen* that complaining parties cannot reargue failed claims in an Article 21.5 proceeding.

Antigua asserts there is no basis for what the United States says in this response. However, it should be pointed out that many of Antigua's claims in the original proceeding were not "considered and rejected," but, as with the Article XIV defence, found to have suffered from the failure to make a prima facie showing. In particular, the Appellate Body, having for the first time in the US – Gambling case assigned the burden of proof on the complaining party to establish "reasonably available alternatives" in the context of an Article XIV defence, held that Antigua had "raised no other measure that . . . could be considered an alternative to the prohibitions on remote gambling contained in the Wire Act, the Travel Act, and the IGBA."[27] *Because this "failure" on the part of Antigua to raise an alternative was not a "rejected" claim, there is nothing to distinguish this "failure" from the failure of the United States to meet its burden of proof under the chapeau. If the Article XIV defence is to be reconsidered, it should be reconsidered in whole.*

[Question 23 (ANT)]

Question 24 (US): Please refer to the Award of the Arbitrator pursuant to Article 21.3(c) of the DSU which states that "the United States emphasizes that the only means of implementation that will achieve the necessary clarification is legislative means" (para. 37) and that "implementation will occur by legislative means" (para. 64). Can these statements in the Award be reconciled with the US submission that "[l]egislation to clarify the interaction between the IHA and Wire Act was a possible means – but not the only means – for compliance"? (US FWS §55) If the US disagrees with the statements in the Award of the Arbitrator, could it please comment on the statements attributed to it in the transcript of the Arbitrator's oral hearing on pages 31-32 ("legislation is required") and page 34 ("we need legislation")? Could the US clarify why it referred on pages 59-60, 60-61 and 72-73 to action by Congress - what could it have contemplated there if not legislation?

56. As the United States explained during the hearing, the United States respectfully disagrees with the arbitrator's characterization of the US views on the possible means of implementation. First, neither the US written submission, nor its presentations during the arbitration hearing (as reflected in the transcript) support this characterization. Second, it is important to understand the context of the arbitrator's statement within the discussions held during the arbitration. The United States sought a reasonable period of time that would allow for implementation through the adoption of new legislation. Antigua agreed that the United States should adopt legislation, but also argued that partial compliance with respect to "non-sports betting" could be achieved by Executive Order. The United States responded that even if an Executive Order were a legally available possibility, this hypothetical, partial means of compliance was not relevant because – as both parties agreed – the arbitrator still needed to determine the reasonable period of time to adopt legislation. In other words, when the United States discussed the need for legislation, this was in response to Antigua's claim that

[27] Appellate Body report on *US – Gambling*, para. 326. This conclusion is simply incorrect.

the United States should get a shorter reasonable period of time because (according to Antigua) partial compliance could be achieved by Executive Order.

The entire discussion of the United States in response to Question 24 is so patently untrue it bears but little comment – the record on this issue speaks for itself. Antigua would, however, like to point out that this assertion that the United States "discussed the need for legislation" only in response to Antigua's arguments in the Article 21.3 proceeding is particularly disingenuous, given that both parties' submissions to the Arbitrator were due and made on the same day.

57. Moreover, there was no discussion during the Article 21.3 arbitration of a legislative means of compliance in the context of a discussion of which alternative means of compliance were available to the United States (except partial compliance through an Executive Order). Thus, to the extent the arbitrator's statement is read as suggesting that there had been a discussion of various alternative means of compliance, and that during this discussion the United States had dismissed all alternatives except legislation, this is clearly a misreading. Finally, nowhere in the record of the arbitration does the United States ever assert or imply that a full factual showing based on legislative history and relevant case law would be insufficient to meet the US burden of showing that the IHA does not create carve outs from criminal statutes.

58. With respect to the first two specific statements cited in the question ("legislation is required" and "we need legislation"), the record of the arbitration clearly shows the context described above.

59. The starting point is Antigua's written submission, which lays out Antigua's idea about differing periods of compliance for sports and non-sports betting:

> "11. Antigua submits that it is possible for the United States to comply with the DSB recommendations and rulings (i) immediately via presidential executive order with respect to the provision of non-sports related and horse racing gambling and betting services and (ii) with respect to the provision of other sports gambling and betting services, within six months of the adoption of the Report and the Panel Report by the DSB via either an amendment to each of the Wire Act, the Travel Act and the Illegal Gambling Business Act or the passage of new legislation that would either repeal or supersede the Federal Trio with respect to the provision of these services from Antiguan operators."

60. During the arbitration hearing, the arbitrator asks about this distinction:

> "In your submission you draw a distinction between 'on-sports related and horseracing gambling and betting services' on the one hand and 'other sports gambling and betting services' on the other. What is the basis for that distinction if one looks at the Panel and Appellate Body reports and what they have said?"

61. Antigua then describes its view of the distinction, without immediately tying the distinction back to Antigua's idea of a shorter RPT for non-sports betting:

> "In neither report do they really consider the different types of gambling. . . .
>
> We referred to a number of discussions in our submissions that that [the distinction between sports and non-sports gambling] is a pretty widely held belief by gambling law commentators throughout the United States."

62. The United States proceeds to respond to Antigua's argument, both with respect to the purported distinction between various types of gambling under federal criminal law, and with respect to the effect that such distinction should have on the calculation of the RPT:

> "I guess there are two ways of responding. The first is that which we took in our statement – that at the end of the day even if there were such a distinction, and we disagree that there is, it is not []relevant to the ultimate decision here since legislation is required and legislation does not really relate to any purported distinction between sports and non-sports betting."

63. In this context, the phrase "legislation is required" is used to rebut Antigua's claim that the RPT is somehow affected by an alleged ability of the United States to address non-sports betting with an Executive Order. As shown above, Antigua expected the United States to adopt legislation to address sports betting, and the above statement simply means that the RPT for legislation is not affected by a purported ability to address non-sports betting through an Executive Order. In context, this statement cannot possibly be read as an overarching assertion that the only means of compliance available to the United States was through legislation.

64. The second phrase ("we need legislation") cited in the question is also made in this same context. Antigua first asserts that the United States can come into compliance through some sort of administrative action with respect to non-sports betting.

> "We are saying here that under the United States law as it actually exists there really is no need to amend these other statutes with respect to non sports betting because it simply is an administrative position of the United States government that these types of services are prohibited as well."

65. The United States then responds, with a similar point as previously made.

> "Again, I think our first response would be that in the end you do not have to reach the issue [of the RPT required to adopt an Executive Order or other administrative action addressed to non sports betting] because Antigua acknowledges that the actions it is requesting us to take with regard to non sports [] betting will not by themselves bring us into compliance, we need legislation on other matters, and therefore, given that the actions they are requesting we take with regard to [] non sports betting would require less time than the legislation, the legislation ultimately is what is driving the determination of the reasonable period of time, so it is an issue that need not even be reached."

66. Again, the US statement cannot be read as making a point about legislation versus every other possible means of compliance. Rather, it is simply a response to Antigua's argument that the purported option of adopting administrative action on non-sports betting could somehow reduce the reasonable period of time.

67. Finally, the question requests that the US clarify why it referred on pages 59-60, 60-61 and 72-73 of the transcript to action by Congress. As explained above, the United States sought a reasonable period of time that would allow for the adoption of a legislative clarification. Accordingly, much of the arbitral proceeding focused on the question of how long it would take to obtain the passage of such legislation. Nowhere in the cited passages (nor elsewhere in the US presentations to the arbitrator), however, does the United States assert that legislation was the only means of compliance.

Question 25 (US): The US has referred to Bill HR 4777. Antigua has referred to Bill HR 4411. What was the relationship between these Bills and the internet gambling law that was passed in

October 2006? Was there ever legislation pending that would have brought the US into compliance with the DSB recommendations in this dispute? (US SWS §38) Is there anything in writing to demonstrate that such legislation was under consideration in the Congress?

68. H.R. 4777 was a bill sponsored by Representative Goodlatte. This bill would have amended 18 U.S.C. 1084 and would have prohibited the acceptance of certain forms of payment for certain gambling activities over the Internet. H.R. 4411 was a bill sponsored by Representative Leach. As introduced, H.R. 4411 also prohibited the acceptance of certain forms of payment for unlawful Internet gambling.

69. H.R. 4411 was merged with H.R. 4777 to include the revisions to 18 U.S.C. § 1084 and the merged bill was passed by the House of Representatives and sent to the Senate for its consideration. The House and Senate, in conference, revised the provisions of the merged bill and incorporated portions of it into the Safe Port Act, Public Law 109-347, which was signed into law by the President in October 2006.

70. The Internet gambling provisions in the Safe Port Act are referred to as the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), Title VIII of Public Law 109-347, and they pertain only to the acceptance of payments for unlawful Internet gambling. Those provisions are similar to the prohibitions contained in H.R. 4411 as introduced. This statute does not amend Section 1084. The provisions pertaining to horse racing are similar to those contained in H.R. 4411 as the bill was passed by the House of Representatives and sent to the Senate.

