

**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

Report of the Panel

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**ABBREVIATIONS USED FOR DISPUTE SETTLEMENT CASES
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Short Title	Full Case Title and Citations
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161.
<i>Brazil – Aircraft (Article 21.5 – Canada)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067.
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985.
<i>Canada – Dairy (Article 21.5 – New Zealand and US)</i>	Appellate Body Report, <i>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</i> , WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, 6829.
<i>Canada – Dairy (Article 21.5 – New Zealand and US II)</i>	Appellate Body Report, <i>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</i> , WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213.
<i>Canada – Patent Term</i>	Appellate Body Report, <i>Canada – Term of Patent Protection</i> , WT/DS170/AB/R, adopted 12 October 2000, DSR 2000:X, 5093.
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS302/AB/R.
<i>EC – Tariff Preferences</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925.
<i>EC – Tariff Preferences</i>	Panel Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/R, adopted 20 April 2004, modified by Appellate Body Report, WT/DS/246/AB/R, DSR 2004:III, 1009
<i>EC – Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia</i> , WT/DS290/R, adopted 20 April 2005.
<i>EC – Trademarks and Geographical Indications (US)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States</i> , WT/DS174/R, adopted 20 April 2005.
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965.
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9.
<i>Turkey – Textiles</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345.

Short Title	Full Case Title and Citations
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619.
<i>US – FSC (Article 21.5 – EC II)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2, adopted 14 March 2006.
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589.
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481.
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report, WT/DS58/AB/RW, DSR 2001:XIII, 6529.
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005.
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875.

LIST OF ABBREVIATIONS

DOJ	United States Department of Justice
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
H.R. 4411	H.R. 4411, 109 th Cong 2 nd Sess., "The Internet Gambling Prohibition and Enforcement Act" (12 July 2006)
IGBA	Illegal Gambling Business Act, 18 U.S.C. § 1955
IHA	Interstate Horseracing Act, 15 U.S.C. §§ 3001 to 3007
RICO	Racketeer Influenced and Corrupt Organizations Statute, 18 U.S.C. §§ 1961-1968
Travel Act	Travel Act, 18 U.S.C. § 1952
UIGEA	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)
USTR	United States Trade Representative
Wire Act	Wire Act, 18 U.S.C. § 1084
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

I. PROCEDURAL BACKGROUND

1.1 On 20 April 2005, the Dispute Settlement Body ("DSB") adopted the Appellate Body Report (WT/DS285/AB/R) and the Panel Report (WT/DS285/R) as modified by the Appellate Body Report in the dispute on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*.¹ In its recommendations and rulings, the DSB requested the United States to bring its measures, that were found, in the Appellate Body Report and in the Panel Report as modified by that Report, to be inconsistent with its obligations under the General Agreement on Trade in Services (GATS), into conformity with its obligations under that Agreement.

1.2 On 19 May 2005, the United States informed the DSB that it intended to implement the DSB's recommendations and rulings in this dispute in a manner that respected the United States' WTO obligations, and that it had begun to evaluate options for doing so. The United States indicated that it would need a reasonable period of time in which to do this and that it stood ready to discuss this matter with the Government of Antigua and Barbuda ("Antigua"), in accordance with Article 21.3(b) of the DSU.²

1.3 On 6 June 2005, Antigua informed the DSB that Antigua and the United States had been unable to agree on a reasonable period of time. Consequently, Antigua requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").³ On 30 June 2005, the Director-General appointed Dr. Claus-Dieter Ehlermann to act as Arbitrator under Article 21.3(c).⁴

1.4 In the Arbitration Award, which was circulated on 19 August 2005, the Arbitrator determined that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB was 11 months and 2 weeks from 20 April 2005, which was the date on which the DSB adopted the Panel and Appellate Body Reports. The reasonable period of time was therefore to expire on 3 April 2006.⁵

1.5 In a first Status Report dated 6 March 2006, the United States informed the DSB that the "US Administration, in consultation with the US Congress, has been working on appropriate steps to resolve this matter".⁶ In its second Status Report, dated 10 April 2006, the United States informed the DSB that:

"On 5 April 2006, the US Department of Justice confirmed the position of the US Government regarding remote gambling on horse racing in testimony before a subcommittee of the US House of Representatives. The Department of Justice stated that:

¹ *Appellate Body Report and Panel Report – Action by the Dispute Settlement Body*, WT/DS285/10; Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/188, para. 75.

² Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/189, para. 47.

³ *Request from Antigua and Barbuda for Arbitration under Article 21.3(c) of the DSU*, WT/DS285/11, 9 June 2005.

⁴ *Appointment of Arbitrator by the Director-General under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, Note by the Secretariat, WT/DS285/12, 5 July 2005.

⁵ *Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, Award of the Arbitrator Claus-Dieter Ehlermann, WT/DS285/13, 19 August 2005; provided to the Chairman of the DSB, WT/DS285/14, 23 August 2005.

⁶ *Status Report by the United States*, WT/D285/15, 7 March 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."⁷

1.6 At the DSB meeting of 21 April 2006, the United States, referring, *inter alia*, to the aforementioned DOJ statement, informed Members that it "was now able to show that relevant US law did not discriminate against foreign suppliers of remote gambling on horse racing" and concluded that it "was in compliance with the recommendations and rulings of the DSB in this dispute".⁸ At the same meeting, Antigua disagreed with that interpretation.⁹

1.7 On 24 May 2006, Antigua and the United States notified an Agreement Regarding Procedures under Articles 21 and 22 of the DSU (the "Agreed Procedures") to the DSB.¹⁰ In a communication dated 8 June 2006, Antigua requested consultations with the United States pursuant to paragraph 1 of the Agreed Procedures.¹¹ Consultations between the parties were held on 26 June 2006 in Washington D.C., but did not result in a settlement of the dispute. In a communication dated 6 July 2006, Antigua requested the DSB to establish a panel pursuant to Article 21.5 of the DSU.¹²

1.8 At its meeting on 19 July 2006, following the request made by Antigua, the DSB agreed to refer to the original Panel, if possible, the matter raised by Antigua in document WT/DS285/18 and decided that the Panel would have standard terms of reference. The terms of reference are, therefore, the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Antigua and Barbuda in document WT/DS285/18, the matter referred to the DSB by Antigua and Barbuda in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."¹³

1.9 Article 21.5 of the DSU provides that a dispute under that provision shall be decided through recourse to the DSU, including, "wherever possible, resort to the original panel". In this case, the Chairperson of the original panel and one of the panellists were unavailable to serve. The parties agreed on their replacements, and as a result the Panel was composed as follows:

⁷ *Status Report by the United States*, Addendum, WT/D285/15/Add.1, 11 April 2006.

⁸ Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/210, 30 May 2006, paras. 33-35.

⁹ *Ibid.*, paras. 36-39.

¹⁰ *Agreement between Antigua and Barbuda and the United States Regarding Procedures under Articles 21 and 22 of the DSU*, WT/DS285/16, 26 May 2006.

¹¹ *Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Request for Consultations*, WT/DS285/17, 12 June 2006. Paragraph 1 of the Agreed Procedures stipulates: "If Antigua and Barbuda deems it appropriate to invoke Article 21.5 of the DSU, Antigua and Barbuda will request consultations, which the Parties agree to hold within 15 days from the date of circulation of the request".

¹² *Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Request for the Establishment of a Panel*, WT/DS285/18, 7 July 2006.

¹³ *Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Constitution of the Panel*, Note by the Secretariat, WT/DS285/19, 16 August 2006; Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/217, 12 September 2006, para. 71.

Chairperson: Mr Lars Anell

Members: Mr Mathias Francke
Mr Virachai Plasai¹⁴

1.10 The representatives of China, the European Communities and Japan reserved their third-party rights to participate in the Panel's proceedings.¹⁵

1.11 The Panel established its Working Procedures and Timetable on, respectively, 4 and 14 September 2006, and communicated these to the parties and third parties.

1.12 After receiving the parties' written submissions, the Panel noted that there appeared to be disagreement as to what had been submitted to the Arbitrator appointed pursuant to Article 21.3(c) of the DSU, and was hence of the view that the record of the Arbitrator might assist the Panel in carrying out its work. After consulting with the parties, the Panel requested access, in a letter dated 21 November 2006 addressed to the Director of the Appellate Body Secretariat, to the Arbitrator's record in the Article 21.3(c) proceeding. This record was transmitted to the Panel the same day. It contained the parties' respective submissions and oral statements, as well as a transcript of the Arbitrator's oral hearing. The third parties received copies of the parties' submissions and oral statements directly from the parties.

1.13 The Panel met with the parties on 27 and 28 November 2006. It met with the third parties on 28 November 2006.

II. FINDINGS REQUESTED BY THE PARTIES

2.1 **Antigua** requests that the Panel:

- (a) find that the United States has not taken measures to comply with the DSB rulings;
- (b) 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
- (c) 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.

2.2 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.

III. ARGUMENTS OF THE PARTIES

3.1 The arguments of the Parties are set out in their respective submissions to the Panel. Executive summaries from the parties, including the first written submissions, rebuttals and written versions of their oral statements, as well as replies to questions and comments on replies to questions, are attached as annexes to this report.

¹⁴ *Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Constitution of the Panel*, Note by the Secretariat, WT/DS285/19, 16 August 2006.

¹⁵ *Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Constitution of the Panel*, Note by the Secretariat, WT/DS285/19, 16 August 2006; Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/217, 12 September 2006, para. 72.

IV. ARGUMENTS OF THE THIRD PARTIES

4.1 Arguments of the third parties that presented written submissions to the Panel, i.e. the European Communities and Japan, are attached as annexes to this report in the form of executive summaries from those third parties. Likewise, the oral statement by China, executive summaries of the oral statements presented by the European Communities and Japan, as well as third parties' replies to the Panel's questions, are attached as annexes to this report.

V. INTERIM REVIEW

5.1 On 25 January 2007, the Panel submitted its interim report to the parties. On 1 February 2007, the parties submitted written requests for review of precise aspects of the interim report. On 8 February 2007, the parties submitted written comments on each other's requests for interim review. In accordance with Article 15.3 of the DSU, this section of the Panel's report sets out a discussion of the arguments made at the interim review stage.

(i) *Public comment on the confidential interim report*

5.2 When transmitting the interim report to the parties, the Panel explicitly indicated that the interim report was strictly confidential. The Panel also explicitly emphasized at its meeting with the parties that the Panel's proceedings were confidential, as provided for in Article 18 of the DSU. This was accepted by the parties, as well as reflected in the Panel's Working Procedures and in all relevant correspondence with the parties.

5.3 Therefore, the Panel notes with concern that the confidentiality requirement was breached on the occasion of the transmission of the interim report to the parties. The Panel is all the more concerned given that breaches of confidentiality had occurred in the original proceeding and were deplored by the original Panel.¹⁶

5.4 Within hours of the transmission of the interim report to the parties, the press reported on the result of the "confidential" interim report.¹⁷ Press reports referred in particular by name to a spokesperson from the USTR "confirm[ing] reports that the ruling went against the United States" and commenting on the content of the interim report.

5.5 On 26 January 2007, Antigua referred the Panel to the press report and noted, in particular, that Antigua had "strictly observed the confidentiality obligation".

5.6 On 29 January 2007, the Panel communicated to the parties as follows:

"The Panel notes with concern that the confidentiality of the Interim Report has been breached, in spite of the fact that the confidentiality requirement was accepted by the Parties (as reflected in the Working Procedures). The Panel wishes to remind the Parties that the Interim Report is strictly confidential, and that breaches of the confidentiality requirement are unacceptable because they affect the credibility and integrity of the WTO dispute settlement process."

5.7 Antigua, in its comments on interim review, expressed its deep disappointment with the decision of the United States to publicly comment on the interim report despite its express agreement not to do so. Antigua informed the Panel that it had scrupulously maintained the confidentiality of the

¹⁶ See the original Panel report, paras. 5.3 to 5.13.

¹⁷ See, for instance, *US confirms loss in Internet Gambling trade case*, Reuters, 25 January 2007.

interim report, and commented that the statements of the USTR were not only contrary to the agreements and obligations of the United States but materially misleading.

5.8 The United States informed the Panel, when submitting its comments on the interim review, that it shared the Panel's concerns regarding the breach of confidentiality of the interim report and assured the Panel that "the United States was not the source of the leaked results". The United States asserted that it had "received several press inquiries regarding these results that indicated that the source was in Geneva. The U.S. comments came only in response to the reports of the leak."

5.9 First, the Panel notes that the insinuations by the United States are serious since they may imply that the Panel or the WTO Secretariat breached the confidentiality requirement with respect to the interim report. The Panel wishes to assert forcefully that neither the Panel nor the Secretariat has done so. Third parties cannot be blamed since they do not receive a copy of the interim report. Second, with respect to the United States' assertion that its comments came "only in response to the reports of the leak", the Panel notes that, even in such circumstances, the comments would still be inappropriate in light of the confidentiality requirement concerning the interim report.

5.10 The Panel wishes to reiterate its concerns and stress again that disregard for the confidentiality requirement affects the credibility and integrity of the WTO dispute settlement process, of the WTO and of WTO Members and is, therefore, unacceptable.

(ii) *Timing of the measure taken to comply*

5.11 The United States requested a footnote to one sentence in paragraph 6.22, clarifying that compliance need not necessarily occur subsequent to the DSB recommendation and rulings, as a WTO Member might modify or remove measures at issue after establishment of a panel but prior to adoption of the panel or Appellate Body report.

5.12 Antigua had no objection to the proposed clarification but considers that, in such an unusual circumstance, the implementing party should announce its compliance no later than the time of adoption of the DSB recommendation to avoid the situation that arose in this dispute.

5.13 The Panel referred throughout its report to matters occurring "since the original proceeding" for the reason given by the United States and has modified the sentence to which the United States referred.

(iii) *Article 17.14 of the DSU*

5.14 The United States noted that the discussion of Article 17.14 of the DSU did not appear to be necessary to the result reached by the Panel but only confirmed the Panel's earlier conclusion. The United States raised three concerns with the systemic implications of the discussion of Article 17.14 of the DSU: (i) in its view, Article 17.14, on its face, was not limited to a compliance proceeding and applied to the "parties to the dispute" in any context. The Panel's interpretation would foreclose a disputing party from re-arguing a legal or factual issue addressed by an Appellate Body report in any future proceeding under the DSU or perhaps even outside the DSU. This was a result that no Member intended. The United States understood that Article 17.14 was simply meant to indicate that no further appeals were available from Appellate Body reports, unlike final panel reports; (ii) the Panel's interpretation would create a major distinction between adopted panel reports and adopted Appellate Body reports because Article 17.14 of the DSU only applies to adopted Appellate Body reports; and (iii) the interim report resorts to the undefined concept of a "claim" to distinguish the *Canada – Dairy* dispute. In *Canada – Dairy*, the complainants' claim effectively failed for lack of a prima facie case, although the Appellate Body did not use that term. The Panel's interpretation would require future

panels to struggle with what is, and what is not, the same "claim" for the purposes of Article 17.14, to distinguish between *Canada – Dairy* and *US – Gambling*.

5.15 Antigua replied that the United States had taken the potential effect of the interim report much farther than warranted. The discussion of the effect of Article 17.14 of the DSU is very helpful in the context of this dispute, particularly given the primary argument of the United States that it was entitled to a second chance to meet its burden of proof. As regards the United States' concerns: (i) the interim report sets out certain limitations applicable to a determination of unconditional acceptance under Article 17.14. The reasoning in the interim report does not prevent Members introducing new evidence or arguments but excludes an attempt to meet a failed burden of proof. Article 17.14 was intended to result in finality and not simply recite a procedural rule; (ii) the problem identified by the United States was resolved in *EC – Bed Linen (Article 21.5 – India)*; and (iii) it is the proper role for a panel to determine what is the same "claim" rather than for a party to determine unilaterally.

