

**UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY
OF GAMBLING AND BETTING SERVICES**

Recourse to Article 21.5 of the DSU by Antigua and Barbuda

Request for Consultations

The following communication, dated 8 June 2006, from the delegation of Antigua and Barbuda to the delegation of the United States and to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

Antigua and Barbuda is pleased to submit this request for consultations with the United States pursuant to paragraph 1 of the "Agreed Procedures under Article 21 and 22 of the Dispute Settlement Understanding Applicable to the WTO Dispute *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285)."

Background

On 21 July 2003, the Dispute Settlement Body (the "DSB") of the World Trade Organization (the "WTO") established a panel at the request of Antigua and Barbuda in this dispute ("DS285"). Both the panel and the Appellate Body in DS285 found certain measures of the United States to be inconsistent with certain of the obligations of the United States under the WTO's *General Agreement on Trade in Services* (the "GATS"). On 20 April 2005, the DSB adopted the report of the panel, as modified by the report of the Appellate Body. The resulting DSB recommendations and rulings include, *inter alia*, the recommendation that the United States bring the measures found to be inconsistent with the GATS into conformity with its obligations under that agreement.¹

On 6 June 2005, Antigua and Barbuda communicated a request to the DSB that the determination of a reasonable period of time for compliance by the United States with the recommendations and rulings of the DSB be the subject of binding arbitration, in accordance with Article 21.3(c) of the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").

On 19 August 2005, the award of the arbitrator determined that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in DS285 was 11 months and two weeks from 20 April 2005. This period of time expired on 3 April 2006.

¹ WT/DS285/AB/R, para. 374.

On 10 April 2006 the United States submitted a status report to the DSB regarding implementation of the DSB recommendations and rulings.² The United States informed the DSB that, in its opinion, it was in compliance with the recommendations and rulings of the DSB based on the following statement (the "DOJ Statement") purportedly made by a representative of the United States Department of Justice to a subcommittee of the United States House of Representatives:

"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."

The United States Has Failed to Comply with the Recommendations and Rulings of the DSB

Antigua and Barbuda disagrees that the United States has complied with the recommendations and rulings of the DSB in DS285 and believes that the United States remains out of compliance with the United States' obligations under the GATS with respect to the provision of cross-border gambling and betting services from Antigua and Barbuda to consumers in the United States.

No Federal Legislation

First, Antigua and Barbuda considers that the United States has taken no measures to comply with the recommendations and rulings of the DSB. In DS285, Antigua and Barbuda established the existence of three federal statutes which serve to prohibit companies from Antigua and Barbuda from providing cross-border gambling and betting services to consumers located in the United States in violation of the United States' obligations under the GATS. These three federal statutes are (i) the Wire Act of 1961, 18 U.S.C. §1084 (the "Wire Act"); (ii) the Travel Act, 18 U.S.C. §1952 (the "Travel Act"); and (iii) the Illegal Gaming Business Act, 18 U.S.C. §1955 (the "IGBA"). The DSB recommended that the United States bring these three measures in conformity with its obligations under the GATS.

Neither during the reasonable period of time nor to date has the United States introduced, much less passed, any legislation that would amend or effect the Wire Act, the Travel Act or the IGBA in such a manner as to make those statutes WTO-consistent. Furthermore, two bills which have been introduced in the current United States' Congress – H.R. 4777 and H.R. 4411 – are expressly contrary to the recommendations and rulings of the DSB in DS285, as each would further institutionalise the discriminatory effect of the three United States statutes. The United States has therefore failed to bring these federal statutes into conformity with its obligations to Antigua and Barbuda under the GATS.

No Other Measures

Second, as noted above, despite having insisted to the Article 21.3(c) arbitrator that the United States would pursue a legislative remedy to bring itself into conformity with the recommendations and rulings of the DSB in DS285, the United States asserted it was in compliance on 10 April 2006 by reference to the DOJ Statement. The DOJ Statement is, however, nothing more than a restatement of the position taken by the United States during the course of DS285 that was ultimately found

² WT/DS285/15/Add.1.

unpersuasive by both the panel and the Appellate Body. Assuming, *arguendo*, that a statement by an unidentified government employee can constitute a "measure" for purposes of the DSU, Antigua and Barbuda does not believe that a simple restatement of a legal position taken by a party to a dispute during its regular course can be considered a "measure taken to comply with the recommendations and rulings" of the DSB within the meaning of Article 21.5 of the DSU.

The United States Remains Out of Compliance with its GATS Obligations

Third, regardless of whether the DOJ Statement constitutes a "measure" for purposes of the DSU or whether it can be considered a "measure taken to comply" within the meaning of Article 21.5 of the DSU, the DOJ Statement does not bring the United States into compliance with the recommendations and rulings of the DSB in DS285. In this regard Antigua and Barbuda notes that, *inter alia*:

- (1) As Antigua and Barbuda had observed to both the panel and the Appellate Body, there are a number of reasonable alternative measures available to the United States other than prohibition to address the concerns of the United States with respect to the provision of remote gambling and betting services. Since the adoption of the panel and Appellate Body reports by the DSB, even more alternatives have become available.
- (2) Since the adoption of the recommendations and rulings of the DSB in DS285, not only have there been no prosecutions of or enforcement actions brought against domestic remote gambling and betting service providers operating pursuant to the Interstate Horseracing Act, but in fact there has been significant growth in and expansion of domestic remote gambling and betting services generally in the United States.
- (3) The position of the United States as reflected in the DOJ Statement is not supported by the bulk of United States legal authority.

Nonetheless, licensed, regulated providers of cross-border gambling and betting services from Antigua and Barbuda to the United States remain subject to prosecution by United States authorities³, contrary to the obligations of the United States under the GATS.

Request for Consultations

On 23 May 2006, Antigua and Barbuda and the United States concluded an "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding Applicable to the WTO Dispute *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285)" (the "Agreed Procedures").

In light of the Agreed Procedures, and without prejudice to its other rights under the DSU, the GATS and the other WTO agreements with respect to compliance by the United States with the recommendations and rulings of the DSB in DS285 or otherwise, Antigua and Barbuda hereby requests consultations with the United States over the subject matters raised by this request. As the Agreed Procedures stipulate that "[i]f 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," Antigua and Barbuda respectfully requests that the delegation of the United States advise the delegation of Antigua and Barbuda

³ On 17 May 2006, an indictment was unsealed in which the United States Department of Justice indicted a number of companies and individuals, including the former holder of a gambling and betting license issued by Antigua and Barbuda, for various alleged violations of United States laws, including the Wire Act, simply by the provision of those services to consumers in the United States.

promptly of the possible dates during the next week or two on which United States' representatives will be available in order to fix a mutually acceptable date and venue for consultations.