71. The horse racing provisions in H.R. 4411 (which, as noted, was an amendment to the Wire Act) address the issue of the relationship between the IHA and the Wire Act, but the legislation as adopted by the House did not clarify the relationship. If the Executive Branch had achieved its goal of obtaining a legislative clarification, this language would have been modified to achieve the clarification. Although the United States is aware that various formulations of the horse racing provisions were discussed, it is not aware of any formally-introduced amendment other than those described above.

H.R. 4411, as adopted by the United House of Representatives, took much the same approach as the final legislation did, saying that "[n]othing in this Act may be construed to prohibit any activity that is allowed under [the IHA] . . .."[28] *This would not have "clarified" the matter in the way the United States would, apparently, have desired in the context of this dispute.*

Question 26 (ANT, US): Does the fact that statements are made in the context of Article 21.3(c) of the DSU require that they be given different weight from that accorded to any other statements of a party concerning an issue in dispute?

72. Article 21.3(c) has a particular, limited purpose, and as numerous arbitrators have explained, their role is not to discuss the particulars of a Member's implementation. The weight accorded to statements made in the context of Article 21.3(c) proceedings should take into account the specific, limited purpose of those proceedings. Furthermore, there is no basis for assigning any special weight to statements made by a party during an Article 21.3 proceeding, as compared to, for example, public statements by a party or statements made by a party to WTO committees.

73. The United States notes that statements of a party could have evidentiary value in interpreting the factual question of the meaning or existence of a party's measure. However, it is hard to see how such statements might arise in an Article 21.3 proceeding. And in the circumstances of this case, the United States had no call to make any statements regarding the substantive, factual issue of the

[28] HR 4411, § 105. See AB First written submission, paras. 62-64.

relationship between the IHA and the three criminal statutes. Rather, the Article 21.3 proceeding addressed an entirely different issue, namely, the amount of time required to obtain a legislative clarification of that relationship.

Question 27 (US): The US has referred to the "safe harbor" provision that is available for the transmission of information assisting in the placing of wagers (US FWS §§7-10; SWS §19) Is an "interstate off-track wager", as defined in the IHA, a "bet or wager" or "information assisting in the placing of wagers" within the meaning of 18 U.S.C. 1084(a)?

74. A wager placed in one state, but not transmitted to another state, with respect to the outcome of a race taking place in another state is a "bet or wager" which may be legal if authorized by the laws of the state in which it is placed. A "pari-mutual wager . . . placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in . . . another State" is the transmission of a "bet or wager" and is a violation of the Wire Act. The transmission of information relating to the formation of a wagering pool is "information assisting in the placement of bet[s] or wager[s]" so long as a wager itself is not transmitted by wire communication in interstate or foreign commerce.

Question 28 (US): The US submits that no language of permission exists in the IHA. (US FWS §33) Can this be reconciled with the following language of Section 5 IHA, cited in the Appellate Body report at para. 361: "An interstate off-track wager <u>may be accepted</u> by an off-track betting system only if consent is obtained from – the horse racing association" [followed by extensive conditions and provisos] (emphasis added)

75. As the United States explained in paragraphs 20-25 of its First written submission, the IHA contains no "language of permission" relating to criminal liability under United States law. To the extent that the IHA includes any "language of permission," it relates only to the allowance of the receipt of certain bets without being subject to civil liability under the IHA itself. It has nothing to do with what is allowed under the criminal law of the United States. Section 4 of the IHA, 15 U.S.C. § 3003, contains the general rule imposing liability for the acceptance of interstate off track wagers not in accordance with the IHA. Section 5 of the IHA, 15 U.S.C. § 3004, specifies those limited circumstances in which wagers may be accepted on horse races. Section 6 of the IHA, 15 U.S.C. § 3005, imposes civil liability on persons accepting wagers on horse races without complying with Section 5's requirements of various agreements with affected parties. Section 7, 15 U.S.C. § 3006, sets forth the parameters of any civil action for damages for non-compliance with the IHA. The IHA must be read as a whole, and nothing in that act grants permission to transmit wagers using wire communication facilities in interstate or foreign commerce, or provides an exception to the criminal law prohibiting such transmission.

Question 29 (US): The U.S. has explained that the IHA and the Wire Act have separate effects with respect to wagering that breaches both Acts. (US FWS §35) Please explain the separate effects of the two Acts with respect to wagering conducted <u>in accordance with</u> Section 5 of the IHA but not in accordance with the Wire Act.

76. If a person living in one state transmits, by wire communication, a wager on a horse race to an off-track betting facility located in another state and the host racing association and the off-track betting facility have the agreements required by the IHA in place, then the host racing association will not have a basis to file an IHA law suit against the off-track betting facility. However, the off-track betting facility would still be subject to prosecution for violating the Wire Act. What the IHA does is to merely protect the right of the entity staging a horse race to enjoy the receipt of all of the revenue from their product, that is, the horse race. What the Wire Act does is punish any person who, being in the business of betting or wagering, uses a wire communication facility for the transmission of bets or wagers in interstate or foreign commerce or for the transmission of information assisting in the

placement of bets or wagers on a sporting event or contest. However, if certain conditions which are outlined in subsection (b) of the Wire Act exist, a person can be protected with respect to the transmission of information assisting in the placement of bets or wagers on a sporting event or contest, but he or she still may not use a wire communication facility for the transmission of the bets or wagers themselves.

Question 30 (US): If there were a positive repugnancy between the IHA and the Wire Act (which the US does not concede), would the US disagree with the rules of statutory construction that allow more recently enacted and specific statutes to control or prevail to the extent of a conflict, as described by Antigua? (Antigua FWS §§58-59*)*

77. The United States agrees that US law includes a judicially-created doctrine of repeal by implication. However, the United States does not agree with Antigua's characterization of that doctrine. A more accurate summary of the doctrine is contained in paragraphs 26-31 and Annex I of the first US submission.

Question 31 (US): Please refer to the Unlawful Internet Gambling Enforcement Act of 2006 (Exhibit AB-113).

> **Sub-question (a): Even if this Act is not within the terms of reference of this Panel, do you consider that it can constitute evidence relevant to the matter before the Panel?**

78. The United States believes that Panels are not barred from considering evidence (including the fact that a new measure was adopted) that comes into existence after the initiation of panel proceedings. The United States submits, however, that the UIGEA does not shed light on the issues in this dispute, because the law does not amend or alter any statutes at issue, and instead establishes a separate enforcement mechanism aimed at particular activities already unlawful under federal or state law.

> **Sub-question (b): Why does 31 U.S.C. 5362(10)(D)(i) provide that the term "unlawful Internet gambling" shall not include any activity that is allowed under the Interstate Horseracing Act of 1978?**

79. On September 29, 2006, Representative Leach, one of the original sponsors of the legislation, submitted a statement on the Internet gambling provisions of the Unlawful Internet Gambling Enforcement Act of 2006 into the Congressional Record. That statement, which is part of the legislative history of the Act, provides that Section 5362(10)(D)(I) "addresses transactions complying with the Interstate Horseracing Act (IHA) which will not be considered unlawful because the IHA only regulates legal transactions that are lawful in each state involved." Importantly, the statute does not change what types of betting operations are "legal transactions." In order to be a "legal transaction," the wager must be made in compliance with both state and federal law. Since the IHA did not repeal Section 1084, the wager must also comply with the provisions of Section 1084.

> **Sub-question (b) [continued]: What activities are allowed under the IHA that would otherwise fall within the definition of the term "unlawful Internet gambling"?**

80. None. The transmission in interstate or foreign commerce of bets or wagers on horse races using wire communication facilities, even if the specific agreements required by the IHA are in place, would constitute "unlawful Internet gambling" because such transmission would violate the Wire Act, may possibly violate other provisions of federal and state law, would therefore not constitute a "legal wager" as required by the IHA, and thus could not be in compliance with the IHA.

Sub-question (c): What are the "existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes" referred to in 31 U.S.C. 5362(10)(D)(iii)? Whom are the disagreements between? Can such disagreements be reconciled with the US submission to this Panel that under fundamental principles of US law, the IHA does not provide an exemption from the three Federal statutes? Does this indicate ambiguity in the relationship between these laws?

81. The disagreement referred to in this "sense of Congress" provision concerns whether the Interstate Horseracing Act repealed by implication pre-existing criminal statutes, thereby allowing the interstate transmission of bets on horse races. The Department of Justice has publicly stated that it does not believe that the IHA amended or repealed pre-existing criminal statutes, while the horse racing industry believes that the IHA removes the criminal prohibitions relating to the interstate transmission for bets on horse races. The disagreements are between the Department of Justice and those interests that wish to profit on interstate gambling on horseracing.

In reality, the "disagreements" are between the United States Department of Justice, on one side, and just about everyone else (including at least 18 state governments), on the other.

82. The "sense of Congress provision" is entirely consistent with US statements concerning the proper interpretation of US criminal statutes. The language simply notes the disagreement, it does not take a position as to how a court would in fact construe the relationship between federal criminal laws and the IHA.