5.16 The Panel recalls that the United States relied heavily in its submissions on the specific findings and conclusions of the Appellate Body in this dispute. Therefore, the Panel considers it important to review those specific findings and conclusions and Article 17.14 of the DSU as an applicable provision in the covered agreements. As regards the United States' specific concerns: (i) the Panel has clarified paragraphs 6.51 to 6.53 so that its findings should not be taken to imply a view on whether Article 17.14 applies to the "parties to the dispute" in any and every context; (ii) the Panel has not created a distinction regarding adopted panel reports. The Appellate Body in its report on *EC – Bed Linen (Article 21.5 – India)* (at paragraph 93) considered that, even though Article 17.14 did not refer to panel reports, a finding in an adopted panel report must be accepted by the parties as a final resolution to the dispute between them "in the same way and with the same finality" as a finding included in an adopted Appellate Body report; and (iii) the Panel has not created a new distinction regarding the outcome of claims, as compliance panels must already distinguish between a claim which led to a conclusion of no "prima facie case", as in the Panel report on *EC – Bed Linen*, and an issue on which there was no ruling, as in the Appellate Body report on the first recourse to Article 21.5 in *Canada – Dairy*. The present dispute can further be distinguished from *Canada – Dairy (Article 21.5 – New Zealand and US)* because in that proceeding the Panel record did not include the data necessary for the Appellate Body to complete the analysis of the claims, whereas in the present dispute, as explained in paragraphs 6.70 to 6.83 of this report, the United States' defence failed due to the underlying facts.

(iv) *Antigua's submissions*

5.17 Antigua considered that the Panel should expand its factual assessment beyond the issue of the relationship between the IHA and the three federal statutes, particularly in the context of "permissible remote gambling in the United States in general". Antigua clarified in its interim review comments one argument concerning State laws and regulations as well as its response to a question from the Panel concerning the activities of suppliers in the United States.

5.18 The United States disagreed with Antigua's request. The issue of compliance was determined by the specific recommendation and rulings of the DSB, which made clear that the issue to be considered was whether the United States had shown "in the light of the [IHA], that the prohibitions in [the three federal gambling statutes] are applied to both foreign and domestic service suppliers of remote betting services for horse racing". The United States did not consider that any change was required to the interim report in light of Antigua's clarifications.

5.19 The Panel confirms that it limited Section VI:C.3(a) to the IHA but notes that its factual assessment in Section VI:C.3(b) also included intrastate commerce. These were the two issues in relation to which Antigua presented evidence of remote gambling in the United States. As Antigua

did not clearly formulate a separate argument as to how the measures at issue were applied in a way that allowed remote gambling in general in the United States, the Panel did not address this evidence further. However, in light of Antigua's clarifications, the Panel has revised paragraph 6.97 and paragraphs 6.111 to 6.116.

(v) *Intrastate commerce*

5.20 Antigua confirmed its view that the Appellate Body findings referenced in footnote 184 are clearly erroneous. Antigua recalled that, in the original proceeding, it made clear its belief that the measures at issue – including in particular the Wire Act – were facially discriminatory by allowing States to do whatever they wanted in the context of remote gambling while effectively prohibiting the cross-border supply of these services from Antigua. Antigua argued at interim review in this compliance proceeding that, because the federal statutes are facially discriminatory, the United States could not possibly justify them under the chapeau of Article XIV of the GATS, regardless of how they are actually applied. The same holds true for the IHA because, in Antigua's view, it was undisputed that intrastate wagering under the IHA was permissible.

5.21 The United States replied that even if it were true that, in the original proceeding, Antigua made clear its belief that the federal laws were facially discriminatory (which the United States did not accept), this only reinforced the point that Antigua was requesting a second chance to re-argue an issue, while opposing any attempt by the United States to obtain a so-called second chance to meet its burden on the IHA/Wire Act issue. Further, the IHA simply does not address what is or is not "permissible" with respect to intrastate wagers.

5.22 The Panel noted in its interim report that Antigua raised the issue of intrastate commerce in the original proceeding. The Panel assesses Antigua's arguments on that issue on the same proviso as that on which it re-assesses the United States' arguments on the IHA.

5.23 The United States suggested that the Panel not include the section on intrastate commerce in its final report as this aspect of the interim report was not within the scope of this proceeding. In its view, the DSB recommendation and rulings in this dispute relate only to the issue of discrimination under the GATS Article XIV chapeau with respect to remote gambling on horse racing, due to the Appellate Body's conclusion on the chapeau of Article XIV in its entirety. Given that the measures at issue in this dispute are unchanged, the United States was not obliged by the DSB recommendation and rulings to bring into compliance any aspect of the measure that was not addressed by the DSB recommendation and rulings. In accordance with *EC – Bed Linen (Article 21.5 – India)*, Antigua may not re-argue a failed claim in a compliance proceeding. The United States argues that the discussion of intrastate commerce is *dicta* that does not belong in the final report.

5.24 Antigua disagreed in the strongest possible terms with the United States' request. The scope of review under Article 21.5 is broad in order to assess compliance with DSB recommendations and rulings and in light of the overriding objective of the DSU to achieve the "prompt settlement" of disputes. In the original proceeding, the United States bore the burden of proof of its defence under Article XIV of the GATS. As its defence under the chapeau was constructed around the assertion that it prohibited *all* remote gambling, that assertion should be the benchmark for assessing its compliance. The discussion of intrastate commerce provides important context for the extensive domestic remote gambling industry operating in the United States today.

5.25 The Panel observes that the primary issue in this proceeding is whether any "measures taken to comply" exist. The Panel has found that none exist. Accordingly, the assessment of the conformity of the measures at issue with US obligations under the GATS is included only for the reasons set out in Section VI:C.1 of this report. This applies not only to the assessment of intrastate commerce, but

also to the assessment of the other matters in Section VI:C, which the United States does *not* request the Panel to remove.

5.26 The Panel recalls that at the outset of this compliance proceeding, the United States presented the issue before the Panel as follows:

"That issue is whether the United States can show that *three facially non-discriminatory U.S. 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 [IHA]."¹⁸ (emphasis added)

5.27 The fact that the Wire Act (and the Travel Act) discriminate on their face between services supplied within the United States and those supplied from outside the United States, insofar as they do not apply to services not supplied in interstate or foreign commerce, is relevant to the first premise of the issue before the Panel, as initially presented by the United States itself.

5.28 Subsequently, in its comments on interim review, the United States described the issue before the Panel more concisely, as follows:

"Thus, any aspect of alleged discrimination under the existing measure involving matters other than horse racing are not covered within the DSB recommendations and rulings."¹⁹ (emphasis in original)

5.29 Intrastate remote wagering, to the extent that it is permitted, covers wagering on horse racing. Therefore, intrastate commerce is relevant to the issue before the Panel, even as subsequently presented by the United States itself. The Panel had already noted that relevant State laws applied to remote wagering on horse racing, but has noted this in paragraphs 6.121 and 6.122 as well.

5.30 Further, Antigua's arguments on intrastate commerce are not a "failed claim". The original Panel did not rule on these arguments. It is equally appropriate to assess Antigua's arguments than it is to re-assess the United States' argument in support of this defence, on which the original Panel and the Appellate Body have already ruled.

5.31 The Panel is aware that the United States' description of the measures at issue as "three facially non-discriminatory U.S. federal criminal statutes" was consistent with the Appellate Body findings referenced at footnote 184 of this report and the United States' arguments in the original proceeding referenced at footnote 133. However, there was no finding on this point in the original Panel report and the issue was contested by Antigua, as referenced at footnote 176.

5.32 Lastly, the United States considered that the discussion of intrastate commerce was confusing and misleading, as it might imply that the Panel was definitively finding an inconsistency with the Article XIV chapeau with respect to this issue. The United States also recalled that a finding of discrimination is not in itself definitive under the Article XIV chapeau, which refers to "arbitrary or unjustifiable" discrimination between countries where "the same conditions prevail", and that these matters were not before the Panel. Antigua replied that the lack of assessment of these issues was by choice of the United States itself. The Panel has clarified its findings in the section on intrastate commerce further to address these particular concerns of the United States. The Panel had already referred to the second of these concerns in paragraph 6.100.

¹⁸ United States first written submission, para. 1.

¹⁹ United States comments on interim review, para. 6.

(vi) *Developments since the original proceeding*

5.33 Antigua saw no reason for the Panel to limit its enquiry in Section VI:C of the report to an assessment as to whether the measures at issue satisfied the requirements of the chapeau of Article XIV of the GATS, particularly in the context of completely new evidence such as the UIGEA. Although Antigua had chosen not to contest the UIGEA as a measure, the UIGEA should be taken further into account in any assessment of the United States' compliance with the recommendation and rulings of the DSB. In particular, Antigua argued that (i) the UIGEA made it impossible for the United States to discharge its burden of proof under the chapeau of Article XIV of the GATS with respect to the IHA; (ii) the intrastate exemption in the UIGEA provided the Panel with a sound basis on which to reassess the discrimination inherent in the Wire Act vis-à-vis intrastate commerce, notwithstanding the Appellate Body's conclusions; and (iii) the UIGEA confirms that there is no prohibition of *all* remote gambling in the United States and that therefore the measures at issue are not "necessary" within the meaning of Article XIV(a) of the GATS. Further, the UIGEA expressly accepts the concept of state regulation of remote gambling which demonstrates that the United States does not consider prohibition "necessary".

5.34 The United States replied that the scope of this proceeding is determined by Article 21.5 and the DSB recommendation and rulings and not by what evidence is, or is not, available. The United States also disagreed with Antigua's assertions regarding the meaning and relevance of the UIGEA. The "intrastate" provisions in the UIGEA apply only under that Act and only affect the new enforcement mechanisms set out in it. For the same reason, they do not mean that US prohibitions on remote gambling are not "necessary". Rather, by creating more effective enforcement tools to address illegal remote gambling, the UIGEA confirms that the United States believes that remote gambling creates serious problems that must be addressed.

5.35 The Panel referred to the UIGEA in Section VI:C.4(b) of its report to the extent that it considered that the UIGEA had evidentiary value to the assessment of the matter before it. The Panel does not consider it appropriate to expand the references to the UIGEA as (i) it remains possible for the United States to address the ambiguity relating to the IHA through "measures taken to comply"; (ii) whilst the definition of "unlawful Internet gambling" in general in the UIGEA refers to applicable Federal or State law, the definition of "intrastate transactions" in the UIGEA applies only under the UIGEA. As such, this intrastate exemption does not provide a basis to assess the conformity of the Wire Act with US obligations under the GATS in this proceeding; and (iii) the Panel already noted in footnote 195 that the UIGEA represents a change since the United States' submissions to the original Panel on the availability of regulation as an alternative to prohibition. However, the Appellate Body considered in its report that the measures at issue were "necessary" within the meaning of Article XIV(a) of the GATS and the Appellate Body report, having been adopted by the DSB, must be unconditionally accepted by the parties to the dispute in accordance with Article 17.14 of the DSU.

5.36 The Panel has also made certain editing changes to its interim report.

VI. FINDINGS

A. ORDER OF ANALYSIS

6.1 The DSB referred to this Panel, pursuant to Article 21.5 of the DSU, the matter raised by Antigua in document WT/DS285/18, with standard terms of reference.²⁰ Article 21.5 of the DSU applies "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]".

²⁰ See para. 1.8 above.

6.2 The matter raised by Antigua in document WT/DS285/18 comprises two disagreements. Firstly, there is a disagreement as to the *existence* of measures taken to comply. Secondly, there is a disagreement as to the *consistency* of the measures at issue with the United States' obligations under the GATS which, depending on the resolution of the first disagreement, may be a disagreement as to the consistency with a covered agreement of "measures taken to comply" with the recommendations and rulings of the DSB. The Panel will consider these two disagreements in the above order.

B. DISAGREEMENT AS TO THE EXISTENCE OF MEASURES TAKEN TO COMPLY

1. **Recommendation of the DSB in the original proceeding**

(a) Main arguments of the parties

6.3 Antigua submits that the United States has not taken measures to comply with the recommendations and rulings of the DSB in this dispute.²¹ Antigua argues that the United States has taken no action towards compliance because the measures at issue in the original proceeding have not been amended, supplemented or otherwise changed.²²

6.4 The United States submits that the "measures taken to comply" in this dispute are the same measures that were at issue in the original proceeding because those measures are consistent with its WTO obligations, only the United States did not meet its burden of showing that they satisfied the requirements of an affirmative defence in the original proceeding.²³ The United States submits that it has complied with the DSB recommendations and rulings by presenting new evidence and arguments during this compliance proceeding that do meet the burden of showing that the measures at issue satisfy the criteria of the chapeau of Article XIV of the GATS.²⁴

(b) Main arguments of third parties

6.5 China argues that, according to the plain language of Article 21.5 of the DSU, there should be a time sequence between the "measures taken to comply" and the recommendations and rulings of the DSB.²⁵

6.6 The European Communities has major difficulties with the notion that a party to a dispute 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 any modification of any aspect of these measures. In its 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.²⁶

6.7 Japan argues that the ordinary meaning and structure of Article 21.5 of the DSU indicate that the "measures taken to comply" cannot be the same measures that were the subject of the original dispute.²⁷

²¹ Request for Establishment of a Panel, WT/DS285/18, page 5.

²² Antigua first written submission, para. 44; second written submission, para. 17.

²³ United States first written submission, para. 43; second written submission, para. 25.

²⁴ United States reply to Panel question No. 1.

²⁵ China third party oral statement, para. 4.

²⁶ European Communities third party written submission, para. 25.

²⁷ Japan third party written submission, para. 3.

(c) Assessment by the Panel

6.8 The parties agree that the United States has not taken any new measures. Nevertheless, the parties disagree as to the existence of "measures taken to comply" with the recommendations and rulings of the DSB in this dispute. Antigua submits that there are *no* measures taken to comply because the United States has done nothing. The United States responds that there *are* "measures taken to comply" because the same measures that were at issue in the original proceeding can also be "measures taken to comply".

6.9 The Panel will examine whether the same measures at issue in the original proceeding can be "measures taken to comply" for the purpose of this compliance proceeding under Article 21.5 of the DSU.

6.10 The text of Article 21.5 provides that the "measures taken to comply" within the scope of this compliance Panel's jurisdiction are those taken to comply "with the recommendations and rulings" [of the DSB].²⁸ The recommendation adopted by the DSB in this dispute was as follows:

"The Appellate Body *recommends* that the Dispute Settlement Body 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."²⁹

6.11 This recommendation, made in accordance with Article 19.1 of the DSU, applies to the measures at issue in the original proceeding that were "found ... to be inconsistent" with the GATS. It appears to follow that, where those measures are unchanged (and where the United States' obligations under the GATS are unchanged) the measures remain inconsistent with that agreement.

6.12 The operative part of the recommendation is that the United States "bring its measures ... into conformity with its obligations" under the GATS.³⁰ The ordinary meaning of the word "conformity" may be defined as:

"1. Correspondence in form or manner (*to, with*); agreement in character; likeness; congruity. 2. Action in accordance with some standard; compliance (*with, to*); acquiescence; an instance of this."³¹

6.13 On the other hand, at the risk of stating the obvious, the ordinary meaning of "inconsistent" may be defined as "[n]ot in keeping, discordant, at variance. Foll. by *with*."³² In other words, a measure "inconsistent with" a covered agreement is not in "conformity with" that agreement. The same is true of the terms used in the French and Spanish versions of the DSU, that are equally authentic, and that use the terms "*conforme*" and "*incompatible*", and "*en conformidad*" and "*incompatible*", respectively.

²⁸ See also on the "express link" between the measures taken to comply and the recommendations and rulings of the DSB: Appellate Body reports on *US – FSC (Article 21.5 – EC II)*, at para. 61, and in *US – Softwood Lumber IV (Article 21.5 – Canada)*, at para. 68.

