

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

Notification of an Appeal by the United States
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 7 January 2005, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/R) ("Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that it "should consider" the following laws "in determining whether or not the United States is in violation of its obligations" under the *General Agreement on Trade in Services* ("GATS"),¹ including the conclusion that Antigua and Barbuda ("Antigua") had met its burden of proof that these laws "result in a prohibition on the cross-border supply of gambling and betting services"²: (1) the Wire Act (18 U.S.C. § 1084); (2) the Travel Act (18 U.S.C. § 1952); (3) the Illegal Gambling Business statute (18 U.S.C. § 1955); (4) Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.; (5) Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws; (6) South Dakota: § 22-25A-8 of the S.D. Codified Laws; (7) Utah: § 76-10-1102(b) of the Utah Code; (8) Colorado: § 18-10-103 of the Colorado Revised Statutes; (9) Minnesota: §§ 609.75, Subdivisions 2-3 and 609.755(1) of Minn. Stat. Ann; (10) New Jersey: paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of the N.J. Code; and (11) New York: § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L. These conclusions are in error and are based on erroneous findings on issues of law and related legal interpretations regarding a complaining party's initial burden of proving an alleged breach of Article XVI of the GATS, and on the Panel's failure to carry out its obligations under Article 11 of the DSU to make an objective assessment of the matter before it. These errors are contained in, *inter alia*, paragraphs 6.160-6.165, 6.199-6.249, 6.357-6.421, and 7.1-7.2 of the Panel Report.

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the U.S. schedule to the GATS includes specific commitments on gambling and betting services under subsector 10.D, "other recreational services (except sporting)." This conclusion is in error and is

¹Panel Report, para. 6.209.

²*Id.*, para. 6.249.

based on erroneous findings on issues of law and related legal interpretations with respect to the provisions of the U.S. schedule to the GATS. These errors are contained in, *inter alia*, paragraphs 6.49-6.138, 6.356, 6.527, and 7.2-7.4 of the Panel Report.

3. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the United States fails to accord services and service suppliers of Antigua treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in the U.S. schedule, contrary to Article XVI:1 and Article XVI:2 of the GATS. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations with respect to Article XVI of the GATS. These erroneous findings include, for example, the following:

- (a) The Panel's findings that any limitation that has the *effect* of limiting the number of service suppliers in a sector or subsector is a limitation in the *form* of numerical quotas within the meaning of Article XVI:2(a), and that "a measure that is not expressed in the form of a numerical quota or economic needs test may still fall within the scope of Article XVI:2(a)"³;
- (b) The Panel's findings that any limitation that has the *effect* of limiting the number of service operations in a sector or subsector is a limitation expressed in the *form* of quotas within the meaning of Article XVI:2(c) of the GATS, and that a limitation that is not "expressed in terms of designated numerical units" may nonetheless fall within the scope of Article XVI:2(c);
- (c) The Panel's finding that a WTO Member does not respect its GATS market access obligations under Article XVI:2 if it limits market access to any part of a scheduled sector or subsector, or if it restricts any means of delivery under mode 1 with respect to a committed sector; and
- (d) The Panel's findings that the United States maintains such limitations.

These errors are contained in, *inter alia*, paragraphs 6.262-6.421 and 7.2-7.4 of the Panel Report.

4. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the Wire Act, the Travel Act (together with the relevant state laws) and the Illegal Gambling Business statute (together with the relevant state laws) are not justified under Articles XIV(a) and XIV(c) of the GATS and are inconsistent with the requirements of the chapeau of Article XIV of the GATS. These conclusions are in error and are based on erroneous findings on issues of law and related legal interpretations with respect to Article XIV of the GATS, and on the Panel's failure to ensure that consultations shall be without prejudice to the rights of the United States in dispute settlement proceedings pursuant to Article 4.6 of the DSU. These errors are contained in, *inter alia*, paragraphs 6.475-6.477, 6.488-6.535, 6.541-6.608, and 7.2 of the Panel Report.

5. The United States seeks review by the Appellate Body, pursuant to Article 11 of the DSU, of the Panel's finding that "the United States has declined Antigua's invitation to engage in bilateral and/or multilateral consultations and/or negotiations."⁴ The Panel's disregard for uncontroverted evidence in the record, such as the fact that the United States engaged in bilateral consultations with Antigua regarding Antigua's concerns relating to U.S. gambling laws pursuant to Article 4 of the DSU, is inconsistent with the Panel's duty to make an objective assessment of the matter before it. These errors are contained in, *inter alia*, paragraphs 6.525-6.533 of the Panel Report.

³*Id.*, para. 6.332.

⁴*Id.*, para. 6.533.

6. The United States seeks review by the Appellate Body, pursuant to Article 11 of the DSU, of the Panel's finding that "the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau" of Article XIV of the GATS.⁵ The Panel's disregard for uncontroverted evidence in the record, such as statistical evidence as to the overall treatment of domestic suppliers of remote gambling services as compared to that of foreign suppliers, is inconsistent with the Panel's duty to make an objective assessment of the matter before it. These errors are contained in, *inter alia*, paragraphs 6.585- 6.589 of the Panel Report.

7. The United States seeks review by the Appellate Body, pursuant to Article 11 of the DSU, of the Panel's finding that "the evidence presented to the Panel is inconclusive and that the United States has not demonstrated that the [Interstate Horseracing Act], as amended, does not permit interstate pari-mutuel wagering for horse racing over the telephone or using other modes of electronic communication, including the Internet."⁶ The Panel's disregard for uncontroverted evidence in the record, such as the consistent position of the U.S. Government that the IHA does not provide legal authority or protection for remote supply of gambling services and settled U.S. law regarding statutory construction, is inconsistent with the Panel's duty to make an objective assessment of the matter before it. These errors are contained in, *inter alia*, paragraphs 6.595-6.600 of the Panel Report.

8. The United States seeks review by the Appellate Body of the Panel's legal conclusion that "practice," which the Panel defines as "a repeated pattern of similar responses to a set of circumstances," can "be considered as an autonomous measure that can be challenged in and of itself."⁷ This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations with respect to what constitutes a "measure" under Article 6.2 of the DSU. These errors are contained in, *inter alia*, paragraphs 6.196-6.198 of the Panel Report.

⁵*Id.*, para. 6.589.

⁶*Id.*, para. 6.600.

⁷Panel Report, paras. 6.196-6.197.