83. A disagreement does not necessarily indicate an "ambiguity." Indeed, in almost every WTO dispute there is a disagreement among Members as to how to interpret particular provisions of the covered agreements, but this does not establish that there is an ambiguity in the drafting of those provisions. However, as the Panel notes, the Appellate Body did not disturb the original Panel's finding of an "ambiguity," and the United States is not disputing that ambiguity in this proceeding. Rather, the United States has explained that despite any ambiguity, there is a right and wrong answer to the question of the relationship between the IHA and the three federal criminal laws at issue. And, based on the evidence and arguments presented in this proceeding, the United States has met its burden of showing that the IHA does not provide exemptions from federal criminal laws.

Franz Kafka would appreciate this answer. Despite mounds of evidence to the contrary and despite the express refusal of the United States Congress – the actual law-making authority in the United States – to clarify the matter in favour of the DOJ interpretation, the United States nonetheless asserts that it "has met its burden of showing that the IHA does not provide exemptions from federal criminal laws."

Sub-question (d): If the US Congress does not wish to resolve any existing disagreements over this question of interpretation at this stage, is the US delegation to this Panel entitled under US law to take a definitive view on it? Is the US delegation asking the Panel to take a definitive view on a question of interpretation that the US Congress has chosen not to resolve?

84. The United States delegation is entitled under US law to take a definitive view on the disagreement. The official position of the Department of Justice -- the agency which is responsible for applying federal criminal law -- is that the IHA provides no exemptions from federal criminal laws. The United States delegation submits that it has shown in this proceeding that the DOJ view of US criminal statutes is correct under fundamental principles of US statutory construction.

85. The United States is not asking the Panel to take any "definitive view" on questions of domestic US law that might have any domestic effect within the United States. To the contrary, the role of this Panel is to resolve the legal and factual issues in this dispute. The key factual issue in this dispute is whether the United States has met its burden of showing that the IHA does not result in discriminatory carve outs from federal criminal statutes, and thus has met its burden of showing that the US measures meet the criteria of the Article XIV chapeau. A Panel finding on this factual issue has no effect on domestic US law.

> **Sub-question (e): Can the US comment on the statements by the National Thoroughbred Racing Association that "[t]he legislation contained language that recognizes the ability of the horse racing industry to offer account wagering under the Interstate Horseracing Act of 1978 as amended" (Exhibit AB-118) and by Youbet.com that the "legislation ... exempts Youbet.com and other advanced deposit wagering companies in the horse racing industry from internet gaming prohibitions"? (Exhibit AB-120)**

86. The UIGEA made no amendments to the Wire Act or any other federal criminal law, and thus simply could not have the effect claimed in the above statement. As noted, however, horseracing interests contend that the IHA provides carve outs from federal criminal law, and it is not surprising that they would make this type of baseless claim about the UIGEA.

Question 32: 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).

> **[Sub-questions (a) and (b) (ANT)]**
>
> **Sub-question (c) (USA): Many of these State laws appear to authorize account wagering by telephone and other electronic means. How does this relate to the prohibition in the Wire Act?**

87. Even if a state laws would appear to authorize account wagering by telephone or other electronic means, they cannot override the Wire Act to the extent that they authorize transmission of wagers by means of a wire communication facility in interstate or foreign commerce. Account wagering, itself, is not a violation of the Wire Act or other federal law to the extent that the state does not authorize the transmission by means of a wire communication facility in interstate or foreign commerce of bets or wagers. If a business is accepting bets or wagers by means of a wire communication in interstate or foreign commerce, the business is violating the Wire Act.

The United States' answer to this question expressly confirms the argument Antigua has made from the beginning of this dispute – that the federal prohibitions contained in the Wire Act, the Travel Act and the IGBA only apply if the "remote" gambling crosses a state or international border, and do not apply to wholly-intrastate remote gambling. As Antigua observed to the panel in the original proceeding:

> *"32. In this respect the Panel should also note that, contrary to what the United States suggests, the laws comprising the federal ban on interstate and cross-border supply of gambling and betting services were not put in place because interstate and cross-border supply of gambling and betting services was considered a greater health risk than the local supply of gambling services. The federal ban on interstate and cross-border supply is merely intended to safeguard the states' ability to regulate gambling as they see fit within their borders.*

> *33. It is particularly important to realise what United States federal law does not do. For example:*
>
> - *Federal law does not require states to regulate gambling within their borders at all*
> - *Federal law does not require states to prohibit gambling within their borders at all*
> - *Federal law does not prohibit telephonic, electronic, Internet or any other forms of remote gambling from occurring within the borders of any state at all*
>
> *34. Thus, ironically (and somewhat difficult to reconcile with the position of the United States that cross-border supply of gambling and betting services poses significant health, law enforcement and other social issues that justify the United States total prohibition), under current federal law every state in the United States, if it so chose, could offer completely unregulated Internet gambling to every person located within the borders of the state. Yet Antigua would still be unable to provide any gambling and betting services-regulated or not-into the United States on a cross-border basis."*[29]

The federal laws at issue do not prohibit remote gambling at all, just cross-border gambling. Because Antigua can only provide remote gambling on a cross-border basis, each of those statutes is facially discriminatory, as well as discriminatory in application.

> **Sub-question (d) (USA): Why do some of these State laws refer to the Interstate Horseracing Act 1978?**

88. The various states of the United States, being sovereign, maintain their own statutory schemes subject only to those matters expressly reserved to the Federal Government by the Constitution. Federal authorities are not in a position to speculate on the reasons state laws are written in any particular way. However, a state would naturally want to require compliance with the IHA for legal off-track account wagering on horse races, that is, account wagering occurring wholly within the state itself that does not involve the transmission in interstate or foreign commerce of the bets or wagers.

The last sentence of this answer is compelling evidence of the discriminatory effect of United States law – "account wagering occurring wholly within the state itself that does not involve the transmission in interstate or foreign commerce of the bets or wagers." As the United States has based its Article XIV defence on the basis that it prohibits <u>all</u> remote gambling and betting services,[30] *the concession made by the United States in this answer – which is supported by the language of the statutes themselves and legal precedent – is enough to show why the United States cannot justify its WTO-inconsistent laws under Article XIV of the GATS.*

Question 33 (ANT, US): Does the IHA only allow domestic suppliers to operate wagering services on horseracing, or can foreign suppliers in some way operate under its auspices? If Antiguan operators entered into revenue-sharing arrangements with racetracks, would they still be liable to prosecution?

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[29] Second written submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (9 January 2004), paras. 32-34.

[30] Appellate Body report on *US – Gambling*, para. 350.

89. So far as we can determine, Antiguan gambling operators, or gambling operators from any other country, would be legally able to enter into the relevant agreements specified in the IHA in the United States so that they could accept wagers on those horse races without fear of being held civilly liable for the payment of damages to the host racing association and others under the provisions of the IHA. However, both domestic and foreign gambling operators would be subject to prosecution for violating the Wire Act if they, being in the business of betting or wagering, knowingly used a wire communication facility in interstate or foreign commerce for the transmission of bets or wagers.

Because Antigua does not come within the IHA's definition of a "State" and both the punter and the operator have to be in a "State" in order to make and accept a legal remote bet or wager under the IHA, Antigua cannot possibly come under its coverage – whether on an intrastate or a cross-border basis.[31] *Once again, however, this answer confirms that a remote wager placed on an intrastate basis would not be prohibited.*

Question 34 (US): Has the US ever prosecuted under the Wire Act wagering on horseracing conducted in accordance with the IHA? If not, why not?

90. None of the federal indictments concerning Internet gambling of which we are aware concern wagering on horseracing that was conducted in accordance with the IHA. There is no reporting requirement for gambling indictments and the statistics maintained by the Executive Office for United States Attorneys only track the number of prosecutions brought under the statute but do not specify the types of bets or wagers. The decision of whether to bring charges in any particular case rests on 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 defence to a prosecution for a violation of any federal gambling statute. If such a defence were raised, the Department of Justice believes such a defence would be legally unsuccessful.

Question 35: Regarding Youbet.com, TVG, XpressBet.com, Capital OTB and the other US domestic operations described by Antigua (Exhibits AB-65 to AB-73):

> **[Sub-questions (a) to (d) (ANT)]**
>
> **Sub-question (e) (US): Has the US launched a criminal prosecution against any of these operators? What is the current status of the prosecution proceedings against Youbet.com that were pending at the time of the original dispute (WT/DS285/R, para. 6.588)?**

91. The Department of Justice is unable to comment on the pendency of proceedings which are not otherwise public. The Department is not aware of any public pending prosecution of Youbet.com or the other entities listed above.

Question 36 (US): Do the recent prosecutions of foreign operators listed in Antigua's First written submission at paras. 106-107 concern the provision of pari-mutual wagering on horseracing or other wagering services or both?

92. The prosecutions listed in paragraphs 106 and 107 of Antigua's First written submission are the May 2006 indictment United States v. William Scott, et al., No CR 05-122 (D.D.C) and the July 2006 indictment United States v. BETONSPORTS PLC, et al., No. 4:06 CR00337 CEJ (E.D. Missouri). The Scott indictment alleged in paragraph 6 that the defendants "unlawfully engaged in illegal internet casino gambling and accepts information to facilitate betting as well as accepting bets

[31] See AB First written submission, paras. 50-51.

and wagers from persons in the United States who place bets on baseball, basketball, football, hockey and other sports through the internet and telephone."