²⁹ Recommendation as set out in para. 374 of the Appellate Body report on this dispute (WT/DS285/AB/R) adopted by the DSB on 20 April 2005; see note 1 above.

³⁰ The wording of the recommendation under Article 19.1 of the DSU is cross-referenced in Articles 22.1, 22.2 and 22.8, although it can be noted that the text of Article 22.2 uses the word "compliance" rather than "conformity".

³¹ *New Shorter Oxford English Dictionary*, (5th edition, 2002) Oxford University Press.

³² *Ibid.*

6.14 These two terms, in context, indicate that, in order to bring a measure that has been found "inconsistent" with an agreement into "conformity with" the same agreement, some change must come about.

6.15 The original Panel has already made an objective assessment of the matter before it, including the measures at issue and the facts of the case as at the time of the original proceeding. It has also made an assessment of the applicability of the GATS and the conformity of the measures at issue with the United States' obligations under that agreement. The recommendation of the DSB was that the United States bring its *measures* into conformity, not to bring the *assessment* of the conformity of those measures into conformity. Therefore, the recommendation requires a change that eliminates the inconsistency of those *measures* with the covered agreements.

6.16 The context within Article 21 of the DSU confirms this interpretation. As part of Article 21, a proceeding under Article 21.5 is a procedure for surveillance of the implementation of recommendations and rulings.³³ It is not an opportunity to reassess claims and defences that led to those recommendations and rulings. Article 21 as a whole deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute.³⁴ The Panel considers this is true not just of the timing of the proceeding under Article 21, but also of the matter that an Article 21.5 panel is mandated to assess.

6.17 The wider context in the DSU confirms this interpretation. Article 3.7 of the DSU provides that if measures are found to be inconsistent with the provisions of any of the covered agreements, 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. In a similar vein, Article 22.8 of the DSU provides that the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement "has been removed". Both of these provisions contemplate that compliance with the standard recommendation applicable in a so-called "violation" case will require a change regarding the measure found inconsistent with a covered agreement.³⁵

6.18 This reading is also consistent with the object and purpose of the DSU insofar as it includes the "prompt settlement" of disputes, as set out in Article 3.3 of the DSU. The DSU expressly provides an opportunity for review of a panel report at the appellate review stage under Article 17, *prior* to the recommendations and rulings of the DSB. Thereafter, Article 21.1 requires prompt compliance with those recommendations or rulings. A reassessment of the same claims or defences with respect to a measure that had already been found inconsistent in the original proceeding, without a change relevant to that measure in the intervening period, would run counter to the prompt settlement of disputes.

6.19 Turning to the *form* of "measures taken to comply", the Panel recalls the view of the Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)* where it envisaged that "measures taken to comply" would, in principle, be new measures:

"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

³³ Appellate Body report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.

³⁴ Appellate Body report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 70.

³⁵ This can be contrasted with a recommendation that the Member concerned make a "mutually satisfactory adjustment", applicable in so-called "non-violation" cases under Article 26.1(b) of the DSU. In such cases, there is no obligation to make any change to bring the measure at issue into conformity with the Member's obligations because the measure is *already* in conformity, or consistent, with those obligations.

'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 measures³⁴: 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.³⁶

"Original footnote: ³⁴ We recognize that, where it is alleged that there exist *no* 'measures taken to comply', a panel may find that there is *no* new measure."

6.20 New measures, including amended measures, are certainly the most common form of measures taken to comply with a recommendation of the DSB. Nevertheless, in accordance with Article 19.1 of the DSU, the recommendation made in this dispute was not to adopt "new" legislation, nor was it to "amend" the existing legislation, although those are both possible means of implementation. Rather, the recommendation was to "bring [the] measures into conformity".

6.21 The possible form of measures taken to comply with a recommendation under Article 19.1 of the DSU will depend on the rulings of the DSB in a particular dispute. For example, if a measure has been found inconsistent with a covered agreement, or unjustified under an otherwise available exception, due to the way in which the measure is *applied*, compliance with the recommendation could presumably be achieved by a change in the application of the measure, without necessarily a change to the text of the measure itself or that of any written implementing measures. The present dispute illustrates this point.

6.22 Moreover, compliance with a recommendation under Article 19.1 of the DSU could conceivably be achieved through changes to the factual or legal background to a measure at issue, without a change to the text of the measure itself. For example, a measure may lapse, or satisfy a requirement in a covered agreement, due to the subsequent occurrence of a relevant circumstance. If changes to the measure's factual or legal background modified the *effects* of that measure sufficiently to bring about a situation in which it complied with the relevant covered agreement, there seems to be no reason why this should not fulfil the aim of the recommendation of the DSB, which is to achieve a satisfactory settlement of the matter in accordance with the rights and obligations under the DSU and the covered agreements, as provided in Article 3.4 of the DSU.³⁷ The essential point is that there needs to be compliance. However, even in these cases, compliance would entail a change relevant to the measure since the original proceeding.³⁸ This dispute does not present any such changes.

6.23 In view of the circumstances of this case, it is not necessary for this Panel to determine what exactly would constitute the "measures taken to comply" in such a situation and whether they could be the same measures at issue in the original proceeding. The Panel only emphasizes that it does not exclude any potential "measures taken to comply" due to their form.

³⁶ Appellate Body report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36, cited in *US – Shrimp (Article 21.5 – Malaysia)*, para. 86; and *EC – Bed Linen (Article 21.5 – India)*, para. 81.

³⁷ The Panel also sees support for this view in the Appellate Body report on *US – Softwood Lumber IV (Article 21.5 – Canada)*:

"[The word 'existence'] also suggests that, as part of its assessment of whether a measure taken to comply *exists*, a panel may need to take account of facts and circumstances that impact or affect such existence." (at para. 67. See also para. 69)

³⁸ The United States provides examples of circumstances where a measure could be brought into compliance with another covered agreement without any change to the measure itself, including a change in the underlying basis for the measure or the adoption of a relevant international standard: see United States reply to Panel question No. 2. The Panel observes that in all these examples, there is a change in the factual or legal context and not simply an improvement in the parties' submissions based on the same available facts.

6.24 Nor does the Panel exclude any potential "measures taken to comply" due to the *purpose* for which they may have been taken. In this regard, the Panel recalls the following view of the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*:

"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.*"³⁹ (emphasis in original)

6.25 Turning to the facts at hand, the United States alleges that the "measures taken to comply" are three US federal criminal statutes, known as the Wire Act, the Travel Act and the Illegal Gambling Business Act.⁴⁰ The first two were enacted in 1961 and the third in 1970. All three were measures at issue in the original proceeding and were the subject of the recommendations and rulings of the DSB in this dispute.

6.26 The original Panel found that, by maintaining these three measures, the United States was acting inconsistently with its obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2 of the GATS. The Appellate Body upheld this finding.⁴¹ Neither the original Panel nor the Appellate Body found that the United States was entitled to maintain these measures under Article XIV of the GATS or any other article in the covered agreements.

6.27 There has been no change to any of these three measures since the original proceeding. There has been no change in the application of these three measures, or even their interpretation, since the original proceeding. There is no evidence of any changes in the factual or legal background bearing on these measures or their effects since the original proceeding that might have brought them into compliance. This indicates that they remain inconsistent with the United States' obligations under the GATS.

6.28 The novel element on which the United States seeks to rely to demonstrate its compliance are its submissions to this compliance Panel. The United States' position depends on the view that all along, both during and since the original proceeding, its measures have been consistent with its obligations under the GATS by virtue of the general exception provision in Article XIV, and that it is entitled to another opportunity to demonstrate before this compliance Panel that the measures in fact *do* meet the requirements of the chapeau of Article XIV.⁴² However, there was no finding in the original proceeding that the measures at issue in this dispute were consistent with the United States' obligations under the GATS, notwithstanding an invocation of Article XIV. Instead, there was a finding that maintaining these measures was inconsistent with the United States' obligations, which was the basis for the recommendation of the DSB.

6.29 It is true that the Appellate Body found that the United States had demonstrated that the measures at issue were "justified" under paragraph (a) of Article XIV of the GATS.⁴³ However, this was *not* a finding on Article XIV in its entirety. The Appellate Body expressly confirmed that Article XIV contemplates a "two-tier analysis" – first, under one of the paragraphs of Article XIV, and then under the chapeau.⁴⁴ There was no finding that the measures were consistent with the chapeau or with Article XIV in its entirety nor, hence, with the United States' obligations under the

³⁹ Appellate Body report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.

⁴⁰ United States first written submission, para. 43; second written submission, para. 25.

⁴¹ Original Panel report, paras. 6.421 and 7.2(b)(i); Appellate Body report, para. 373(C)(ii).

⁴² United States first written submission, paras. 49-50; second written submission, paras. 25, 40; opening oral statement, paras. 27, 42; replies to Panel questions Nos. 1, 8, 10 and 17.

⁴³ Appellate Body report, para. 326.

⁴⁴ Appellate Body report, paras. 291-292.

GATS, and there is no concept recognized under the DSU of provisional or transitional consistency with a recommendation of the DSB.

6.30 Therefore, the Panel rejects the United States' submission that the same measures at issue in the original proceeding in this dispute constitute "measures taken to comply".

6.31 The United States' position in this compliance proceeding is also at odds with its earlier decision to seek a reasonable period of time in which to comply with the recommendations and rulings of the DSB. Article 21.3 of the DSU provides that a Member shall have a reasonable period of time in which to comply "[i]f it is impracticable to comply immediately with the recommendations and rulings". Had the measures the subject of the recommendations and rulings of the DSB already been in compliance, it would not have been impracticable to comply immediately.⁴⁵

6.32 The Panel notes that the parties have referred to facts that have arisen, and a new statute that has been enacted, since the original proceeding, but neither party alleges that these bring the measures at issue into conformity with the GATS or are otherwise "measures taken to comply".

6.33 First, the United States referred in its April 2006 status report regarding implementation of the DSB recommendations and rulings in this dispute⁴⁶ to testimony before a subcommittee of the US House of Representatives by a Department of Justice official (the "April 2006 DOJ Statement").⁴⁷ The United States does not assert that the April 2006 DOJ Statement is a separate measure, nor does it rely solely on the April 2006 DOJ Statement to demonstrate compliance with the DSB recommendation and rulings.⁴⁸

6.34 The United States explained in its status report to the DSB that the April 2006 DOJ Statement "confirmed" the position of the US Government regarding remote gambling on horse racing. The United States does not assert that the April 2006 DOJ Statement implies any change to the application or interpretation of the measures at issue, in fact, quite the opposite. Indeed, the Panel observes that, by its own terms, the April 2006 DOJ Statement reiterates the view that the Department of Justice had previously stated, which was included in a Presidential signing statement and considered by the original Panel.⁴⁹ In view of these considerations, the Panel does not consider this statement a measure taken to comply. However, the Panel may refer to the statement, to the extent that the statement has evidentiary value, in the course of assessment of the matter before it.

6.35 Second, the United States enacted the Unlawful Internet Gambling Enforcement Act ("UIGEA") in October 2006.⁵⁰ Antigua does not ask the Panel to address this Act within its terms of reference as a measure taken to comply, but considers that the Act is perhaps best suited to demonstrate certain other matters allegedly at issue in this proceeding.⁵¹

6.36 The United States submits that the UIGEA is not within the Panel's terms of reference because it was enacted after the date of referral of this matter to the Panel under Article 21.5 and is

⁴⁵ As to statements made during the arbitration pursuant to Article 21.3(c) of the DSU, see further paras. 6.86 to 6.90 below.

⁴⁶ *Status Report by the United States*, Addendum, WT/D285/15/Add.1, 11 April 2006.

⁴⁷ 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" presented on April 5, 2006, set out in Exhibit AB-32.

⁴⁸ United States first written submission, paras. 48-50.

⁴⁹ United States original first written submission, para. 34; repeated in reply to original Panel question No. 21, and set out in original Exhibit US-17. See the original Panel report, para. 6.597, fn. 1060.

⁵⁰ Antigua second written submission, paras. 46-60 and Exhibit AB-113.

⁵¹ Antigua second written submission, para. 47.

not mentioned in Antigua's request for establishment of a panel.⁵² The United States does not contest that the Panel may consider evidence that comes into existence after the initiation of panel proceedings but it does not consider that the UIGEA sheds light on the issues in this dispute.⁵³

6.37 The Panel notes that neither party asks it to treat the UIGEA as a measure taken to comply.⁵⁴ Further, the UIGEA does not amend or alter any statutes at issue nor affect which activities are unlawful under those statutes. Accordingly, there is no reason to consider the UIGEA as a measure taken to comply. However, the Panel may refer to the UIGEA, to the extent that the UIGEA has evidentiary value, in the course of its assessment of the matter before it.

6.38 For the reasons set out above, the Panel's preliminary conclusion is that there are no measures taken to comply with the recommendations and rulings of the DSB in this dispute and, accordingly, that the United States has failed to comply with those recommendations and rulings. The Panel will now consider the specific findings and conclusions in the original proceeding in order to determine whether, as the United States argues, they compel or allow a different conclusion.

2. Specific findings and conclusions in the original proceeding

(a) Main arguments of the parties

6.39 Antigua submits that panel and Appellate Body findings adopted by the DSB constitute a final resolution of the dispute between the parties. This is true whether a party failed to make a prima facie case or whether it did manage to make a prima facie case but its argument failed on substantive grounds. According to the Appellate Body report on *EC – Bed Linen (Article 21.5 – India)* a party should not be given a "second chance" in an Article 21.5 proceeding.⁵⁵ There is no distinction between the burden of proof on a complainant to establish its claim and the burden of proof on a responding party to establish an affirmative defence. The United States failed to meet its burden to prove the affirmative defence in the original proceeding. Its defence therefore failed and it is not entitled to a "second chance" to re-argue the same defence in the compliance proceeding. To do so would run counter to the language and the structure of the DSU.⁵⁶

6.40 The United States emphasizes that compliance with the DSB recommendations and rulings must depend on the specific findings of the Appellate Body in this dispute. It recalls that, in the original dispute, there was no explicit finding that its measures did not satisfy the requirements of Article XIV of the GATS. Rather, it was found that the United States had "not shown", had "not demonstrated" or "did not establish" that its measures were entitled to this affirmative defence.⁵⁷ This case involves an affirmative defence and is therefore entirely different from *EC – Bed Linen (Article 21.5 – India)* where a complaining party failed to make its case on a particular issue. Furthermore, the Appellate Body made an explicit finding that neither the Panel nor the Appellate Body itself had found that the affirmative defence did not apply, and repeatedly made use of language indicating that compliance with the recommendations and rulings could be achieved by showing or demonstrating that the affirmative defence applied.⁵⁸ The Appellate Body also emphasized that there was no finding of fact by the original Panel or itself as to whether the prohibition embodied in the measures at issue was applied to both foreign and domestic service suppliers of remote betting services for horse racing. Therefore, the only substantive issue in the compliance proceeding is

⁵² United States second written submission, para. 43.

⁵³ United States reply to Panel question No. 31(a).

⁵⁴ The Panel recalls the view of the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* that "[i]t is rather for the Panel itself to determine the ambit of its jurisdiction" (at para.73).

⁵⁵ Antigua first written submission, para. 32.

⁵⁶ Antigua second written submission, paras. 19-27.

⁵⁷ United States first written submission, para. 42.