93. The BETONSPORTS PLC indictment alleged that the defendants accepted "sports wagers from gamblers in the United States" (paragraph 1), "offered gamblers in the United States illegal wagering on professional and college football and basketball, as well as many other professional and amateur sporting events and contests." (paragraph 2). The overt acts allege that the company "accepted a sports bet" but does not provide any further information on the type of sporting event. The Section 1084 counts in the indictment allege the transmission of bets but do not specify the type of bet. While the indictment does not specifically mention pari-mutual wagering, the defendants did accept pari-mutual wagers, and such wagers are included in the indictment's reference to "other . . . sporting events and contests."

94. The United States has recently brought several more prosecutions of illegal gambling businesses that took bets on horse races as well as a variety of other sporting events. In United States v. Arthur Gianelli, et al., (District of Massachusetts), and United States v. Herbert David Meyers, et al., (District of Maryland), United States-based gambling operations employed the services of foreign gambling businesses to receive, record, and tabulate wagers from the United States on various sporting events, including horse racing. In United States v. Gerard Uvari, et al., (Southern District of New York), United States bookmakers transmitted numerous illegal wagers on horse races interstate. None of the defendants in these cases entered into the agreements required by the IHA or otherwise conformed their conduct to the IHA's provisions.

Question 37 (US): Please refer to the statement of Bruce G. Ohr of the US Department of Justice as set out in Exhibit AB-32.

> **Sub-question (a): Can the US confirm that this is the statement referred to in the US April 2006 status report to the DSB (WT/DS285/15/Add.1)?**

95. Yes, this is the same statement.

> **Sub-question (b): What is the current status of "the civil investigation relating to a potential violation of law" to which Mr. Ohr referred?**

96. The civil investigation is still pending. Beyond that the Department of Justice is unable to make any statement about any matter which is not public.

> **Sub-question (c): What was the law potentially violated? Why was it a civil, rather than a criminal, investigation? How is it relevant to the question of how the three Federal criminal statutes at issue are applied?**

97. The Department of Justice is unable to make any specific statement concerning the investigation. The decision to proceed criminally or civilly is, under United States legal practice, committed to the sound discretion of the prosecutor based on a variety of considerations. A civil injunctive suit would be relevant to the application of the criminal statutes because such an injunctive action would require, among other things, a demonstration that the federal criminal statutes at issue were, or were about to be, violated, and that such violation would continue into the future.

> **Sub-question (d:) Has the US Department of Justice ever initiated a criminal prosecution of the interstate transmission of wagers conducted in accordance with the IHA? Can this pattern of prosecution be taken into account in ascertaining the Department's interpretation of the statute that it administers?**

98. As set forth in response to question 34, we are not aware of any federal prosecutions concerning Internet gambling concerning the transmission of wagers conducted in accordance with the IHA. With regard to the second half of this question, the Appellate Body in the original proceeding found that the Panel had erred in relying on evidence of a lack of prosecution in support of an interpretation of the federal criminal statutes.

This finding of the Appellate Body was based upon its opinion that there was insufficient evidence presented in the original proceeding to place evidence of lack of prosecutions in proper context.[32] *In this "re-evaluation" of its Article XIV defence demanded by the United States, Antigua has put this evidence clearly in context. There have been no prosecutions of remote gambling and betting service providers operating under the auspices of the IHA and state regulatory schemes. But there have been prosecutions by the United States government – including two high-profile prosecutions this very year – against remote gambling and betting service providers operating under the Antiguan regulatory scheme.*

> **Sub-question (e): Hasn't the original Panel already considered the interpretation of the US Department of Justice of the IHA as amended, as expressed in the Presidential signing statement, and found it unpersuasive? (Panel report, paras. 6.597 and 6.600) Is the interpretation given in Mr. Ohr's statement any different from that expressed in the Presidential signing statement?**

99. As the United States understands the original panel findings, the Panel found that the Presidential signing statement was not sufficient to meet the US burden of establishing an affirmative defence. However, the signing statement and the testimony of Mr. Ohr are official statements regarding the interpretation of US criminal statutes, and are cumulative evidence in support of the US position. Moreover, under the *Skidmore* doctrine discussed in the first US submission, such statements would be considered by US courts on the issue of statutory interpretation that the Panel is examining in this dispute.

> **Sub-question (f): Did the US Department of Justice strongly object to the 2000 amendment to the IHA? If so, does this affect the weight to be given now to its interpretation of the relationship between that Act, as amended, and the Federal criminal statutes at issue?**

100. The 2000 Amendment to the Interstate Horseracing Act was inserted at the last minute by Congress in an appropriations bill providing funding for the Department of Justice and other agencies of government. The Department of Justice did not learn that this amendment had been inserted until after the bill had been passed by both houses of Congress and transmitted to the President for signature. In sum, the Department of Justice was not afforded an opportunity to comment on the amendment until after it had already been adopted by Congress. However, the Department's position on the effect of the amendment with respect to federal criminal laws was made clear in the Presidential signing statement.

Question 38: With respect to the question whether the three Federal criminal statutes at issue are, on their face, non-discriminatory.

> **Sub-question (a) (ANT, US) Did the Appellate Body have competence to make the finding at paras. 354 and 357 of its report when this was not covered in the Panel report or a legal interpretation developed by the Panel, and it was contested by Antigua (original first oral statement, para. 92; original Second written submission, paras. 33-34)?**

[32] Appellate Body report on *US – Gambling*, para. 356.

101. Yes, the Appellate Body had competence to make this finding. In doing so, the Appellate Body was attempting to complete the analysis in the dispute, after the Appellate Body had vacated certain Panel findings regarding the application of the Article XIV chapeau to the facts of this case. The wording of the statutes was not in dispute, and the Appellate Body acted properly in applying the legal criteria of the GATS to the undisputed facts concerning the content of the statutory language.

Although the Appellate Body may have had the competence to make the finding, unfortunately the finding was clearly in error.

[Sub-question (b) (ANT)]

Sub-question (c) (US): Without prejudice to whether the Panel should review this issue, can the US elaborate on its view that the text of those laws does not contain provisions that discriminate between countries, when the Wire Act refers to "interstate or foreign commerce", but not to intrastate commerce? (US FWS §17)

102. The source of federal jurisdiction for the federal gambling statutes at issue is the Commerce Clause of the United States Constitution, which allows Congress to pass laws only where there is an effect on interstate or foreign commerce. The reference to interstate or foreign commerce in the Wire Act is an example of the jurisdictional requirement imposed by the Constitution, and does not define the class of individuals who may be prosecuted under the statute. Once this requisite effect on interstate or foreign commerce is satisfied, the criminal prohibitions are applied equally to anyone, without discrimination, regardless of nationality or country of origin, that violates the statute.

103. Thus, the fact that the statutes do not address intrastate commerce reflects no "discrimination" in the operation of US federal laws, it simply reflects the US constitutional scheme governing federal regulation of commerce. Moreover, the absence of a federal prohibition on intrastate activity in no way indicates that state gambling statutes (which do govern intrastate commerce) are discriminatory. For these reasons, the Appellate Body was correct in finding that the federal statutes were non-discriminatory on their face.

Both the GATS and the DSU are clear that they apply on a Member-to-Member basis and that the obligations and commitments undertaken apply within the applicable territories of the Members without consideration of internal or domestic governmental distinctions.[33] *Thus, from Antigua's perspective, how the United States chooses to distribute authority between the central and regional or state governments is not relevant. What is relevant is whether Antiguan service providers are prohibited by United States law from offering their services remotely to consumers in the United States. And this, by virtue of the Wire Act alone, they clearly are. Yet the Wire Act – as the United States has conceded – does not prohibit the remote provision of these services on an intrastate basis. And, as Antigua has demonstrated, a number of states have decided to allow gambling and betting services in one form or another to be provided on a remote basis within (and in a number of cases, without as well) their borders.*[34]

Further, because of the Wire Act, even if every state were to pass legislation directly authorising foreign service providers to offer services on a remote basis to their states (which of course none have done), the services would nonetheless be illegal because they would constitute "interstate or foreign commerce," within the meaning of the Wire Act. So, regardless of what state law provides, the Wire Act ensures discriminatory treatment of foreign service providers.

[33] GATS, Article I:2; Article I:3(a); DSU, Article 19.9.
[34] See AB First written submission, paras. 65-129.

ANNEX G-2

COMMENTS BY THE UNITED STATES ON REPLIES TO QUESTIONS POSED BY THE PANEL (14 DECEMBER 2006)

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 US comment on a particular question should not be taken as agreement with other parties' submissions.

A. COMMENTS ON ANSWERS OF ANTIGUA TO QUESTIONS FROM THE PANEL

Question 2 (ANT, US): 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:

2. 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 in 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.

3. 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 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.

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

4. 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

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

[2] Appellate Body report on *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)*).

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

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.

Question 6 (ANT, US): 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?

5. Antigua's response draws by analogy on the practice of the United States Supreme Court. Although US law is generally not instructive on the proper interpretation of the DSU, the United States nonetheless notes that Antigua's reliance on US legal practice does not support its position. Antigua claims that once a dispute is considered by the US 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 US legal system determine outstanding questions of law, and the detailed factual findings need to be examined (and sometimes reexamined in a remand proceeding) by a trial-level court.

6. 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 – Dairy* 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.

Question 7 (ANT, US): 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?

7. 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

[4] US Answers, para. 32.

[5] Appellate Body report on *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*).

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.

Question 20 (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?

8. 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]

9. 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]

10. 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.

11. The United States also notes the following with regard to a hypothetical proceeding under Article 22.8: (i) 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; (ii) the dispute

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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.

[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.

would be heard by a new panel, and not necessarily the panelists who were already familiar with the dispute; (iii) 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; (iv) the responding Member would be unfairly subject to a suspension of concessions for its decision to maintain and defend a WTO-consistent measure.

12. 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.

Question 23 (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.

13. 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 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.

14. 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.

Question 32: 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).

> **Sub-question (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?**

15. 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

[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).

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.

Question 35: Regarding Youbet.com, TVG, XpressBet.com, Capital OTB and the other US domestic operations described by Antigua (Exhibits AB-65 to AB-73):

> **Sub-question (d) (ANT): If the US 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 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?**

16. As stated in the US 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.

17. 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 …"

B. COMMENTS ON ANSWERS OF THIRD PARTIES TO QUESTIONS FROM THE PANEL

Question 6 (EC, Japan): 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 cannot use a compliance proceeding to obtain a "second chance"? (EC oral statement, para. 20; Japan oral statement, para. 2)

18. 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*

[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."

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.

19. 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.

20. The EC statement is also devoid of any practical meaning. The term "*res judicata*" is not self-defining. Indeed, under US 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.

21. 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]

22. 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 *EC-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.)

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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.

23. 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.

24. 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.

Question 9: 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?

25. 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.

Question 11 (Japan): If this Article 21.5 compliance proceeding "cannot function as the forum" for the US to show or demonstrate the applicability of the Article XIV defence, what would be the appropriate forum in which the US could make such a showing or demonstration? (Japan Third party submission, para. 14)

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

Question14: 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?

27. 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

[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.

context of the facts and circumstances of this dispute, and that the answers of the third parties must be considered in this light.

ANNEX H

REQUEST FOR THE ESTABLISHMENT OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS285/18
7 July 2006

(06-3316)

Original: English

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

The following communication, dated 6 July 2006, from the delegation of Antigua and Barbuda to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

Antigua and Barbuda is pleased to submit this request for the establishment of a panel to the Chairman of the Dispute Settlement Body and to the United States of America pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* of the WorId Trade Organisation with respect to the dispute known as *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285).

Background

On 21 July 2003, the Dispute Settlement Body (the "DSB") of the WorId Trade Organization (the "WTO") established a panel at the request of Antigua and Barbuda in this dispute ("DS285"). Both the panel and the Appellate Body in DS285 found certain measures of the United States to be inconsistent with certain of the obligations of the United States under the WTO's *General Agreement on Trade in Services* (the "GATS"). On 20 April 2005, the DSB adopted the report of the panel, as modified by the report of the Appellate Body. The resulting DSB recommendations and rulings include, *inter alia*, the recommendation that the United States bring the measures found to be inconsistent with the GATS into conformity with its obligations under that agreement.[1]

On 6 June 2005, Antigua and Barbuda communicated a request to the DSB that the determination of a reasonable period of time for compliance by the United States with the recommendations and rulings of the DSB be the subject of binding arbitration, in accordance with

[1] WT/DS285/AB/R, para. 374.

Article 21.3(c) of the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). On 30 June 2005, an arbitrator was appointed by the Director-General of the WTO.

During the course of the proceedings before the arbitrator, the United States argued that "both the legal form of implementation and the technical complexity of the contemplated measures require a reasonable period of time of no less than 15 months".[2] The United States took the position during the arbitration that it intended to seek compliance with the DSB recommendations and rulings through legislation.[3]

On 19 August 2005, the award of the arbitrator determined that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in DS285 was 11 months and two weeks from 20 April 2005. This period of time expired on 3 April 2006 without any measure being adopted by the United States.

On 10 April 2006 the United States submitted a status report to the DSB regarding implementation of the DSB recommendations and rulings.[4] The United States informed the DSB that, in its opinion, it was in compliance with the recommendations and rulings of the DSB based on the following statement (the "DOJ Statement") made by a representative of the United States Department of Justice to a subcommittee of the United States House of Representatives on 5 April 2006:

> "The Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity. We have previously stated that we do not believe that the Interstate Horse Racing Act, 15 U.S.C. §§ 3001-3007, amended the existing criminal statutes.
>
> In view of these circumstances, the United States is in compliance with the recommendations and rulings of the DSB in this dispute."

At a meeting of the DSB on 21 April 2006, the United States informed the DSB that in light of the DOJ Statement, it was in compliance with the recommendations and rulings of the DSB. At the same meeting, Antigua and Barbuda expressed its disagreement with the United States' assertion of compliance, noting that the DOJ Statement was in fact a restatement of one of the arguments made by the United States to the panel and the Appellate Body during the course of the proceedings.

On 23 May 2006, Antigua and Barbuda and the United States concluded an "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding Applicable to the WTO Dispute *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285)" (the "Agreed Procedures").

On 8 June 2006, Antigua and Barbuda initiated proceedings under Article 21.5 of the DSU, requesting consultations with the United States. These consultations were held in Washington, D.C. on 26 June 2006, but did not result in a settlement of the dispute. Consequently, 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.

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[2] *US – Gambling*, Arbitration under Article 21.3(c) of the DSU, Submission of the United States of America, para. 9.

[3] *Id.*

[4] WT/DS285/15/Add.1.

The United States Has Failed to Comply with the Recommendations and Rulings of the DSB

Antigua and Barbuda disagrees that the United States has complied with the recommendations and rulings of the DSB in DS285 and believes that the United States remains out of compliance with the United States' obligations under the GATS with respect to the provision of cross-border gambling and betting services from Antigua and Barbuda to consumers in the United States.

No Federal Legislation

First, Antigua and Barbuda considers that the United States has taken *no* measures to comply with the recommendations and rulings of the DSB. In DS285, Antigua and Barbuda established the existence of three federal statutes which serve to prohibit companies from Antigua and Barbuda from providing cross-border gambling and betting services to consumers located in the United States in violation of the United States' obligations under the GATS. These three federal statutes are (i) the Wire Act of 1961,18 US.C. §1084 (the "Wire Act"); (ii) the Travel Act, 18 US.C. §1952 (the "Travel Act"); and (iii) the Illegal Gaming Business Act, 18 US.C. §1955 (the "IGBA"). The DSB recommended that the United States bring these three measures in conformity with its obligations under the GATS.

Neither during the reasonable period of time nor to date has the United States introduced, much less passed, any legislation that would amend or effect the Wire Act, the Travel Act or the IGBA in such a manner as to make those statutes WTO-consistent. Furthermore, two bills which have been introduced in the current United States' Congress – H.R. 4777 and H.R. 4411 – are expressly contrary to the recommendations and rulings of the DSB in DS285, as each would further institutionalise the discriminatory effect of the three United States statutes. The United States has therefore failed to bring these federal statutes into conformity with its obligations to Antigua and Barbuda under the GATS and each statute remains contrary to Article XVI of the GATS without meeting the requirements of Article XIV of the GATS.

DOJ Statement not a "Measure" for Purposes of the DSU

Second, despite having insisted to the Article 21.3(c) arbitrator that the United States would pursue a legislative remedy to bring itself into conformity with the recommendations and rulings of the DSB in DS285, the United States asserted it was in compliance on 10 April 2006 by reference to the DOJ Statement. However, the DOJ Statement does not constitute a "measure" for purposes of the DSU. The DOJ Statement is nothing but an utterance of a government official without any independent legal effect under United States law or under the GATS, the DSU or any other WTO agreement.

Not a "Measure Taken to Comply"

Third, the DOJ Statement is nothing more that a restatement of the position taken by the United States during the course ofDS285 that was ultimately found unpersuasive by both the panel and the Appellate Body. Assuming, *arguendo*, that an utterance by a government employee can constitute a "measure" for purposes of the DSU, Antigua and Barbuda does not believe that a simple restatement of a legal position taken by a party to a dispute during its regular course can be considered a "measure *taken to comply* with the recommendations and rulings" of the DSB within the meaning of Article 21.5 of the DSU

The United States Remains Out of Compliance with its GATS Obligations

Fourth, regardless of whether the DOJ Statement constitutes a "measure" for purposes of the DSU or whether it can be considered a "measure taken to comply" within the meaning of Article 21.5 of the DSU, the DOJ Statement does not bring the United States into compliance with the recommendations and rulings of the DSB in DS285. In this regard Antigua and Barbuda notes that, *inter alia:*

(1) As Antigua and Barbuda had observed to both the panel and the Appellate Body, there are a number of reasonable alternative measures available to the United States other than prohibition to address the concerns of the United States with respect to the provision of remote gambling and betting services. Since the adoption of the panel and Appellate Body reports by the DSB, even more alternatives have become available. Ironically, as further discussed below each of the two bills pending in the United States Congress explicitly recognise that it is possible to address risks of remote gambling with extant technology, fundamentally undermining the United States' defence under Article XIV of the GATS.