⁵⁸ United States first written submission, para. 54.

whether the United States can demonstrate that point now.⁵⁹ The United States argues that it is not asking the Panel to revisit the findings of the Panel and the Appellate Body in this case, but that it is requesting the Panel to examine the issues under the chapeau of Article XIV based on new evidence and arguments not previously available to the Panel or the Appellate Body.⁶⁰

(b) Main arguments of third parties

6.41 China does not consider that Article 17.14 of the DSU permits either party to the dispute a second chance to re-argue a claim or a defence that has already been settled by the Appellate Body. The Appellate Body report on *EC – Bed Linen (Article 21.5 – India)* confirms this view.⁶¹

6.42 The European Communities recalls the findings in the original proceeding that the United States had not demonstrated that its measures were applied consistently with the chapeau of Article XIV of the GATS and that ambiguity existed in the relationship between the various legislative measures. Neither party should be entitled to reopen in Article 21.5 proceedings issues settled by final adjudication in view of Article 17.14 of the DSU and the principle of *res judicata* as interpreted by the Appellate Body.⁶²

6.43 Japan argues that the Appellate Body's legal ruling with respect to the chapeau of Article XIV of the GATS is unambiguous and final and cannot be reopened under Article 17.14 of the DSU. The Appellate Body found that the US statutory scheme is inconsistent with the GATS and, therefore, the United States needs to take some type of measure to implement the specific recommendations and rulings of the DSB.⁶³

(c) Assessment by the Panel

6.44 The Panel has examined the specific findings and conclusions in the original Panel Report and Appellate Body Report on this dispute that related to the United States' affirmative defence under Article XIV of the GATS. The Appellate Body found and concluded, as regards the chapeau of Article XIV:

"that the United States has not demonstrated that—in the light of the existence of the Interstate Horseracing Act—the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the chapeau";⁶⁴

and, as regards Article XIV in its entirety:

"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 and, therefore, has not established that these measures satisfy the requirements of the chapeau"⁶⁵

⁵⁹ United States second written submission, paras. 7-8.

⁶⁰ United States reply to Panel question No. 6.

⁶¹ China third party oral statement, para. 6.

⁶² European Communities third party written submission, paras. 9-14 and 30-34.

⁶³ Japan third party written submission, paras. 9 and 11.

⁶⁴ Appellate Body report, para. 373(D)(v)(c).

⁶⁵ Appellate Body report, para. 373(D)(vi).

6.45 The parties disagree on the effect of these findings and conclusions. For Antigua, these findings mean that the measures at issue in the original proceeding are not justified by Article XIV of the GATS. For the United States, these findings simply mean that it has not established its defence under Article XIV of the GATS on the basis of the facts and arguments presented in the original proceeding. Therefore, in the United States' view, there is no finding that prevents it from attempting to establish that same defence in the compliance proceeding.

6.46 The Panel recalls that Article 17.14 of the DSU provides as follows:

"An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report." (footnote omitted)

6.47 Neither party disputes that, in accordance with Article 17.14 of the DSU, the Appellate Body report is final and must be unconditionally accepted by them.⁶⁶ However, they disagree on what unconditional acceptance entails.

6.48 The text of Article 17.14 uses the words "be ... accepted" which is the passive form of the verb "accept". There are several ordinary meanings of this verb, including the following:

1. Take or receive with consenting mind; receive with favour or approval.
2. Receive as adequate or valid; admit; believe; tolerate; submit to."⁶⁷

6.49 Article 17.14 expressly provides that Members retain the right to express their views on an Appellate Body report. "Members" include the parties to the dispute, which indicates that the parties are *not* required to receive an adopted Appellate Body report with favour or approval but may state that they disagree with it. Therefore, the second of these two meanings is apposite (other than the denotation "believe"), rather than the first, indicating that the parties to the dispute receive the adopted Appellate Body report as adequate or valid, and submit to it. This is confirmed by the French and Spanish versions of the DSU, that are equally authentic, and that use the terms "*sera accepté*" and "*serán aceptados*", respectively.

6.50 The verb "accept" is used with the modal verb "shall" which indicates that, in this context, acceptance is an obligation. The phrase "shall accept" is used in the same sense in Article 22.7 of the DSU. The phrase "shall be accepted" is also used in Article XII:5(e) of the GATS, as is "shall accept" in Article XV:2 of GATT 1994, in the same sense, although in a different context. This phrase can be contrasted with the words "mutually acceptable" in Articles 3.7 and 22.2 of the DSU, where parties do *not* have an obligation to accept a particular solution or compensation. This obligation can also be contrasted with the prior GATT practice according to which Members were able to block adoption of panel reports.⁶⁸

⁶⁶ Antigua first written submission, para. 32; oral statement, para. 11; reply to Panel question No. 6; United States reply to Panel question No. 6; comment on Antigua's reply to Panel question No. 20.

⁶⁷ *New Shorter Oxford English Dictionary*, (5th edition, 2002) Oxford University Press.

⁶⁸ The previous GATT practice was to adopt panel reports by consensus, without prejudice to the GATT provisions on decision-making: see the Decision of 12 April 1989 on improvements to the GATT dispute settlement rules and procedures, para. G.3 (BISD 36S/61-67). This practice remains applicable to so-called "situation complaints" under Article 26.2 of the DSU.

6.51 However, unlike all these other provisions, Article 17.14 qualifies the phrase "shall be accepted" with the adverb "unconditionally".⁶⁹ This indicates that Members are not simply obliged to receive an Appellate Body report as adequate or valid and submit to it, but that they must do so "unconditionally". The word "unconditionally" is formed from the adjective "unconditional", the ordinary meaning of which may be defined as "[n]ot limited by or subject to conditions; absolute, complete".⁷⁰ This is consistent with the French and Spanish versions, that use the terms "*sans condition*" and "*sin condiciones*" respectively. The phrase "shall be ... unconditionally accepted" includes the notion of finality but it does not simply indicate that a report is final in the sense that there is no opportunity to appeal further, nor that a report is the final step at the appellate review stage of a proceeding. Rather, it indicates that the parties may not place *any* conditions on their acceptance of an adopted Appellate Body report.

6.52 There are specific limits on the scope of this obligation. The text of Article 17.14 specifies that the obligation only applies to the "parties to the dispute". Moreover, the parties only owe the obligation with respect to the *report*, which by its own terms is limited to the measures in dispute and the claims, defences and issues ruled upon therein. The text of Article 17.14 also establishes a procedural limit, in that it makes the parties' unconditional acceptance contingent upon adoption of the Appellate Body report by the DSB and expressly acknowledges that the DSB may decide not to adopt it. Therefore, Appellate Body reports are not final until they are adopted, and an Appellate Body report that the DSB decides by consensus not to adopt is not final, or binding, at all.⁷¹ However, an Appellate Body report that has been adopted by the DSB shall be unconditionally accepted by the parties to the dispute which indicates that, from that point on, the report *is* a final resolution, within the context of that dispute, of the claims, defences and issues ruled upon therein. Whether or not the report resolves matters in dispute between those parties in any other context is an issue on which the Panel need not, and does not, rule. Article 19.2 of the DSU also confirms a substantive limit on the effect of panel and Appellate Body reports, by confirming that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".

6.53 This reading of Article 17.14 is consistent with the object and purpose of the DSU insofar as it includes the "prompt settlement" of disputes, as set out in Article 3.3 of the DSU. As the Panel noted at paragraph 6.18 above, the DSU expressly provides an opportunity for review of a panel report at the appellate review stage under Article 17, *prior* to the recommendations and rulings of the DSB. Thereafter, Article 21.1 requires prompt compliance with those recommendations or rulings. A reassessment in a compliance proceeding of an issue that had already been ruled upon in an original proceeding in an adopted report, even with better arguments by the respondent but without a change relevant to the underlying facts in the intervening period, would run counter to the prompt settlement of disputes.

6.54 This reading is also confirmed by the drafting history of the DSU. During the Uruguay Round, consideration of the concept of appellate review generally proceeded on the understanding that the parties to a dispute would agree in advance that they would accept the results of an appellate review unconditionally.⁷² All drafting options for the precursor of Article 17.14 provided that

⁶⁹ The word "unconditionally" is only used in the covered agreements in relation to adopted Appellate Body reports (see Article 17.14 of the DSU and Articles 4.9 and 7.7 of the SCM Agreement), and in the MFN obligations (see Article I:1 of GATT 1994, Article II:1 of the GATS and Article 4 of the TRIPS Agreement).

⁷⁰ *New Shorter Oxford English Dictionary*, (5th edition, 2002) Oxford University Press.

⁷¹ Contrast Article 22.7 of the DSU that *does* use the word "final" where it provides that "[t]he parties shall accept an arbitrator's decision as final and the parties concerned shall not seek a second arbitration". However, Arbitrator's decisions are final immediately, without the possibility of an appeal or the requirement of adoption by the DSB.

⁷² See "Profile on the Status of the Work in the Group – Report by the Chairman", dated 18 July 1990, GATT document MTN.GNG/NG13/W/43, para. 5.

appellate decisions would be "the final disposition of the case" or "final and unconditionally accepted".⁷³ The Chairman of the Negotiating Group on Dispute Settlement, Ambassador Lacarte-Muró, drafted a single text for the precursor of Article 17.14 based on the latter option but replacing the word "final" with the provision that reports shall be "adopted by the Council" and adding the proviso "unless the Council decides not to adopt the appellate report ..."⁷⁴ This was negotiated further and circulated in the so-called "Brussels Draft" substantially in the form of Article 17.14 today.⁷⁵

6.55 This reading is further confirmed by the Appellate Body report on *US – Shrimp (Article 21.5 – Malaysia)*, followed in *EC – Bed Linen (Article 21.5 – India)*, which stated as follows:

"Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, '... unconditionally accepted by the parties to the dispute', and, therefore, must be treated by the parties to a particular dispute as *a final resolution to that dispute*. In this regard, we recall, too, that Article 3.3 of the DSU states that the 'prompt settlement' of disputes 'is essential to the effective functioning of the WTO'.⁷⁶ (emphasis added)

6.56 The Panel agrees, subject to a suitable definition of "dispute" that is limited to the claims, defences and issues ruled upon in a report.⁷⁷ As a "final resolution" of a dispute, the adopted Appellate Body report entails more than a final ruling on the evidence presented. It entails a final decision on the claims and defences ruled upon with respect to the measures at issue as they existed at the time of the original proceeding. A compliance panel does not make a reassessment of that same matter but rather assesses the consistency with a covered agreement of "measures taken to comply" (unless it assesses only the *existence* of "measures taken to comply"). This constitutes a separate enquiry and, accordingly, is consistent with the finality of the Appellate Body report adopted at the conclusion of the original proceeding.

6.57 In the present compliance proceeding, the United States seeks an assessment of the consistency of its measures with its obligations under the GATS in relation to an issue on which the Appellate Body ruled in its report on the same dispute in relation to the same measure in the same factual and legal context. The express purpose of such a reassessment would be to reach a new conclusion – that the United States *has* established that these measures satisfy the requirements of the chapeau of Article XIV of the GATS – without any "measures taken to comply" but only the presentation of new and allegedly better arguments. Such a conclusion would mean that the original conclusion, quoted at paragraph 6.44 above, was not final. Yet, in the Panel's view, Article 17.14 of the DSU applies to *all* conclusions in an Appellate Body report. The United States' position can be characterized as an acceptance of the original ruling on condition that it retains the right to seek a more favourable conclusion in a further proceeding. That type of acceptance is not unconditional. Therefore, in the circumstances, in accordance with Article 17.14, the Panel cannot accede to the United States' request to reach a conclusion different from that reached by the original Panel as upheld by the Appellate Body and adopted by the DSB, without any change relevant to the measures at issue.

6.58 The United States agrees that a complainant who fails to discharge its burden of proof may not re-argue a claim in a compliance proceeding, but it does not consider that the same applies to a

⁷³ See "Draft Text on Dispute Settlement", dated 21 September 1990, GATT document MTN.GNG/NG13/W/45.

⁷⁴ "Chairman's Text on Dispute Settlement", dated 19 October 1990.

⁷⁵ "Draft Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations – Revision", dated 3 December 1990, GATT document MTN.TNC/W/35/Rev.1.

⁷⁶ Appellate Body report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 97, quoted in *EC – Bed Linen (Article 21.5 – India)*, para. 90.

⁷⁷ See further para. 6.61 below.

respondent. It argues that a respondent has a "special status", as complaining and responding parties are in fundamentally different positions under Articles 21 and 22 of the DSU.⁷⁸

6.59 The Panel agrees that the respondent is in a unique position under Article 21 of the DSU because it is the only Member to whom the DSB recommendation is addressed and, as such, it is the only Member that must comply with the recommendation. Nevertheless, the respondent, as a party to the dispute, is obliged by Article 17.14 of the DSU unconditionally to accept an adopted Appellate Body report. For the reasons given above, the Panel considers that that obligation precludes re-argument of the same defence in relation to the same measure without any change relevant to the measure.

6.60 The United States also refers to *Canada – Dairy (Article 21.5 – New Zealand and US II)* as an illustration that a Member can present new evidence when it has previously failed to establish a claim due to a lack of evidence. It asserts that there is no general bar in the DSU that prevents a party from meeting its burden of proof in a second proceeding.⁷⁹

6.61 The Panel notes that the example to which the United States refers consisted of two recourses under Article 21.5 of the DSU, both of which assessed the consistency of measures actually adopted by the respondent to comply with a DSB recommendation, unlike the present dispute. In the first recourse, the Appellate Body concluded that the Panel's findings were vitiated by error of law and did not rule on the relevant claim. There was no finding or conclusion that the complainant failed to make a prima facie case.⁸⁰ Accordingly, the second recourse by the complainants under Article 21.5 did not imply a rejection or conditional acceptance of the findings or conclusions in the Appellate Body report adopted in the first recourse under Article 21.5.

6.62 The United States argues that the Panel and Appellate Body reports in the present dispute 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 measures met the requirements of the Article XIV chapeau.⁸¹ The Appellate Body did not state that the measures at issue were inconsistent with the chapeau of Article XIV of the GATS but rather, variously, that the United States "has not demonstrated", "has not shown" and "has not established", essentially, that the measures satisfy the requirements of the chapeau.

6.63 The Panel recalls that, as the party asserting an affirmative defence under Article XIV of the GATS, the United States bore the initial burden of proof that its measures did satisfy the requirements of Article XIV, including the chapeau. A burden of proof is a responsibility to put forward evidence and arguments that show or demonstrate certain matters of fact and law sufficient to establish a particular claim or defence.⁸² The Panel notes that it is standard practice for the Appellate Body and panels to use a phrase such as "has not demonstrated" in order to indicate that a party fails to discharge the burden of proof of an affirmative defence.⁸³ The Panel also notes that the terms "show",

⁷⁸ United States second written submission, paras. 28-31.

⁷⁹ United States reply to Panel question No. 12; comment on Antigua's reply to Panel question No. 7.

⁸⁰ Appellate Body reports on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 103-104; *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 6.

⁸¹ United States reply to Panel question No. 12.

⁸² As explained, for example, in the Appellate Body report on this dispute at para. 282.

⁸³ See, for example, the Panel reports on *EC – Tariff Preferences*, paras. 7.235, 7.236 and 8.1(d); and *Dominican Republic – Import and Sale of Cigarettes*, para. 7.155; and the Appellate Body reports on *Brazil – Aircraft*, para. 186; *Brazil – Aircraft (Article 21.5 – Canada)* para. 80; and *Turkey – Textiles*, para. 63.

"demonstrate" and "establish" are used throughout the Appellate Body report in this dispute, including in contexts that explicitly address the burden of proof.⁸⁴

6.64 The Appellate Body's findings in this dispute, which use the terms "show", "demonstrate" and "establish", indicate that the United States failed to discharge its burden of proof. This was a ruling on the defence in relation to the measures at issue. It was not equivalent to a statement that the Appellate Body "does not rule" or an exercise of judicial economy. Instead, it indicates that the United States' affirmative defence failed. The Appellate Body then made the recommendation required under Article 19.1 of the DSU with respect to the measures found inconsistent with the United States' obligations under the GATS.⁸⁵

6.65 For the same reason, the original Panel used the terms "has not demonstrated", "has not been able to demonstrate" or "has failed to demonstrate" in its conclusions, not only with respect to the US affirmative defence under Article XIV⁸⁶ but also with respect to Antigua's claims under Article VI of the GATS.⁸⁷ In each instance the term simply indicated that a particular defence or claim failed due to failure to discharge the relevant burden of proof. This is abundantly clear in relation to the findings on the Interstate Horseracing Act ("IHA") in particular, as the original Panel expressly used the word "demonstrate[d]" twice in the final sentence of this section to link the allocation of the burden of proof to its conclusion.⁸⁸

6.66 The Panel can detect no suggestion in the Appellate Body's use of these terms that the United States could bring its measures into compliance simply through further submissions or presentation of additional evidence to show or demonstrate what it did not show or demonstrate in the original proceeding.