(2) Since the adoption of the recommendations and rulings of the DSB in DS285, not only have there been no prosecutions of or enforcement actions brought against domestic remote gambling and betting service providers operating pursuant to the Interstate Horse Racing Act (the "IHA"), but in fact there has been significant growth in and expansion of domestic remote gambling and betting services generally in the United States.

(3) The position of the United States as reflected in the DOJ Statement is not supported by the bulk of United States legal authority.

(4) Assuming the accuracy of the portion of the DOJ Statement in which it is said that "[t]he Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity" the reference to a *civil* investigation is evidence of the discriminatory application of its laws by the United States, as licensed, regulated providers of cross-border gambling and betting services from Antigua and Barbuda to the United States remain subject to *criminal* prosecution by United States authorities[5], contrary to the obligations of the United States under the GATS.

Pending Legislation in the United States Congress Would Violate the GATS

As noted above, two bills are currently pending in the United States Congress which expressly address the provision of remote gambling and betting services. One bill was introduced into the United States Congress on 16 February 2006 as H.R. 4777 and is entitled the "Internet Gambling Prohibition Act" (the "Goodlatte Bill"), and another was introduced on 18 November 2005 as H.R. 4411 and is cited as the "Unlawful Internet Gambling Enforcement Act of2005" (the "Leach Bill" and, collectively with the Goodlatte Bill, the "Bills"). Each of the Bills is in key respects expressly contrary to the recommendations and rulings of the DSB.

Each Bill is not only non-responsive to the recommendations and rulings of the DSB, rather each is in fact directly contrary to the recommendations and rulings in several key respects. The Goodlatte Bill is cast as an amendment to the Wire Act, designed to expand the coverage of the Wire Act to most types of gambling services offered over the Internet, whereas the Leach Bill does not expressly purport to prohibit any class of remote gambling and betting or further criminalise remote betting *per se*. Rather, the Leach Bill seeks to criminalise facilitation of or participation in certain

[5] On 17 May 2006, an indictment was unsealed in which the United States Department of Justice indicted a number of companies and individuals, including the former holder of a gambling and betting license issued by Antigua and Barbuda, for various alleged violations of United States laws, including the Wire Act, simply by the provision of those services to consumers in the United States.

financial transactions associated with what the legislation defines as "unlawful Internet gambling". The Goodlatte Bill also includes prohibitions on certain financial transactions similar to those contained in the Leach Bill in its proposed amendments to the Wire Act.

Although addressed in slightly different ways, both the Goodlatte Bill and the Leach Bill contain three significant exceptions from their coverage. *First*, both of the Bills exclude from their coverage transactions made in accordance with the IHA, effectively removing remote betting and gambling in accordance with the IHA from the scope of the legislation. *Second*, both of the Bills specifically exclude from their coverage transactions that the Leach Bill calls "intrastate transactions", effectively sanctioning remote gambling that occurs wholly within the borders of an American state. *Third*, both of the Bills exclude from their coverage remote gambling conducted by Native American tribes in accordance with existing federal legislation applicable to Native American gaming. Neither of the Bills provide gambling and betting service operators located in Antigua and Barbuda with any access to consumers in the United States or are in any way responsive to the recommendations and rulings of the DSB in DS285.

The defence of the United States in DS285 under Article XIV of the GATS was predicated on the notion that "remote" gambling-which the United States defined as gambling in which the bettor and the gambling service provider or an agent are not physically in the presence of each other when a wager is made-presents certain "risks" that are either not present or not present to a similar extent than when gambling is not "remote". Although gambling over the Internet can be remote it is not the exclusive mode of remote gambling. None of the federal laws that Antigua and Barbuda challenged prohibit remote gambling. What they prohibit are certain forms of *cross-border* gambling. It was never alleged by the United States nor was it found by the panel or the Appellate Body that *cross-border* gambling presents any special "risks" that could come within the scope of Article XIV of the GATS. Thus, while "cross-border" gambling may in most cases be "remote" it does not however hold true that all "remote" gambling is "cross-border". Although the Appellate Body decided that the United States had established the three federal statutes in question as "necessary" to protect against "risks" associated with remote gambling, the failure of the United States to meet its burden of proof under the chapeau of Article XIV resulted in the overall failure of the Article XIV defence. The three exceptions to the coverage of the Goodlatte Bill and the Leach Bill mentioned above only serve to highlight the chapeau failure and the discriminatory and trade restrictive application of the three federal laws by the United States government.

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 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.

Pursuant to the Agreed Procedures, the United States has agreed to accept the establishment of a panel at the first meeting at which this request for the establishment of a panel appears on the agenda.

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ANNEX I

WORKING PROCEDURES OF THE PANEL

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following working procedures shall apply.

2. The Panel will provide the Parties and Third Parties with a timetable for its proceedings. The timetable may be modified by the Panel as appropriate, after having consulted the Parties.

3. The Panel shall meet in closed session. The Parties, and interested Third Parties, shall be present at the meetings only when invited by the Panel to appear before it.

4. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU, nor in these Working Procedures, precludes a Party or a Third Party from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. As provided in Article 18.2 of the DSU, where a Party submits a confidential version of its written submissions to the Panel, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be normally submitted no later than one week after the written submission is presented to the Panel.

5. Before the substantive meeting of the Panel with the Parties, and in accordance with the timetable approved by the Panel, the Parties shall transmit to the Panel written submissions and subsequently written rebuttals in which they present the facts of the case, their arguments and their counter-arguments, respectively. Third Parties may transmit to the Panel written submissions after the first written submissions of the Parties have been presented, and in accordance with the timetable approved by the Panel.

6. All Third Parties shall be invited in writing to present their views during a session of the substantive meeting of the Panel set aside for that purpose. Third Parties may be present during the entirety of this session.

7. At its substantive meeting with the Parties, the Panel shall ask Antigua and Barbuda to present its case first. Subsequently, and still at the same meeting, the United States will be asked to present its point of view. At a separate session of the same meeting set aside for that purpose, the Third Parties will be asked to present their views thereafter. Parties will then be allowed an opportunity for final statements, with Antigua and Barbuda presenting its statement first.

8. The Panel may at any time put questions to the Parties and to the Third Parties and ask them for explanations either in the course of the substantive meeting or afterwards in writing. Replies to questions shall be submitted in writing by the dates specified by the Panel after consultation with the Parties.

9. Each Party shall make available to the Panel and to the other Party a written version of its oral statements, preferably at the end of the meeting with the Panel, and in any event not later than the working day following the meeting. Any Third Party that wishes to present its views shall similarly make available to the Panel and to the Parties and other Third Parties a written version of their oral statements, preferably at the end of the meeting with the Panel, and in any event not later than the working day following the presentation. Parties and Third Parties shall provide the Panel and other

participants at the respective session with a provisional written version of their oral statements at the time that the statements are made.

10. In the interest of full transparency, the oral presentations shall be made in the presence of the Parties. Moreover, each Party's written submissions, including replies to questions put by the Panel, shall be made available to the other Party. Third Parties shall receive copies of the Parties' first written submissions and rebuttals. Parties shall submit all factual evidence to the Panel as early as possible and no later than in their respective rebuttals, except with respect to evidence necessary for purposes of answering questions. Exceptions will be granted upon a showing of good cause. In such cases, the other Party shall be accorded a period of time for comment, as appropriate.

11. The Parties and Third Parties shall provide the Panel with an executive summary of the facts and arguments as presented to the Panel in their written submissions and oral presentations within one week following the delivery to the Panel of the relevant submissions. The executive summaries of the written submissions to be provided by each Party shall not exceed 8 pages in length and the executive summaries of the oral presentations shall not exceed 4 pages in length each. The summary to be provided by each Third Party shall summarize their written submission and oral presentation, and shall not exceed 4 pages in length. The executive summaries shall not in any way serve as a substitute for the submissions of the Parties in the Panel's examination of the case. However, the Panel may reproduce the executive summaries provided by the Parties and Third Parties in the arguments section of its report, subject to any modifications deemed appropriate by the Panel. The Parties' and Third Parties' replies to questions will be attached to the Panel report as annexes.

12. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular the references to exhibits submitted by Parties, Parties shall sequentially number their exhibits throughout the course of the dispute. For example, exhibits submitted by Antigua and Barbuda should be numbered AB-1, AB-2, etc. If the last exhibit in connection with the first submission was numbered AB-5, the first exhibit of the next submission thus should be numbered AB-6. Exhibits submitted by the United States should be numbered US-1, US-2, etc.

13. The Parties and Third Parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include, as representatives of the government concerned, private counsel and advisers. The Parties and Third Parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations, as well as any other advisors consulted by a Party or Third Party, act in accordance with the rules of the DSU and the working procedures of this Panel, particularly in regard to confidentiality of the proceedings. Parties shall provide a list of the participants of their delegation before or at the beginning of any meeting with the Panel.

14. Any request for a preliminary ruling to be made by the Panel shall be submitted no later than in a Party's first written submission. If Antigua and Barbuda requests any such ruling, the United States shall submit its response to such a request in its first written submission. If the United States requests any such ruling, Antigua and Barbuda shall submit its response to such a request in its rebuttal submission. Exceptions to this procedure will be granted upon a showing of good cause.