6.67 The United States also draws attention to the following clarification in the Appellate Body's overall conclusion on Article XIV:

"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."⁸⁹

6.68 The United States interprets this clarification, read in the context of the findings that the United States had "not shown", had "not demonstrated" and "did not establish" certain matters, as amounting to an invitation to the United States to demonstrate to a compliance panel that its measures do in fact meet the requirements of the Article XIV exception of the GATS.⁹⁰

⁸⁴ Appellate Body Report, paras. 4, 9, 10, 35, 44, 55, 57, 103, 104, 114D(iii), 114(D)(iv), 114(D)(v), 116, 133, 139, 151, 153, 183, 226, 253, 254, 279, 298, 300, 302, 309, 311, 313, 315, 326, 329, 336, 351, 352, 353, 355, 365, 360, 369, 371, 372, 373(D)(v)(a) and 373(D)(vi)(a).

⁸⁵ Appellate Body report, para. 374.

⁸⁶ Original Panel report, paras. 6.600, 6.607, 6.608 and 7.2(d). The original Panel also used the term "has demonstrated" to indicate where the United States did succeed in discharging its burden of proof: see original Panel report, paras. 6.594 and 6.603.

⁸⁷ Original Panel report, paras. 6.437 and 7.2(c).

⁸⁸ Original Panel report, para. 6.600. The burden of proof was also recalled in para. 6.596.

⁸⁹ Appellate Body report, para. 371.

⁹⁰ United States first written submission, para. 44. While the United States originally submitted that it had received an "explicit invitation" to do so from the Appellate Body, it later clarified that it used the term "invitation" as shorthand for the type of reasoning commonly found in Article 21.5 proceedings, that is where the Appellate Body (or a 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

6.69 In the Panel's view, the Appellate Body's clarification was due to the unusual, but not unprecedented, circumstance of the Appellate Body declining to accept a Member's interpretation of its own domestic law.⁹¹ The clarification provided greater certainty that, whilst the original Panel and the Appellate Body had not accepted the US interpretation that the IHA does *not* permit activities prohibited by the measures at issue, this did not mean that the original Panel and the Appellate Body had found that the IHA *did* permit such activities. The Panel notes that it is not uncommon for the Appellate Body to clarify what it has *not* decided in a report.⁹² The Panel also notes that none of the third parties in this proceeding, nor Antigua, considered that this clarification was open to the interpretation which the United States places upon it.⁹³

6.70 In any case, the Appellate Body did not simply clarify what it had *not* decided, and find that the United States had "not shown", had "not demonstrated" and "did not establish" certain matters. In reaching its conclusions, the Appellate Body reviewed and upheld a specific finding by the original Panel on the interpretation of the US measures. Specifically, the Appellate Body was not persuaded that the original Panel had failed to make an objective assessment of the facts as regards the relationship between the IHA, on the one hand, and the measures at issue, on the other, and upheld the original Panel's finding. It later summarized that finding in the following terms:

"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." (footnotes omitted)⁹⁴

6.71 Here, the Appellate Body cross-referenced the following finding of the original Panel:

"In summary, on the basis of evidence provided to the Panel relating to the domestic enforcement of the US prohibition on the remote supply of wagering services for horse racing against TVG, Capital OTB and Xpressbet.com and *in light of the ambiguity relating to the Interstate Horseracing Act, which pertains to wagering services for horse racing*, we believe that the United States has not demonstrated that it applies its prohibition on the remote supply of these services in a consistent manner as between those supplied domestically and those that are supplied from other Members. Accordingly, we believe that the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute 'arbitrary and unjustifiable discrimination between countries where like conditions prevail' and/or a 'disguised restriction on trade' in accordance with the requirements of the chapeau of Article XIV."⁹⁵ (emphasis added)

bring its measure into compliance. The United States referred to the Appellate Body report on *US – Shrimp (Article 21.5 – Malaysia)* as an "instructive example", but it appeared to acknowledge that in that dispute compliance depended on some change, at least to the facts, since the original proceeding: see United States reply to Panel question No. 16.

⁹¹ See the Appellate Body report on *India – Patents (US)*, para. 70. See also the Panel reports on *EC – Trademarks and Geographical Indications (US)*, para. 7.96, and *(Australia)*, para. 7.146.

⁹² See the Appellate Body reports on *US – Shrimp*, para. 185; *Brazil – Aircraft*, para. 187; *US – FSC*, para. 179; *Canada – Autos*, para. 183; *Canada – Patent Term*, paras. 100-101; *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 103; *US – Section 211 Appropriations Act*, para. 362; and *US – Softwood Lumber V*, para. 181.

⁹³ China, European Communities and Japan respective replies to Panel third party question No. 10; Antigua second written submission, para. 14; reply to Panel question No. 16.

⁹⁴ Appellate Body report, para. 368.

⁹⁵ Original Panel report, para. 6.607.

6.72 The ambiguity relating to the IHA to which the original Panel referred is discussed in a previous section of the original Panel report.⁹⁶ That section includes the following finding:

"In our view, even if the IHA did not repeal the Wire Act, the Travel Act and the Illegal Gambling Business Act as has been submitted by the United States, *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.* We consider this relationship to be critical in determining whether, in fact, the amendment to the IHA permits wagering on horse racing by means of electronic communication."⁹⁷ (emphasis added)

6.73 Clearly, this is a finding on the interpretation of US domestic law. However, it is not a finding on the proper interpretation of US law for US citizens. It is an interpretation solely for the purpose of assessing the United States' compliance with its international obligations under the GATS.⁹⁸

6.74 The finding is that the relationship between the IHA and the measures at issue is ambiguous. This was the key to the conclusion that the United States did not establish that the measures at issue satisfied the requirements of the chapeau of Article XIV of the GATS as set out in the original Panel report, upheld in the Appellate Body report, and adopted by the DSB. Therefore, in accordance with Article 17.14 of the DSU, this finding on the relationship between the IHA and the measures at issue "shall be ... unconditionally accepted by the parties to the dispute".

6.75 The United States argues that it did not have the opportunity to present complete evidence on the interaction among these statutes in the original proceeding. It asks this compliance Panel to consider evidence allegedly not presented to the original Panel and to reach the conclusion that the IHA does not provide an exemption from the measures at issue.⁹⁹ Antigua replies that the failure of the United States to meet its burden of proof in the original proceeding rests squarely on its own shoulders.¹⁰⁰

6.76 The Panel recalls the Appellate Body's observation that, on this issue, "[t]he [original] Panel had limited evidence before it, as submitted by the parties, on which to base its conclusion."¹⁰¹ However, this reference to the limitations of the evidence does not alter the effect of the finding. The Appellate Body did not consider the evidence *inadequate* for the original Panel to reach its finding. On the contrary, the Appellate Body upheld the finding. As the Panel pointed out at paragraph 6.57 above, the United States' position can be characterized as an acceptance of the original finding on condition that it retains the right to seek a more favourable finding in a further proceeding. That type of acceptance is not unconditional. Therefore, in these circumstances, in accordance with Article 17.14, the Panel cannot accede to the United States' request to make a different finding, that the IHA in no way limits the application of federal criminal statutes¹⁰², without any change relevant to the measures.

6.77 In any event, the record of the original Panel proceeding indicates that the United States indeed had the opportunity to present complete evidence on the interaction among these statutes.¹⁰³

⁹⁶ Original Panel report, paras. 6.595 to 6.600.

⁹⁷ Original Panel report, para. 6.599.

⁹⁸ This is consistent with the approach of the Appellate Body report on *India – Patents (US)*, para. 65.

⁹⁹ United States first written submission, paras. 3, 52-53.

¹⁰⁰ Antigua second written submission, para. 23.

¹⁰¹ Appellate Body report, para. 364.

¹⁰² United States first written submission, para. 3.

¹⁰³ The Panel does not have access to the record of the appellate review stage of the original proceeding.

Whilst the United States did not raise its affirmative defence under Article XIV of the GATS until its second written submission in the original proceeding, it addressed the effect of the IHA amendment and its relationship with the measures now at issue in its *first* written submission in that proceeding. It provided the view of the Department of Justice on the specific issue, as expressed in a Presidential statement on signing of the IHA amendment, a view which the Department of Justice had "repeatedly affirmed".¹⁰⁴ Antigua also addressed this issue in its submissions to the original Panel.¹⁰⁵ In response to questions from the original Panel after the first substantive meeting, the United States referred again to the Department of Justice view expressed in the Presidential signing statement, as well as information on the US principle of statutory construction that repeals by implication are not favoured, with a citation to a US Supreme Court opinion of 1939.¹⁰⁶ The United States returned to the issue to reiterate its view in its original second written submission¹⁰⁷ and also addressed the prosecution of illegal wagering on horse racing in its opening oral statement at the original Panel's second substantive meeting.¹⁰⁸ The US evidence showed that the Department of Justice was fully aware from the time of the IHA amendment in 2000 of the state of US domestic law on the precise issue under consideration, and a representative of the Department of Justice was part of the US delegation at both of the original Panel's substantive meetings with the parties. In its detailed comments on the original interim review, the United States simply restated the arguments that it had already made.¹⁰⁹

6.78 The United States argues that a respondent Member should not be precluded from presenting facts in a compliance proceeding in order to show that WTO-consistent measures are, in fact, WTO-consistent. The United States emphasizes that a finding that means that a measure *may or may not* fall within Article XIV of the GATS cannot require a Member to abolish or amend a measure, in view of Article 19.2 of the DSU,¹¹⁰ which reads as follows:

"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."

6.79 The Panel notes once again that this argument depends on the view that the measures at issue have been consistent with the United States' obligations under the GATS all along, both during and since the original proceeding (see para. 6.28 above). As a matter of principle, the Panel does not consider that a recommendation that a Member bring its measures into conformity with a covered agreement could possibly add to or diminish the rights or obligations of any Member provided in the covered agreements. The recommendation, by its own terms, does not require the Member concerned to take measures to comply with any obligations beyond those set out in the relevant covered agreement.

6.80 The United States' argument also depends on the view that the finding in the original proceeding was due to poor briefing on its own part as if, in allegedly confused circumstances in the original proceeding, it had failed to gather and present otherwise available information that would have been sufficient for the original Panel or the Appellate Body to conclude that the measures at issue were actually consistent with the United States' obligations. However, the Panel notes that the

¹⁰⁴ United States original first written submission, paras. 34-35 and original Exhibit US-17, and referred to in original Exhibit AB-39, as pointed out in United States original first written submission, para. 35 fn 54. See the summary of arguments of the parties in the original Panel report, paras. 3.22-3.23 and 3.228.

¹⁰⁵ Antigua original first written submission, para. 116; original opening second oral statement, para. 94; original second written submission, para. 21; original replies to Panel questions 19 and 32; original Exhibits AB-17, AB-39, AB-54, AB-81 and AB-122.

¹⁰⁶ United States replies to original Panel questions Nos. 21 and 22.

¹⁰⁷ United States original second written submission, para. 63.

¹⁰⁸ United States original second opening oral statement, paras. 66-67.

¹⁰⁹ United States comments on original interim review, paras. 38-40.

¹¹⁰ United States second written submission, para. 26; reply to Panel question No. 2(b).

source of the ambiguity between the IHA, on the one hand, and the Wire Act, on the other, lies in "the text of the revised statute ... on its face"¹¹¹ or, in other words, "the plain language of the IHA".¹¹² Aware of the view of the Department of Justice, included in a Presidential signing statement, and aware of the US principle of statutory construction that repeals by implication are not favoured, the original Panel made an objective assessment that, when interpreting US domestic law, it could not ignore the plain language of a statute enacted by the United States Congress.¹¹³

6.81 Perhaps the original Panel could have reached a different conclusion had the parties submitted a US Supreme Court opinion or other authoritative judicial opinion on the relationship between the amended IHA and the measures at issue. The Department of Justice would not have been unaware of the existence of any such authoritative opinion. Whilst the United States *did* submit examples of reported court cases in which the Department of Justice had used federal gambling laws challenged by Antigua to prosecute illegal wagering on horse racing, all those examples pre-dated the amendment of the IHA and all but one pre-dated the IHA itself.¹¹⁴

6.82 The absence of US judicial opinion on point was further exacerbated by a lack of prosecutions under the measures at issue of persons who complied only with the provisions of the IHA but not with the measures at issue; this could have indicated how the civil provisions of the IHA were to be construed in cases of conduct considered criminal under the measures at issue.¹¹⁵ Instead, the United States was only able to assert that its law enforcement officials did not agree with wagering suppliers in the United States who cited the amendment to the IHA as the statutory basis for Internet gambling on horse racing, notwithstanding the fact that such officials had never prosecuted any of these wagering suppliers.¹¹⁶ The United States *did* point to a disclosure in the annual report of one supplier that referred to unspecified action by the Department of Justice for unspecified companies that the Department of Justice deemed to be operating without proper licensing and regulatory approval. The United States agreed that this supplier "face[d] the risk" of criminal proceedings and penalties brought by the government.¹¹⁷ The United States also provided statistics on caseload data extracted from the United States Attorneys' Case Management System that included data on any and all criminal cases/defendants where the Wire Act or the Travel Act was brought as any charge against a defendant for the fiscal years 1992-2003.¹¹⁸ Yet there was no clear evidence of a single actual criminal prosecution under the Wire Act or the Travel Act of a person who operated in accordance with the IHA, which would have shown whether the application of those measures was affected by the existence of the IHA.

¹¹¹ Original Panel report, para. 6.599.

¹¹² Appellate Body report, para. 364.

¹¹³ Original Panel report, para. 6.599. The original Panel also had a copy of a December 2002 report prepared by the United States General Accounting Office for Congressional requesters titled "Internet Gambling – An Overview of the Issues" which found that "[t]he language of the [IHA] appears to allow the electronic transmission of interstate bets as long as the appropriate consent is obtained", see original Exhibit AB-17, p. 16. The United States considered that characterization as incorrect: original first written submission, para. 33.

¹¹⁴ United States original second opening oral statement, para. 45.

¹¹⁵ The Panel here refers to prosecutions to the extent they could shed light on the relationship of the IHA to the measures at issue and not to enforcement of the measures at issue more generally as addressed in the Appellate Body report, paras. 352-357.

¹¹⁶ United States original second opening oral statement, para. 46.

¹¹⁷ United States original second opening oral statement, para. 47, see original Panel report, para. 6.587. Earlier, the United States had provided a careful legal explanation as to why certain services supplied by such suppliers would not be liable to prosecution, if they fell within the "safe harbor" provision of the Wire Act: United States reply to original Panel question No. 22.

¹¹⁸ United States original second opening oral statement, para. 42-44; original Exhibit US-41, see original Panel report, para. 3.236.

6.83 In sum, the original Panel had "limited evidence" before it on the relationship between the IHA and the Wire Act because the underlying facts that might otherwise have given risen to more substantial factual submissions were limited. The ambiguity of this relationship was not a matter of poor briefing; rather, it was merely a reflection of the ambiguous state of US domestic law.¹¹⁹ This ambiguity in US domestic law prevented the United States from demonstrating in the original proceeding that its measures satisfy the requirements of the chapeau of Article XIV of the GATS. Whilst there may be a right and a wrong interpretation of this point in US domestic law, it is currently a matter open to disagreement. As long as this ambiguity remains, the measures at issue are not in compliance with the United States' obligations under the GATS.¹²⁰

6.84 Therefore, the Panel concludes that, both as a matter of principle and also in the specific circumstances of this dispute, its interpretation of the recommendation that the United States bring its measures into conformity with its obligations under the GATS does not diminish the United States' rights or increase its obligations inconsistently with Article 19.2 of the DSU.

6.85 For the reasons set out above, the Panel sees nothing in the specific findings and conclusions in the original proceeding that would disturb its preliminary conclusion at paragraph 6.38. Therefore, the Panel concludes that the United States has not complied with the recommendations and rulings of the DSB.

3. Statements made during the arbitration pursuant to Article 21.3(c) of the DSU

6.86 Both parties and the European Communities referred to statements made by the United States on the means of implementation of the DSB recommendation and rulings during the course of the arbitration to determine a reasonable period of time pursuant to Article 21.3(c) of the DSU in this dispute.¹²¹ Essentially, they disagreed as to whether the United States itself had, during the arbitration, submitted that legislation was the only possible means to bring its measures into compliance with the recommendations and rulings of the DSB.

6.87 The Panel considers that parties' statements made in the course of an arbitration pursuant to Article 21.3(c) can be helpful in addressing the existence of measures taken to comply in an Article 21.5 proceeding because, as a practical matter, they will address the specific recommendation and rulings of the DSB in the dispute at hand and also what is required in order for the respondent to comply.¹²² In this way, they may confirm a compliance panel's own objective assessment of whether the respondent has complied, based on the specific recommendations and rulings of the DSB in the dispute.

6.88 The Panel notes that the United States, in its written submission and oral statement to the Arbitrator, sought a period of time to adopt legislation *without* stating that legislation was the only

¹¹⁹ The Panel reiterates that this interpretation of US domestic law is solely for the purpose of assessing the United States' compliance with its international obligations under the GATS.

¹²⁰ See the additional clarification with respect to the IGBA, set out at note 139 below. The Panel's findings are without prejudice to any other possible inconsistencies between the measures at issue and the United States' obligations under the GATS.

¹²¹ Antigua first written submission, paras. 17-18; United States first written submission, para. 55; European Communities third party submission, para. 58.

¹²² See also the following statement in the Appellate Body report on *US – Softwood Lumber IV (Article 21.5 – Canada)*:

"Thus, within Article 21 as a whole, the declarations of the implementing Member form an integral part of the surveillance of implementation, but they do not stand alone. Rather, they are complemented by, and subject to, multilateral review within the World Trade Organization (the 'WTO')." (at para. 70).

option to ensure compliance.¹²³ Nevertheless, the Panel observes that the Award of the Arbitrator stated that:

"For this reason, the United States emphasizes that the only means of implementation that will achieve the necessary clarification is legislative means."¹²⁴

6.89 The United States respectfully disagrees with the Arbitrator's characterization of its views, including after its perusal of the unverified transcript of the Arbitrator's oral hearing.¹²⁵ Antigua considers the Arbitrator's conclusion to be a correct interpretation of the US argument put before him.¹²⁶

6.90 The Panel can see that the United States submitted to the Arbitrator that it intended to seek legislation and, in this context, stated orally that it needed legislation or that legislation was required. However, the Panel cannot conclude with certainty that the United States *emphasized* that legislation was the *only* means of implementation, especially since a question on that point was never posed to the United States. The Panel, for its part, does not consider that legislation is the only possible means of implementation in this dispute. Even though the key finding on the chapeau of Article XIV of the GATS in the original proceeding concerned the relationship between different statutes, the chapeau relates to the *application* of the measures at issue, which does not simply relate to their wording. The original Panel was not persuaded by the Department of Justice's view of that relationship but that does not exclude other forms of administrative action, or judicial action, to bring the measures into conformity. For this reason, the Panel does *not* consider that the lack of new legislation amending the measures at issue or amending the IHA is determinative of the existence of any "measures taken to comply" in this dispute.

C. DISAGREEMENT AS TO THE CONSISTENCY WITH A COVERED AGREEMENT OF MEASURES TAKEN TO COMPLY

1. Nature of the Panel's assessment

(a) Main arguments of the parties

6.91 Antigua believes that it is not necessary for the Panel to go much further than find that the United States has done nothing to come into compliance but, if the Panel does go further, Antigua submits that the United States has again failed to meet its burden of proof under the chapeau of Article XIV of the GATS.¹²⁷

6.92 The United States argues that the compliance Panel has before it a much more complete factual record concerning the relationship between the IHA and the Wire Act than the original Panel and asks the Panel to find that US "measures taken to comply" are not inconsistent with the GATS.¹²⁸

¹²³ See United States written submission to the Arbitrator, paras. 2, 3, 9-12, 17 and 36; and oral statement to the Arbitrator, paras. 3, 4, 13-14 and 18; summarized in the Award of the Arbitrator (WT/DS285/13), at paras. 7-10 and 16.

¹²⁴ Award of the Arbitrator (WT/DS285/13), at para. 37.

¹²⁵ United States reply to Panel question No. 24. The Panel obtained the Arbitrator's record as described at para. 1.12 above.

¹²⁶ Antigua comment on US reply to Panel question No. 24.

¹²⁷ Antigua second written submission, paras. 3-5.

¹²⁸ United States first written submission, para. 3; second written submission, paras. 32, 33 and 50; replies to Panel questions Nos. 1, 6 and 14.

(b) Assessment by the Panel

6.93 The Panel has already concluded at paragraph 6.85 that the United States has not complied with the recommendations and rulings of the DSB. Having reached that conclusion, the Panel need not continue its assessment of the matter before it. Indeed, the Panel cannot assess a disagreement as to the *consistency* with a covered agreement of "measures taken to comply" with the recommendations and rulings of the DSB because it has found that no such measures exist.

6.94 Nevertheless, it is quite clear what the United States alleged to be the "measures taken to comply". These are the same measures the subject of the recommendations and rulings of the DSB in this dispute, namely, the Wire Act, the Travel Act and the IGBA. As the sole trier of fact in this compliance proceeding, the Panel considers it appropriate to make certain factual findings beyond those that are strictly necessary to resolve the dispute, which may assist the Appellate Body should it later be called upon to complete the analysis. Indeed, the original Panel made such a decision, which was upheld on appeal.¹²⁹

6.95 The United States submits that it can demonstrate in this compliance proceeding what it failed to demonstrate in the original proceeding. This submission depends on the premise that the facts and arguments that it has presented in this compliance proceeding are different from, and more persuasive than, those it submitted in the original proceeding. Therefore, in the circumstances, and in accordance with the function of panels under Article 11 of the DSU, the Panel considers it useful and appropriate to make a factual assessment of that premise. In so doing, the Panel will also make an assessment of facts and arguments presented by Antigua in this compliance proceeding.

6.96 Further, the original Panel's assessment of the matter before it, as reviewed by the Appellate Body, was based on the facts as they existed at the time of the original proceeding. The Panel will also make a factual assessment of certain new developments that have arisen since the time of the original proceeding.

6.97 The Panel sees no reason to limit its factual assessment to the single issue of the legal interpretation of the relationship between the IHA, on the one hand, and the measures at issue, on the other, on which the original Panel ruled, as upheld by the Appellate Body. The language used by the Appellate Body in its report with respect to that issue did not amount to an invitation to the United States to make a demonstration to a compliance panel of this one specific point, for the reasons given at paragraphs 6.62 to 6.69 above. Instead, to the extent that the Panel revisits the United States' defence that the measures at issue satisfy the requirements of the chapeau of Article XIV of the GATS, the Panel considers it equally appropriate to assess an issue that was raised in the original proceeding but upon which the original Panel did *not* rule, namely whether the measures at issue are discriminatory "on their face". This was an issue to which *both* parties referred in their submissions to this Panel. The Panel assesses this issue in terms of the treatment of intrastate commerce. However, the Panel emphasizes that it makes this assessment solely for the purposes set out at paragraph 6.94 above and without prejudice to its finding that the Appellate Body's conclusion regarding the United States' defence under Article XIV of the GATS must be unconditionally accepted by the parties in accordance with Article 17.14 of the DSU.

6.98 The chapeau of Article XIV of the GATS sets out the following requirement:

"Subject to 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, or a disguised restriction on trade in services".

¹²⁹ Appellate Body report, para. 344.

6.99 The Panel recalls the Appellate Body's interpretation of this provision in this dispute:

"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 to [*sic*] 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."¹³⁰ (footnotes omitted)

2. United States' submissions

(a) Interstate Horseracing Act, as amended

6.100 In this compliance proceeding, as in the original proceeding, the United States asserts that its measures satisfy the requirements of the chapeau of Article XIV because they do not discriminate *at all*. The United States has not put forward an additional argument that *even if* such discrimination exists, it does not rise to the level of "arbitrary" or "unjustifiable" discrimination.

6.101 The United States submits that the prohibition embodied in the three measures at issue is applied consistently with the requirements of the chapeau of Article XIV of the GATS because the measures do not discriminate between countries on their face, and because the IHA does not provide an exemption from those measures. The United States refers to the plain text of the IHA, legislative history and the US principle of statutory construction which disfavors repeals of earlier statutes by implication.¹³¹

6.102 The Panel observes that there is repetition in key respects between the evidence submitted by the United States in this compliance proceeding with the evidence submitted in the original proceeding, notably with that mentioned at paragraph 6.77 of this report with regard to:

- (a) the text of the measures at issue;¹³²
- (b) an assertion that the measures at issue "on their face" meet the requirements of the chapeau of Article XIV of the GATS because their text allegedly does not discriminate between countries;¹³³
- (c) a description of the "safe harbor" provision in the Wire Act which applies to information assisting in the placing of bets and wagers, but not to bets and wagers themselves;¹³⁴

¹³⁰ Appellate Body report, para. 339.

¹³¹ United States first written submission, paras. 10-40.

¹³² United States first written submission, paras. 6-8, citing Exhibit AB-1; first written submission, para. 19, citing the Appellate Body report, paras. 260 and 262. The texts of the measures at issue were set out in original Exhibit AB-82 and summarized in United States original second written submission, paras. 78, 80 and 83. See the original Panel report, paras. 3.264-3.267; 6.199, 6.216, 6.221-6.222, 6.360, 6.366 and 6.374; and Appellate Body report, paras. 147, 258, 260 and 262.

¹³³ United States first written submission, para. 17; reply to Panel question No. 38(c). This was asserted in United States original second written submission, para. 116. See the original Panel report, paras. 3.228 and 3.282. United States original second written submission, para. 118, also referred to non-discrimination in terms of nationality. See the original Panel report, para. 3.283.

- (d) the legislative history of the Wire Act;¹³⁵
- (e) the text of the IHA and assertions that it does not expressly state that it provides an exemption to the criminal statutes, or is otherwise consistent with those statutes;¹³⁶
- (f) the view of the Department of Justice on the relationship between the IHA amendment and the measures at issue;¹³⁷ and
- (g) statements that, under the US principles of statutory construction, repeals by implication are not favoured.¹³⁸

6.103 It is indisputable that this evidence, presented in the original proceeding (and re-presented in this compliance proceeding), failed to demonstrate that the measures at issue satisfy the requirements of the chapeau of Article XIV of the GATS. The original Panel's finding on this point was upheld in the Appellate Body report, which was adopted by the DSB. Neither party disputes that that finding still stands as regards that evidence.

6.104 Without prejudice to the Panel's findings regarding Article 17.14 of the DSU at paragraphs 6.46 to 6.57 above, the Panel will now proceed to make a factual assessment of the other evidence in the United States' submissions, for the reasons set out at paragraphs 6.94 and 6.95. The Panel will refer to this other evidence as "supplementary" evidence.¹³⁹

¹³⁴ United States first written submission, paras. 7-8; second written submission, paras. 11 and 19. In response to a question from the Panel, the United States confirmed the apparent relationship between the "safe harbor" provision and the plain language of the IHA amendment, which indicated that the former does not resolve the ambiguity in the relationship between the IHA and the measures at issue: see reply to Panel question No. 27. This provision was explained in United States original second written submission, para. 78. See the original Panel report, paras. 3.140, 3.141 and 3.264.

¹³⁵ United States first written submission, para. 9; oral statement, para. 20; and Exhibit US-1. This was discussed extensively in United States original second written submission, paras. 74-79 and included in original Exhibits US-24 and US-30. See the original Panel report, paras. 3.262-3.264, 6.482, 6.486, 6.490 and fn. 321; Appellate Body report, para. 296.

¹³⁶ United States first written submission, paras. 12, 22, 25 and 33; second written submission, paras. 11 and 14. The text was set out in original Exhibit AB-82 and discussed in United States original first written submission, paras. 34-35; reply to original Panel question No. 21; original second written submission, para. 63. See the original Panel report, paras. 3.22, 3.23, 3.228, 6.597; Appellate Body report, paras. 38, 361 and 362.

¹³⁷ United States first written submission, paras. 49-50; reply to Panel question No. 37. The Department of Justice's view as contained in the December 2000 Presidential signing statement was provided in original Exhibit US-17 and quoted in full in United States original first written submission, para. 35, and again in reply to original Panel question No. 21. See the original Panel report, paras. 3.22-3.23, 3.228, 6.597, and Appellate Body report, para. 362, fn 464. The Panel has noted that the April 2006 DOJ Statement refers expressly to the Wire Act rather than to all existing criminal statutes but this was in the context of Bill H.R. 4777, that would have expressly amended the Wire Act.

¹³⁸ United States first written submission, paras. 26 and 37; oral statement, para. 18. This was set out in reply to original Panel question No. 21; comments on original interim review, para. 38; and taken into account in the original Panel report at para. 6.599. The United States' view of repeals by implication was also referred to in the Appellate Body report, para. 362.

¹³⁹ The Panel sought, and obtained, one clarification from the parties that could be useful in the implementation of the recommendations and rulings of the DSB with respect to one of the measures at issue, namely the IGBA. Both parties had initially understood that the focus of Antigua's allegation of discrimination under the IHA was on the Wire Act (United States first written submission, para. 19; confirmed by Antigua in its second written submission, fn. 9). However, in response to a question from the Panel, both parties agreed that offences under the IGBA are not predicated on a violation of federal laws, such as the Wire Act, but on a violation of State laws, whereas the IHA applies to activity that is lawful in each State where it takes place. The United States added that, for this reason, in its view, the original Panel's findings with respect to the Wire Act

6.105 First, the Panel considers that the United States' submission is erroneous insofar as it asserts that no language of "permission" exists in the IHA.¹⁴⁰ Clearly such language does exist. Section 5 of the IHA, which was quoted in the Appellate Body report, provides that "[a]n interstate off-track wager *may be accepted* by an off-track betting system" if certain consent is obtained, followed by extensive conditions and provisos concerning the revenue-sharing arrangement with the horse track (emphasis added). Insofar as the United States' submission on this point asserts otherwise, it boils down to the observation that the IHA does not contain an express carve-out from criminal laws, which was already plain from the text of the IHA in the original proceeding and is not disputed.¹⁴¹

6.106 Second, some of this supplementary evidence, whilst it presents interesting background information, provides little that is useful in resolving the ambiguity in the relationship between the IHA and the Wire Act, notably:

- (a) the original version of the IHA before it was amended in 2000, its legislative history, and an interpretation that there was no repugnancy between the statutes before the IHA was amended. This does not address the material difference in the IHA since 2000 which is key to the potential repugnancy with the Wire Act;¹⁴²
- (b) an explanation that the IHA, and the IHA as amended, can preserve civil enforcement rights without any repugnancy vis-à-vis the criminal prohibition in the Wire Act. This does not address the key issue as to how the IHA, as amended, on its face can authorize activity that otherwise violates the Wire Act without any repugnancy;¹⁴³
- (c) confirmation that the definitions used in the IHA do not amend definitions used in any other federal statute. This is not disputed;¹⁴⁴ and
- (d) confirmations that the IHA, and the IHA as amended, do not cover the entire field occupied by the Wire Act. This is not disputed, as the parties agree that it is not the only way in which a repugnancy can arise between two statutes.¹⁴⁵

6.107 Third, some of the supplementary evidence provides more detail on issues that were raised in the original proceeding:

- (a) the full text of a US Supreme Court opinion from which the United States had cited the principle of statutory construction that repeals by implication are not favoured.¹⁴⁶ The United States has also provided the full text and descriptions of four federal court

and the Travel Act, as upheld by the Appellate Body, cannot apply to the IGBA (Antigua reply to Panel question No. 23 and the United States' comment thereon). The Panel notes that this argument, raised very late indeed, appears to be at odds with the United States' position in the original proceeding, as reflected in the view of the Department of Justice expressed in the December 2000 Presidential signing statement. Nevertheless, in view of the wording of the IHA, which is not entirely clear on this point, and of the IGBA, it may be possible for the Department of Justice to clarify the specific issue of the applicability of the IGBA to interstate wagering on horseracing, where legal in the various States involved.