15. Following issuance of the interim report, the Parties shall have no less than 7 days to submit written requests to review precise aspects of the interim report and to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at the time the written request for review is submitted. Following receipt of any written requests for review, in cases where no further meeting with the Panel is requested, the Parties shall have the opportunity within a time-period to be specified by the Panel to submit written comments on the other Parties' written requests for review. Such comments shall be strictly limited to commenting the other Parties' written requests for review.

16. The following procedures regarding service of documents shall apply:

(a) Each Party shall serve its submissions directly on the other Party. Each Party shall, in addition, serve its first written submission and rebuttals on Third Parties. Each Third Party shall serve its submissions on the Parties and other Third Parties. Each Party and Third Party shall confirm in writing, at the time it provides the submission to the Secretariat, that copies have been served as required.

(b) The Parties and Third Parties should provide their written submissions to the Panel, through the Secretariat, by 5.00 p.m., local Geneva time, on the deadlines established by the Panel.

(c) Parties and Third Parties shall provide the Secretariat with written copies of their oral statements on the working day following the date of the presentation.

(d) The Parties and Third Parties shall provide the Secretariat with ten (10) paper copies of all their submissions as well as an "electronic" copy on a CD-ROM, diskette or as an e-mail attachment, in a format compatible with the Secretariat's software. Paper copies shall be delivered to the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (Room 2150). Electronic copies should be sent by e-mail to Mr. Ferranco at DSregistry@wto.org, with a copy to Ms Mireille Cossy (mireille.cossy@wto.org) and to Mr. Matthew Kennedy (matthew.kennedy@wto.org).

(e) The Panel will provide Parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the Parties or Third Parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

17. These working procedures may be modified by the Panel as appropriate, after having consulted the Parties.

ANNEX J

LISTS OF EXHIBITS SUBMITTED BY THE PARTIES

ANNEX J-1

LIST OF SCHEDULES AND EXHIBITS SUBMITTED BY ANTIGUA AND BARBUDA

Schedule No	Title
AB 1.	State Remote Gambling Regulatory Schemes
AB 2.	Illustration of Remote Wagering at YouBet and the World Sports Exchange
AB 3.	Supplementary Materials on Regulatory Alternatives

Exhibit No	Title
AB 1.	The Wire Act, 18 U.S.C. §§1081, 1084
AB 2.	The Travel Act, 18 U.S.C. § 1952
AB 3.	The Illegal Gambling Business Act, 18 U.S.C. § 1955
AB 4.	The Interstate Horseracing Act, §§ 3001 to 3007
AB 5.	*Lewis Pub. Co. v Morgan*, 229 U.S. 288 (1913)
AB 6.	*FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981)
AB 7.	*SEC v. Sloan*, 436 U.S. 103 (1978)
AB 8.	*FMC v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973)
AB 9.	*Volkswagenwerk v. FMC*, 390 U.S. 261 (1968)
AB 10.	*NLRB v. Brown*, 380 U.S. 278, 291 (1965)
AB 11.	*FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965)
AB 12.	*Social Security Board v. Nierotko*, 327 U.S. 358 (1946)
AB 13.	*Burnet v. Chicago Portrait Co.*, 285 U.S. 1 (1932)
AB 14.	*Webster v. Luther*, 163 U.S. 331 (1896)
AB 15.	*Gonzales v. Oregon*, 126 S. Ct. 904 (U.S. 2006)
AB 16.	*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)
AB 17.	S. Rep. No. 95-1117 (1978) reprinted in U.S.C.C.A.N. 4144 (Interstate Horseracing Act of 1978 Senate Report (Commerce, Science and Transportation Committee))
AB 18.	1978 U.S.C.C.A.N. 4132 (Interstate Horse Racing Act of 1978 Senate Report (Commerce, Science and Transportation))
AB 19.	House Conference Report 106-1005, Making Appropriations for the Government of the District of Columbia and Other Activities Chargeable in Whole or in part Against Revenues of Said District for the Fiscal Year Ending September 30, 2001, and For Other Purposes, to accompany H.R. 4942, Sec. 629 (available at 2000 WL 1606910, *151).
AB 20.	146 Cong. Rec. H 11230, 106th Cong. 2nd Sess. (2000)
AB 21.	*And They're Off: The Legality of Interstate Pari-Mutuel Wagering and Its Impact on the Thoroughbred Horse Industry*, 89 Kentucky L. J. 711, 725 (2001)
AB 22.	Office of the Attorney General of Maryland, Opinion No. 01-015 (2001)
AB 23.	*Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999)
AB 24.	*Watt v. Alaska*, 451 U.S. 259 (1981).
AB 25.	*Tug Allie-B, Inc. v. United States*, 273 F.3d 936 (11th Cir. 2001)
AB 26.	*Morton v. Mancari*, 417 U.S. 535 (1974)
AB 27.	*United States v. Louwsma*, 970 F.2d 797 (11th Cir. 1992)
AB 28.	*United States v. DeLaurentis*, 491 F.2d 208 (2nd Cir. 1974).
AB 29.	*United States v. Bass*, 404 U.S. 336 (1971)
AB 30.	*Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Association, Inc.*, 989 F.2 1266 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993).

Exhibit No	Title
AB 31.	H.R. 4411, 109th Cong. 2nd Sess., "The Internet Gambling Prohibition and Enforcement Act" (12 July 2006)
AB 32.	Statement of Testimony of Bruce G. Ohr, Chief, Organized Crime and Racketeering Section, Criminal Division, United States Department of Justice, Before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, United States House of Representatives, Concerning H.R. 4777, The "Internet Gambling Prohibition Act" [later merged with H.R. 4111, supra], 5 April 2006
AB 33.	Antonia Z. Cowan, *The Global Gambling Village: Interstate and Transnational Gambling,* 7 Gambling Law Review 251 (August 2003)
AB 34.	California Remote Account Wagering Laws Statute: WEST'S ANN. CAL. BUS. & PROF. CODE § 19604 Regulation: CAL. CODE REGS. tit. 4, §§ 2070 to 2083
AB 35.	Connecticut Remote Account Wagering Laws Statute: CONN. GEN. STAT. § 12-571 Regulation: CONN. AGENCIES REGS. § 12-574-F60
AB 36.	Idaho Remote Account Wagering Laws Statute: IDAHO CODE § 54-2512(5) Regulation: IDAHO ADMIN. CODE §§ 11.04.02.041 to .044 and 11.04.02.050 to .060
AB 37.	Kentucky Remote Account Wagering Laws Statute: KY. REV. STAT. ANN. §§ 230.378 to 230.379; 230.775 to 230.783 Regulation: None
AB 38.	Louisiana Remote Account Wagering Laws Statute: LA. REV. STAT. ANN. § 149.5 Regulation: LA. ADMIN. CODE tit. 35, pt. XIII, §§ 12001 to 12014
AB 39.	Maryland Remote Account Wagering Laws Statute: MD. CODE ANN., BUS REG. § 11-805 Regulation: MD. REGS. COD tit. 09, § 10.04.24
AB 40.	Massachusetts Remote Account Wagering Laws Statute: MASS. GEN. LAWS ch. 128A § 5C Regulation: MASS. REGS. CODE tit. 205, §§ 6.20 to 6.26
AB 41.	Nevada Remote Account Wagering Laws Statutes: NEV. REV. STAT. §§ 463.016425, 463.750 to 463.780, 466.155(1)(b) Regulation: NEV. GAM. REG. 22 (22.010 to 22.160) and 26C (§§26C.010 to 26C.220)
AB 42.	New Hampshire Remote Account Wagering Laws Statute: N.H. REV. STAT. ANN. §§ 284:22 to 284:22-a Regulation: None
AB 43.	New Jersey Remote Account Wagering Laws Statute: N. J. STAT. ANN. §§ 5:5-127, 5:5-142 to 5:5-144 Regulation: N.J. ADMIN. CODE tit. 13, §§ 74 - 7.1 to 74 - 7.18
AB 44.	New York Remote Account Wagering Laws Statute: N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1012 Regulation: N.Y. COMP. CODES R. & REGS. tit. 9, §§ 5200.1 to 5204.17
AB 45.	North Dakota Remote Account Wagering Laws Statute: N.D. CENT. CODE § 53-06.2-10.1 Regulation: None