¹⁴⁰ United States first written submission, para. 33, see also para. 20.

¹⁴¹ United States first written submission, paras. 23-24; reply to Panel question No. 28.

¹⁴² United States first written submission, paras. 10, 29, 35; Exhibit US-2; second written submission, paras. 12-13, 16-17, 19.

¹⁴³ United States first written submission, paras. 11 and 35; second written submission, paras. 17 and 19; oral statement, paras. 20-21; reply to Panel question No. 29.

¹⁴⁴ United States second written submission, para. 15; oral statement, para. 17.

¹⁴⁵ United States first written submission, paras. 30 and 36 and Exhibit US-6.

¹⁴⁶ United States first written submission, para. 26 and Exhibit US-5. See note 138 above.

cases that illustrate how US courts consider claims of repeal by implication¹⁴⁷ and which indicate that this principle applies with even greater force when the claimed repeal rests solely in an appropriations Act;¹⁴⁸ and

- (b) in response to a question from the Panel, confirmation that the Department of Justice is not aware of any public pending prosecution of the suppliers in the United States mentioned in the original proceeding.¹⁴⁹

6.108 Fourth, the supplementary evidence also includes the following:

- (a) the US principles of statutory construction that one begins with the plain language of the statute and only resorts to the legislative history where there is ambiguity;¹⁵⁰
- (b) the doctrine that an agency's interpretation of the statute that it administers constitutes a body of experience and informed judgement to which courts and litigants may properly resort for guidance, but which is not controlling upon the courts by reason of its authority;¹⁵¹ and
- (c) sections of the legislative history of the IHA amendment that describe only the textual change effected in the IHA; and an explanation of the interpretative value of a statement made by an individual Congressman who opposed adoption of the 2000 amendment to the IHA.¹⁵²

6.109 The original Panel, which did not have the supplementary evidence before it, made an objective assessment that, when interpreting US domestic law, it could not ignore the plain language of a statute enacted by the US Congress. None of the supplementary evidence alters or addresses the essential point that, on its face, the text of Section 5 of the IHA, read in conjunction with the definition of "interstate off-track wager" as amended in 2000, appears to authorize something that the Wire Act prohibits. The supplementary evidence actually *confirms* that, under US domestic law, whilst repeals by implication are not favoured, they are possible where there is a positive repugnancy between two Acts. Whilst the US court opinions submitted for the first time in this compliance proceeding confirm that two statutes can independently prohibit the same conduct, none of them indicate or even imply that a US court would ignore an authorization in the plain language of a US statute in light of an older statute that addresses the same conduct in less specific terms.¹⁵³

6.110 Therefore, the United States' submissions in this compliance proceeding do not provide any facts and arguments concerning the relationship between the IHA, on the one hand, and the Wire Act, on the other, that would justify a different finding from that made by the original Panel on this issue.

¹⁴⁷ United States first written submission, para. 27, Annex I; Exhibits US-10 to US-13; oral statement, paras. 18-19; reply to Panel question No. 30.

¹⁴⁸ United States first written submission, para. 37; Exhibit US-7; oral statement, para. 22. The original Panel noted that the 2000 amendment to the IHA was contained in an appropriation Act; see fn 1060 in the original Panel report.

¹⁴⁹ United States reply to Panel question No. 35(e), referring *inter alia* to the evidence of action against the supplier in the United States set out in para. 6.82 above.

¹⁵⁰ United States first written submission, paras. 13-15 and 20; Exhibits US-3 and US-4; oral statement, para. 15. See note 112 above.

¹⁵¹ United States first written submission, paras. 16 and 48, referring to Exhibit AB-16; reply to Panel question No. 37(e).

¹⁵² United States first written submission, paras. 38-40; Exhibits US-8, US-9 and US-14.

¹⁵³ The measures at issue were enacted at an earlier time than the IHA and the United States has not argued that they are more specific than the IHA.

3. Antigua's submissions

(a) Interstate Horseracing Act, as amended

6.111 Antigua argues that the measures at issue in the original proceeding remain out of compliance with Article XIV of the GATS.¹⁵⁴ Although it considers that the issue was resolved in the original proceeding, it submits that the IHA authorizes remote pari-mutuel account wagering in the United States and that this is not prohibited by the Wire Act. It refers *inter alia* to the IHA on its face, US domestic law including principles of statutory construction, State account wagering laws, the activities of suppliers of remote gambling and betting services operating in the United States, and the UIGEA.¹⁵⁵ Much of this evidence was presented for the first time in the compliance proceeding but some of it only provides more detail on information presented in the original proceeding.

6.112 First, Antigua relies on the text of the IHA on its face, which is actually quoted in the original Panel and Appellate Body reports.¹⁵⁶ Antigua does not take a position on whether there is a direct conflict between the IHA and the Wire Act but submits opinions of the US Supreme Court and the US Court of Appeals that were not presented in the original proceeding to explain principles of statutory construction. Like the United States' own evidence, these opinions confirm that, under US domestic law, repeals by implication are not favoured but are possible where there is a positive repugnancy between two Acts.¹⁵⁷ This principle had already been presented in the original proceeding, in less detail, by the United States. One supplementary element provided by Antigua consists of the US court opinions in the *Burrillville* case dating from 1992 and 1993, which is apparently the only reported court case that refers to both the Wire Act and the IHA.¹⁵⁸ However, that case relates to the old version of the IHA before the 2000 amendment and does not discuss the activity engaged in by the defendant in a way that would clearly address the issue that the Panel is assessing. The lack of clarity on this point is highlighted by the fact that both parties to this dispute see in it support for their opposing respective views of the relationship between the two Acts.¹⁵⁹

6.113 Second, Antigua has submitted laws and regulations of California, Connecticut, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Virginia, Washington and Wyoming that authorize "account wagering". These laws and regulations were not presented in the original proceeding.¹⁶⁰ Most of these State laws refer expressly to the IHA.¹⁶¹ Almost all these State laws expressly refer to

¹⁵⁴ Antigua first written submission, para. 46; second written submission, para. 5.

¹⁵⁵ Antigua first written submission, paras. 46-129; second written submission, paras. 29-60.

¹⁵⁶ Antigua first written submission, para. 50; second written submission, para. 29. Antigua draws attention to the fact that the definition covers remote wagering on an intra- and interstate basis. Indeed, the definition includes wagers placed or transmitted in one State and accepted by an off-track betting system in the *same or another* State: see original Panel report, para. 6.598; Appellate Body report, para. 361; Exhibit AB-4.

¹⁵⁷ Antigua first written submission, paras. 58-59, second written submission, paras. 36-39, and Exhibits AB-23 to AB-27.

¹⁵⁸ Exhibits AB-30 and AB-117.

¹⁵⁹ Antigua first written submission, para. 61; second written submission, paras. 40-45; United States first written submission, fn. 15; second written submission, paras. 20-23; oral statement, para. 15.

¹⁶⁰ Antigua only mentioned account wagering permitted by States: original first written submission, para. 118.

¹⁶¹ Antigua first written submission, para. 66, Exhibits AB-34 to AB-51. Oregon law refers to compliance with the IHA, including one provision that licensees may accept bets from persons outside the State provided that they comply with the IHA (Exhibit AB-60). Virginia law expressly refers to pari-mutuel wagering "permissible under the IHA" (Exhibits AB-49 and AB-62). Idaho, Kentucky and Washington laws provide that a hub or advance deposit wagering facility must comply with the IHA (Exhibits AB-55, AB-37, AB-56 and AB-50). Maryland and Missouri laws provide that their intent is similar to the IHA or that the intent of the IHA is instructive (Exhibit AB-58 and AB-54). Louisiana law provides that it is subject to applicable federal law, specifically both the IHA *and* the Wire Act (Exhibits AB-38 and AB-57). However, seven State laws provide

account wagering by telephone, Internet and/or other electronic means¹⁶² (referred to below as "remote account wagering").¹⁶³ Some of these State laws purportedly authorize remote account wagering on an interstate basis.¹⁶⁴ The United States does not contest what the State laws provide on their face but explains that State laws cannot override the Wire Act or other US federal law.¹⁶⁵ The Panel notes that some of the State laws, on their face, regulate the acceptance of legal interstate off-track wagers on horse races in accordance with the IHA. However, some do not refer to the IHA and others do not refer to the IHA in relation to the acceptance of wagers.¹⁶⁶ Further, whilst all the State laws refer to wagering on horse races, some apply to wagering on other sports¹⁶⁷ and four purport to allow wagers placed from foreign jurisdictions¹⁶⁸, which are matters outside the scope of the IHA. All allow remote wagers wholly within the State in question which, to the extent that it does not involve the transmission of bets or wagers in interstate or foreign commerce, is a matter outside the scope of the Wire Act¹⁶⁹ (discussed at paragraphs 6.118 to 6.123 below). In any event, even to the extent that these State laws are contemplated by the IHA, they do not remove the ambiguity in the relationship between the IHA itself and the Wire Act.

6.114 Third, Antigua has submitted evidence relating to wagering suppliers operating in the United States, many of whom expressly indicate on their websites that they provide telephone or Internet (i.e. remote) wagering services on horse racing.¹⁷⁰ Less detailed information on four of these operators was submitted in the original proceeding and addressed in the original Panel report in relation to an allegation of non-enforcement of the measures at issue against local suppliers in general.¹⁷¹ The Panel addresses them now, in this section, in relation to the specific, and distinct, question of what the IHA authorizes.

6.115 The suppliers in relation to which Antigua submits evidence in the compliance proceeding hold licences granted by State governments under the State laws and regulations referred to in paragraph 6.113 above to conduct remote account wagering, or are public benefit corporations established for this purpose.¹⁷² Some of these licences are expressly limited to remote wagering in the

that simulcasts (as opposed to wagers) shall comply with the IHA. The United States chose not to address the substance of Antigua's evidence on these matters in its submissions. It considers that there is no basis for allowing Antigua to bring up in a compliance proceeding claims that were not reflected in the DSB's recommendation and rulings: United States second written submission, para. 9.

¹⁶² New Hampshire's law does not (Exhibit AB-42).

¹⁶³ The Panel uses the word "remote" as defined by the original Panel at paras. 6.32-6.33 of its report.

¹⁶⁴ California, Idaho, Kentucky, Louisiana, Maryland (allows telephone betting from account holders with a principal residence outside the State), Nevada, Oregon, Virginia, Washington and Wyoming.

¹⁶⁵ United States reply to Panel question No. 32(c).

¹⁶⁶ See note 161 above.

¹⁶⁷ Connecticut, Massachusetts, New Hampshire, Oregon and Wyoming laws also apply to wagering on greyhound racing, dog racing and/or jai alai.

¹⁶⁸ Idaho, Kentucky, Nevada and Washington. Oregon, Virginia and Wyoming also refer to "other jurisdictions".

¹⁶⁹ United States reply to Panel question No. 32(d).

¹⁷⁰ Antigua first written submission, paras. 71-88, and Exhibits AB-65 to AB-73. The United States chose not to address the substance of Antigua's evidence on these matters in its submissions. It considers that there is no basis for allowing Antigua to bring up in a compliance proceeding claims that were not reflected in the DSB's recommendation and rulings: United States second written submission, para. 9.

¹⁷¹ Antigua original first written submission, para. 118; original Exhibits AB-42, AB-43 and AB-44; response to original Panel question No. 19. A page from the website of another supplier was also provided in original Exhibit AB-123. See original Panel report, paras. 6.585-6.589, 6.607; Appellate Body report, paras. 352-357 and 373(D)(v)(a).

¹⁷² The evidence relates to nine suppliers who comprise all the advance deposit wagering licensees in California (Exhibit AB-101), Idaho (Exhibit AB-96, except for one), Oregon (Exhibit AB-95, except for one), Virginia (Exhibit AB-98) and possibly Washington (Exhibit AB-99 - it is not clear if the licensee information is exhaustive for that State) as well as two public benefit corporations in New York (Exhibits AB-71 and AB-72).

State "that is permissible under the Interstate Horseracing Act".¹⁷³ Some of the suppliers and industry associations also confirm that they operate under the IHA.¹⁷⁴ Most of these suppliers state that they accept wagers placed in other States.¹⁷⁵ These suppliers are substantial and even prominent businesses with, collectively, thousands of employees and apparently tens of thousands of clients, paying taxes or generating revenue for government owners, having traded openly for up to 30 years and in some cases even operating television channels. Three are publicly listed corporations making filings with the United States Securities and Exchange Commission or subsidiaries of such corporations.

6.116 The evidence regarding these suppliers demonstrates the existence of a flourishing remote account wagering industry on horse racing in the United States operating in ostensible legality. However, it is not clear whether these suppliers actually transmit bets and wagers in interstate or foreign commerce in violation of the Wire Act or only information in relation to the formation of a wagering pool or other information that may fall within the "safe harbor" provision of that Act. Therefore, the Panel is unable to determine to what extent the evidence of these suppliers' operations sheds light on the operation of the IHA in a way that would demonstrate that the IHA authorizes pari-mutuel account wagering that would otherwise violate the Wire Act.

6.117 Therefore, whilst the Panel notes the differences between Antigua's submissions in this compliance proceeding and those it made in the original proceeding, they do not provide any facts and arguments concerning the relationship between the IHA, on the one hand, and the Wire Act, on the other, that would justify a different finding from that made by the original Panel on this issue.

(b) Intrastate commerce

6.118 Antigua's submissions in this compliance proceeding have provided facts and arguments concerning another aspect of the measures at issue on which the original Panel did not rule.

6.119 In the original proceeding, Antigua explained that the measures at issue did not prohibit all remote supply of gambling services within the domestic market of the United States because the measures did not apply to intrastate commerce.¹⁷⁶ The text of the Wire Act and the Travel Act, on their face, showed that their scope was limited to "interstate or foreign" commerce (not "domestic or foreign" commerce) so that they did not include intrastate commerce. Antigua did not clarify to the original Panel how this limitation on scope was discriminatory in practice because, apart from one example¹⁷⁷, Antigua did not provide evidence that remote gambling was permitted in intrastate commerce. Instead, Antigua chose to focus on differential treatment between *non-remote* gambling within the domestic market of the United States and remote gambling from outside the United States rather than on the existence of an authorization to supply remote gambling and wagering services

The evidence does not cover licensees in Kentucky (Exhibit AB-97, where only racetracks and Kentucky off-track betting parlors are licensed) or Ohio (Exhibit AB-94, where only racetracks are licensed).

¹⁷³ See the licence renewals ordered by the Virginia Racing Commission (Exhibit AB-98).

¹⁷⁴ Exhibits AB-65, AB-66, AB-118, AB-119 and AB-120.

¹⁷⁵ One supplier, in New Jersey, states that it does not (Exhibit AB-73).

¹⁷⁶ Antigua original first opening oral statement, para. 92; original second written submission, paras. 33-34; and see original Panel report at paras. 3.105-3.106, 3.110-3.111, 3.135, 3.224, 3.227 and 3.232.

¹⁷⁷ This was a special exemption in Nevada law: Antigua reply to original Panel question No. 19, fn 117; see also the United States' reply to original Panel question No. 36. Antigua also mentioned the existence of State horse racing laws and account wagering, and quoted an IHA definition in a footnote in its original first written submission, paras. 116 and 118, but in its original second written submission, paras. 33-34, it set out the limitation on the scope of federal laws without pursuing the State authorizations that existed beyond that limitation.

within the United States. Consequently, the original Panel refrained from making a finding on this aspect of the Wire Act and the Travel Act.¹⁷⁸

6.120 In this compliance proceeding, the United States asserts that the measures at issue "on their face" meet the requirements of the chapeau of Article XIV of the GATS because their text does not discriminate between countries.¹⁷⁹ Antigua disputes this assertion, referring to the operative language of the Wire Act, that prohibits only bets or wagers in "interstate or foreign commerce", but not intrastate commerce.¹⁸⁰ In response to questions from the Panel, the United States indicated that this was a jurisdictional requirement imposed by the United States Constitution. The United States did not dispute that the Wire Act, which is a federal statute, does not prohibit intrastate remote wagering where it has no effect on interstate or foreign commerce but cautioned that this does not indicate that State gambling statutes are discriminatory.¹⁸¹

6.121 It is not disputed that the Wire Act prohibits remote wagering from jurisdictions outside the United States, such as Antigua. It is also undisputed that the Wire Act does not prohibit remote wagering within the United States to the extent that it is not in interstate or foreign commerce. Antigua's submissions in this compliance proceeding show that there are at least 18 State laws (laws outside the Panel's terms of reference) that expressly authorize wagering by wire within the United States, including on a wholly intrastate basis. Most of these State laws authorize remote wagering on horse racing, some of them expressly in accordance with the IHA.¹⁸² The simultaneous prohibition of cross-border supply of remote wagering services, on the one hand, and the lack of a prohibition of some domestic supply of remote wagering services, on the other hand, afford different treatment.¹⁸³

6.122 The text of the Wire Act, together with the State laws presented in the compliance proceeding, provide the Panel with a factual record that was not available in the original proceeding concerning the treatment of intrastate commerce, including with respect to remote wagering on horse racing. This factual record would enable the Panel to make findings as to whether the United States has demonstrated that the Wire Act meets the requirements of the chapeau of Article XIV of the GATS on grounds *in addition to* those regarding the ambiguity in the relationship between the IHA and the Wire Act.

6.123 A finding that the Wire Act "on its face" meets the requirements of the chapeau of Article XIV because its text does not discriminate between countries would overlook the fact that the

¹⁷⁸ The original Panel expressly noted that both the Wire Act and the Travel Act applied only to "interstate or foreign commerce": see original Panel report, paras. 6.362 and 6.367, cross-referenced in the Appellate Body report, fn 424. The original Panel also discussed the fact that the measures *prohibit* remote gambling and betting services and other activities in the context of the "necessity" test but it did not find that the measures prohibit all remote supply within the United States or that they were non-discriminatory on their face, which was raised extensively in the arguments of the parties section of the report: see note 176 above.

¹⁷⁹ See para. 6.102(b) above. The United States adds that the limitation to "interstate or foreign commerce" does not discriminate in terms of nationality either: see its reply to Panel question No. 38(c).

¹⁸⁰ Antigua second written submission, para. 9. See also its first written submission, para. 116.

¹⁸¹ United States replies to Panel questions Nos. 32(c) and 38(c). The United States did not otherwise explain how the discrimination might not be "arbitrary or unjustifiable" or not inconsistent with the requirements of the chapeau of Article XIV of the GATS. The United States considers that there is no basis for allowing Antigua to bring up in a compliance proceeding claims that were not reflected in the DSB's recommendation and rulings: United States second written submission, para. 9.

¹⁸² This includes the State laws and regulations that authorize remote wagering on horseracing and, in some cases, other sports, referred to at para. 6.113, as well as Nevada laws and regulations that authorize interactive gaming, and lotteries in other States that allow the sale of tickets by telephone: see Antigua first written submission, paras. 116-129; comment on US reply to Panel question No. 38(c).

¹⁸³ The Panel notes that this issue is unrelated to the United States' argument that the Wire Act "safe harbor" provision, by virtue of the additional requirements of the IHA, discriminates in favour of suppliers from outside the United States, raised in United States original second written submission, para. 64.

prohibition in the Wire Act does not apply to remote wagering within the United States to the extent that it is not in interstate or foreign commerce. A finding that the text of the Wire Act does not discriminate between United States and foreign suppliers in terms of nationality would require some explanation of the relevance of nationality to the chapeau of Article XIV.¹⁸⁴ However, in view of the Panel's interpretation of Article 17.14 of the DSU at paragraphs 6.46 to 6.57 above, the Panel considers that it is not entitled to make any further findings on this issue as the United States' defence has been finally resolved with respect to the measures at issue in this dispute.

4. Developments since the original proceeding

(a) April 2006 DOJ Statement and prosecutions

6.124 Since the original proceeding, in April 2006, an official of the Department of Justice stated in testimony before a Committee of the US House of Representatives the Department of Justice's view of the relationship between the IHA, on the one hand, and federal criminal statutes, on the other.¹⁸⁵ That view reiterated the view expressed in the Presidential statement on the signing of the amendment of the IHA in 2000, which the United States had presented to the original Panel. It is notable that in that testimony, as in the Presidential signing statement, the Department of Justice lacked an authoritative court opinion to support its view.

6.125 In its statement, the Department of Justice official referred to a "civil investigation" relating to a potential violation of an unspecified law, which the Panel understands is not one of the measures at issue. The United States informed the Panel that that investigation is "still pending" and no further details are publicly available.¹⁸⁶

6.126 It is striking that the Department of Justice has not, apparently, ever initiated a criminal prosecution under the measures at issue of a pari-mutuel wagering supplier in the United States who transmits bets and wagers in violation of the Wire Act but who, at the same time, has obtained consent from the horse racing associations and shares its revenue with the racetracks in accordance with the IHA.¹⁸⁷ Such a prosecution could lead to a court opinion that would prove – or disprove – the Department of Justice's view, as a court could decide whether the IHA authorized such activity despite the terms of the Wire Act.

6.127 Since the original proceeding, the United States has, under various measures at issue, prosecuted gambling business operators trading as WorldWide Telesports, based in Antigua, and BETONSPORTS PLC, also based outside the United States, and prosecuted US-based operators, named Gianelli, Meyers and others, who employed the services of foreign gambling businesses. During that time the United States has also prosecuted US bookmakers who transmitted illegal wagers

¹⁸⁴ The Panel has taken due account of the Appellate Body's findings that "[t]he statutes at issue make no distinction on their face as to gambling services from different origins", that the language of the Wire Act is "neutral" and that "[t]hese measures, on their face, do *not* discriminate between United States and foreign suppliers of remote gambling services" (emphasis in original): see Appellate Body report at paras. 332, 354 and 357; as well as the Appellate Body's findings regarding the IHA, an Act that does not discriminate on its face between United States and foreign suppliers in terms of nationality either: see Exhibit AB-4; United States reply to Panel question No. 33; and Antigua's comment on the US reply.

¹⁸⁵ *Status Report by the United States*, Addendum, WT/D285/15/Add.1, 11 April 2006; also set out in Exhibit AB-32, discussed in Antigua first written submission, paras. 34-35; second written submission, para. 67; and United States first written submission, paras. 48-50.

¹⁸⁶ United States reply to Panel question No. 37(b) and (c).

¹⁸⁷ United States replies to Panel questions Nos. 34, 35, 36 and 37(d).

on horse races interstate without "conforming their conduct to the provisions of the IHA", i.e. without obtaining consent from the horse racing associations and sharing their revenue with the racetracks.¹⁸⁸

6.128 However, the Department of Justice is not aware of any public pending prosecution of the suppliers in the United States of online pari-mutuel wagering on horse racing who were referred to in the original Panel report¹⁸⁹, including the supplier whom the United States advised the original Panel "face[d] the risk" of criminal proceedings and penalties brought by the government.¹⁹⁰ The evidence referred to at paragraph 6.114 above shows that these and other suppliers confirm that they operate in accordance with the IHA. Whilst it is not clear whether these suppliers actually violate the Wire Act, it is clear that none of them are being prosecuted.¹⁹¹

6.129 The Panel accepts that there are many factors that affect decisions to prosecute, including the availability of resources and prosecutorial priorities.¹⁹² However, the evidence set out above is at least consistent with the view that remote wagering services supplied in accordance with the IHA are tolerated, even if not authorized under federal law. Criminal prosecutions of appropriate cases under the measures at issue could change their application from that which prevailed at the time of the original proceeding and also resolve the ambiguity in the relationship between the IHA, on the one hand, and the Wire Act, on the other, for the purpose of assessing the United States' compliance with its international obligations under the GATS.

(b) Unlawful Internet Gambling Enforcement Act

6.130 Since the original proceeding, in October 2006, during the course of this compliance proceeding, the United States enacted the UIGEA.¹⁹³ The Panel agrees with Antigua that the UIGEA is particularly relevant to the question of the relationship between the IHA, on the one hand, and the measures at issue, on the other, because (i) it specifically refers to that issue; and (ii) as a statute enacted by the United States Congress, it is authoritative on matters of US domestic law.

6.131 The UIGEA does not amend or alter any statutes at issue nor affect which activities are unlawful under those statutes.¹⁹⁴ The UIGEA applies to activities falling within its definition of "unlawful Internet gambling". That definition excludes certain activities, among them certain intrastate transactions¹⁹⁵, certain intratribal transactions¹⁹⁶, and also the following regarding interstate horse racing:

¹⁸⁸ Antigua first written submission, paras. 106-107, Exhibit AB-75 (indictment before the original Panel circulated its report), Exhibits AB-76 and AB-77; United States reply to Panel question No. 36.

¹⁸⁹ Antigua original first written submission, para. 118; United States reply to original Panel question No. 22; United States comments on original interim review, para. 35.

¹⁹⁰ United States reply to Panel question No. 35(e), referring to the mention of action against suppliers set out in para. 6.82 above.

¹⁹¹ Antigua first written submission, para. 104; United States replies to Panel questions Nos. 34 and 37(d). See paras. 6.114 and 6.116 above.

¹⁹² United States reply to Panel question No. 34; comment on reply to Panel question No. 35(d).

¹⁹³ Exhibit AB-113, discussed in Antigua second written submission, paras. 46-60.

¹⁹⁴ 31 U.S.C. §5363 prohibits acceptance of any financial instrument for 'unlawful Internet gambling'; §5364 provides for policies and procedures to identify and prevent restricted transactions; §§5365 and 5366 provide for civil and criminal remedies, respectively; and §5367 prohibits circumvention.

¹⁹⁵ The exclusion of intrastate transactions is subject to conditions, among them that the State laws or regulations include age and location verification requirements reasonably designed to block access to minors and persons located out of a State jurisdiction and appropriate data security standards to prevent unauthorized access. This represents a change since the United States submitted to the original Panel, with respect to identity verification and prevention of online gambling by children, as follows:

"In fact, such regulation is infeasible. Children have ready access to payment instruments, and no technology has yet been developed to enable constraints on Internet gambling even

"The term 'unlawful Internet gambling' shall not include any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.)."¹⁹⁷

6.132 The definition of "unlawful Internet gambling" applies to the UIGEA only. It does not define or alter what type of Internet gambling is unlawful under US domestic law, including under the measures at issue.¹⁹⁸ At the same time, in enacting this exclusion from that definition, the United States Congress appears to have contemplated that some activity may be "allowed" under the IHA that might otherwise be considered "unlawful Internet gambling".¹⁹⁹ However, the Panel does not leap to the conclusion that this provision means that the IHA allows activities prohibited by the Wire Act, in light of another provision in its immediate context within the UIGEA that expresses the sense of Congress as follows:

"(iii) Sense of Congress

"It is the sense of Congress that this subchapter shall not change which activities related to horse racing may or may not be allowed under Federal law. This subparagraph is intended to address concerns that this sub-chapter could have the effect of changing the existing relationship between the Interstate Horseracing Act and other Federal statutes in effect on the date of the enactment of this subchapter. This subchapter is not intended to change that relationship. *This subchapter is not intended to resolve any existing disagreements over how to interpret the relationship between the IHA and other Federal statutes.*"²⁰⁰ (emphasis added)

6.133 The United States confirmed to the Panel that the disagreement referred to concerns whether the IHA repealed by implication pre-existing criminal statutes, thereby allowing the interstate transmission of bets on horse races.²⁰¹ This is the precise factual issue that the United States delegation, throughout its submissions, asked the Panel to assess.²⁰² However, the United States points out that in the "Sense of Congress" provision of the UIGEA "[t]he language simply notes the

approaching those that are possible in other settings where gambling can be confined and access to it strictly controlled." (United States original first written submission, para. 39)

See also the original Panel report at paras. 6.515-6.518.

¹⁹⁶ The exclusion for intratribal transactions is subject to conditions that include those set out at note 195 above.

¹⁹⁷ 31 U.S.C. 5362(10)(D)(i).

¹⁹⁸ The definitions in §5362 apply "[i]n this subchapter". See also the rule of construction in §5361 (b).

¹⁹⁹ The Department of Justice expressed a similar view on a provision in Bill H.R. 4777: see Exhibit AB-32, p.4. A statement which forms part of the legislative history of the UIGEA explains that this provision "addresses transactions complying with the IHA which will not be considered unlawful because the IHA only regulates legal transactions that are lawful in each State involved": see Statement of Representative Leach, Congressional Record, pages H8029-H8030 in Exhibit US-15, submitted with United States reply to Panel question No. 31(b). This statement does not indicate whether transactions under the IHA comply with pre-existing federal criminal statutes. The US National Thoroughbred Racing Association considers 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" and "[t]his is a very significant landmark recognition by the U.S. government of our industry's legal right to conduct wagering under the IHA and of our industry's important position as an agribusiness that supports 500,000 jobs": see Exhibit AB-118. The United States does not agree with this view: see United States reply to Panel question No. 31(e).

²⁰⁰ 31 U.S.C. 5362(10)(D)(iii).

²⁰¹ United States reply to Panel question No. 31(c).

²⁰² See, for example, "the IHA in no way limits the application of federal criminal statutes" in the United States first written submission, para. 3.

disagreement [but the language] does not take a position as to how a court would in fact construe the relationship between federal criminal laws and the IHA."²⁰³

6.134 The Panel agrees. In this way, the United States Congress has provided confirmation that, under US domestic law, the original Panel's finding was correct, that is:

"[T]here 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."²⁰⁴

6.135 This provision also shows that since the original proceeding the United States had an opportunity to remove the ambiguity and thereby comply with the recommendations and rulings of the DSB.²⁰⁵ Instead, rather than take that opportunity, the United States enacted legislation that confirmed that the ambiguity at the heart of this dispute remains and, therefore, that the United States has not complied.

VII. CONCLUSION

7.1 For the reasons set out in this Report, the Panel concludes that the United States has failed to comply with the recommendations and rulings of the DSB in this dispute.

²⁰³ United States reply to Panel question No. 31(c).

²⁰⁴ Original Panel report, para. 6.599, dated 10 November 2004, quoted above at para. 6.72.

²⁰⁵ Nevertheless, the parties do not dispute that no legislation was ever pending in the United States Congress that would have complied with the recommendations and rulings of the DSB in this dispute.