Exhibit No	Title
AB 46.	Ohio Remote Account Wagering Laws Statute: OHIO REV. CODE ANN. §§ 3769.01 to 3769.14 Regulation: OHIO ADMIN. CODE §§ 3769-3-32 and 3769-13-32
AB 47.	Oregon Remote Account Wagering Laws Statute: OR. REV. STAT. §§ 462.700 to 462.740. Regulation: OR. ADMIN. R. §§ 462-210-0010 to 462-210-0040; and R. 462-220-0010 to 462-220-0080
AB 48.	Pennsylvania Remote Account Wagering Laws Statute: PA. STAT. ANN., tit. 4, § 325.218(b)-(c) Regulation: 58 PA. CODE §§ 169.1 to 169.5 and 58 PA. CODE §§ 187.1 to 187.4
AB 49.	Virginia Remote Account Wagering Laws Statute: VA. CODE ANN. §§ 59.1-364 to 59.1-374 Regulation: 11 VA. ADMIN. CODE §§ 10-45-10 to 10-45-70
AB 50.	Washington Remote Account Wagering Laws Statute: WASH. REV. CODE ANN. § 67.16.260 Regulation: WASH. ADMIN. CODE §§ 260-49-010 to 260-49-100
AB 51.	Wyoming Remote Account Wagering Laws Statute: WYO. STAT. ANN. §§ 11-25-102(xi) and 11-25-105(k) Regulation: WYO. RULES & REG. DEP'T COMMERCE, PC Ch. 9, § 2
AB 52.	Arizona State Wagering Laws Under the IHA ARIZ. REV. STAT. ANN. § 5-112 (B)
AB 53.	Colorado Wagering Laws Under the IHA COLO. REV. STAT. ANN. § 12-60-602(5)(b)(IV)
AB 54.	Missouri Wagering Laws Under the IHA MO. ANN. STAT. § 313.655
AB 55.	Idaho Wagering Laws Under the IHA IDAHO CODE § 11.04.02.050(a)-(b)
AB 56.	Kentucky Wagering Laws Under the IHA KY. REV. STAT. ANN § 230.777(2), § 230.779(1), and § 230.783(2)
AB 57.	Louisiana Wagering Laws Under the IHA LA. REV. STAT. ANN. § 4:149.3 LA. ADMIN. CODE ANN tit. 35, § 12003(A); § 12001; and § 10377
AB 58.	Maryland Wagering Laws Under the IHA MD. CODE ANN. BUS. REG. § 11-804 and § 11-804.1(a) MD. REGS. CODE tit. 09, § 10.04.24(C)(2) and § 10.04.24(A)(3)
AB 59.	Massachusetts Wagering Laws Under the IHA MASS. GEN. LAWS ANN., ch. 128C, § 2 and ch. 128A, § 5C
AB 60.	Oregon Wagering Laws Under the IHA OR. REV. STAT. § 462.710(6)(d) OR. ADMIN. R. 462-220-0020(2)
AB 61.	Pennsylvania Wagering Laws Under the IHA PA. CODE § 173.3(c), § 190.3(c), § 190.4
AB 62.	Virginia Wagering Laws Under the IHA VA. CODE ANN. § 59.1-369; 11 VA. ADMIN. CODE § 10-45-10.
AB 63.	Washington Wagering Laws Under the IHA WASH. ADMIN. CODE 260-49-0202(6)(c); § 260-49-010(3); § 260-49-060(5)

Exhibit No	Title
AB 64.	Marc Falcone, Eric Hasler, Jason Ader, *The Global Account Wagering Industry: What Treasures Does It Hold?* (January 2002, Bear Stearns Equity Research)
AB 65.	YouBet Information
AB 66.	TVG: The Interactive Horseracing Network Information
AB 67.	XpressBet Information
AB 68.	The Racing Channel, Inc.
AB 69.	AmericaTab, Ltd. Information
AB 70.	US Off Track, LLC Information
AB 71.	Capital District Regional Off-Track Betting Corporation ("Capital OTB") Information
AB 72.	New York City Off-Track Betting Corporation Information
AB 73.	New Jersey Account Wagering Information
AB 74.	World Sports Exchange License
AB 75.	WWTS Indictments (May 2006)
AB 76.	Department of Justice Press Release regarding BetonSports Indictments (17 July 2006)
AB 77.	BetonSports Indictment (July 2006)
AB 78.	Matt Richtel, "Arrest Made in Crackdown on Internet Betting," New York Times, C1 (18 July 2006)
AB 79.	Nancy Zuckerbrod, "Frist Targets Internet Gambling," Washington Post (13 September 2006)
AB 80.	Stations Casino "Sports Connection" Materials
AB 81.	La Fleur's 2004 World Lottery Almanac, Lottery Fast Facts, p. 16-17.
AB 82.	Massachusetts Lottery Documents
AB 83.	Massachusetts Subscription Season Tickets and Winnings
AB 84.	Illinois Lottery Documents
AB 85.	Maine Lottery Documents
AB 86.	Maryland Lottery Documents
AB 87.	New Hampshire Lottery Documents
AB 88.	New York Lottery Documents
AB 89.	Vermont Lottery Documents
AB 90.	Virginia Lottery Documents
AB 91.	Michelle T. Grando, Allocating the Burden of Proof I WTO Disputes: A Critical Analysis, Journal of International Economic Law, Vol. 9, No. 3 (advance publication 17 August 2006)
AB 92.	United Kingdom Gambling Act 2005
AB 93.	Tasmanian Gaming Control Act 1993, Part 4A, Division 5 - Betting exchange operations
AB 94.	Ohio Licenses of Account Wagering Services
AB 95.	Oregon Licenses of Account Wagering Services
AB 96.	Idaho Licenses of Account Wagering Services
AB 97.	Kentucky Licenses of Account Wagering Services
AB 98.	Virginia Licenses of Account Wagering Services
AB 99.	Washington Licenses of Account Wagering Services
AB 100.	Oregon Racing Commission, Annual Performance Progress Report Executive Summary: Time Period: Fiscal Year 2003-2004
AB 101.	California Horse Racing Board, Thirty-Fifth Annual Report of the California Horse Racing Board: A Summary of Fiscal Year 2004-2005 Racing in California

Exhibit No	Title
AB 102.	State Age Verification Measures for Remote Cigarette Sales Arizona California Delaware Minnesota Rhode Island Texas Virginia Washington
AB 103.	State Age Verification Measures for Remote Alcohol Sales Arizona California Michigan Minnesota Colorado
AB 104.	United States General Accounting Office, GAO-04-11, Social Security Numbers: Private Sector Entities Routinely Obtain and Use SSNs, and Laws Limit the Disclosure of Information (January 2004).
AB 105.	Youth, Pornography and the Internet, Dick Thornburgh and Herbert S. Lin, Editors, *Committee to Study Tools and Strategies for Protecting Kids from Pornography and Their Applicability to Other Inappropriate Internet Content*, (2002 National Academy Press/National Research Council)
AB 106.	Idology, Inc. documentation
AB 107.	Choice Point documentation
AB 108.	Trifuna documentation
AB 109.	Verid documentation
AB 110.	i-Mature documentation
AB 111.	NetIdMe documentation
AB 112.	Legislative Histories of the Wire Act, Travel Act and IGBA
AB 113.	Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884, 1952- 1962 (2006) (to be codified at 31 U.S.C. §§ 5361 to 5367)
AB 114.	*United States v. Belt*, 319 U.S. 521 (1943)
AB 115.	*Bobula v. United States Department of Justice*, 970 F.2d 854 (6th Cir. 1992)
AB 116.	*Posadas v. National City Bank of New York*, 296 U.S. 497 (1936)
AB 117.	*Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Association, Inc.*, 802 F. Supp 662 (D.R.I. 1992), *aff'd*, 989 F.2d 1266 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993).
AB 118.	National Thoroughbred Racing Association, Legislative Statement, "Congress Affirms Horse Racing's Position in Internet Gaming; Legislation Passed by Both House Early This Morning" (2 October 2006)
AB 119.	American Horse Council, Press Release, "Congress Passes Internet Gambling Prohibition Bill" (2 October 2006)
AB 120.	Letter from Charles F. Champion, Chief Executive Officer of YouBet, to company shareholders (13 October 2006)
AB 121.	Patricia Campbell, "Gaming company sells out; more layoffs pending," Antigua Sun (25 October 2006)

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LIST OF EXHIBITS SUBMITTED BY THE UNITED STATES

Exhibit No	Title
US 1.	House Report No. 967, Prohibiting Transmission of Bets, Wagers, and Related Information by Wire Communications (Aug. 17, 1961).
US 2.	Congressional Record – Senate, Interstate Horseracing Act of 1978, 31543-62 (Sept. 26, 1978).
US 3.	Richardson v. United States 526 U.S. 813 (1999).
US 4.	McGraw v. Barnhart, 450 F.3d 493 (10th Cir. 2006).
US 5.	United States v. Borden, 308 U.S. 182 (1939).
US 6.	United States v. Brien, 617 F.2d 299 (1st Cir. 1980).
US 7.	Environmental Defense Center v. Babbitt, 73 F.3d 867 (9th Cir. 1995).
US 8.	Congressional Record – House, H11187 (Oct. 25, 2000).
US 9.	European Community v. RJR Nabisco, 355 F.3d 123 (2d Cir. 2004).
US 10.	United States v. Cook, 922 F.2d 1026 (2d Cir. 1991).
US 11.	United States v. Mitchell, 39 F.3d 465 (4th Cir. 1994).
US 12.	United States v. Hansen, 566 F. Supp. 162 (D.D.C. 1983).
US 13.	United States v. Vulcan Materials, 320 F. Supp. 1378 (D.N.J. 1970).
US 14.	Pierpoint v. Barnes, 94 F.3d 813 (2d Cir. 1996).
US 15.	Statement of Representative Leach, Congressional Record, pages H8029-H8030 (Sep. 29, 2006)