BEFORE THE ARBITRATORS
OF THE
WORLD TRADE ORGANISATION

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

WT/DS285

ARBITRATION UNDER ARTICLE 22.6 OF THE DSU

WRITTEN REPONSES OF ANTIGUA AND BARBUDA

to

THE QUESTIONS OF THE ARBITRATORS

2 November 2007

US – MEASURES AFFECTING THE CROSS-BORDER PROVISION OF GAMBLING AND BETTING SERVICES (DS285)

ARBITRATION UNDER ARTICLE 22.6 OF THE DSU

Questions to the parties

19 October 2007

Each party is requested to respond to all the questions addressed to it. In addition, each party may comment on the questions addressed to the other party if it so wishes.

NOTE: Unless otherwise provided or the context otherwise requires, defined terms and references to prior WTO rulings and decisions shall be referred to herein as in the Written Submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration Under Article 22.6 of the DSU*, WT/DS285 (4 October 2007) (the *"Antigua Submission"*).

LEVEL OF NULLIFICATION OR IMPAIRMENT

1. To the United States: Please clarify whether you agree that you bear the burden of proving that the level of suspension proposed by Antigua and Barbuda (hereafter "Antigua") is not equivalent to the level of nullification or impairment of benefits suffered by Antigua as a result of the US measures found to be inconsistent with US WTO obligations in the underlying proceedings.

The United States agreed with this at the hearing before the Arbitrators on 18 October 2007. This is consistent with the decisions of arbitrators in prior arbitrations under Article 22 of the DSU.[1] The United States therefore agrees that it has the burden to submit evidence and argumentation sufficient to demonstrate that the level of suspension of concessions or other obligations proposed by Antigua is not equivalent to the level of nullification or impairment caused by the illegal United States measures.

Determination of benchmark/Construction of counterfactual

2. To Antigua: Please elaborate on why you have assumed, for the purposes of your counterfactual, that the US would allow Antiguan operators to provide unrestricted access to cross-border remote gambling and betting services to US consumers.

In summary, Antigua's assumption is based upon at least nine specific factors, including (1) the "full" nature of the commitment made by the United States in the US Schedule with respect to gambling and betting services; (2) the findings by the original panel and the Appellate Body that the maintenance of the Federal Trio violated the obligations of the United States under Article XVI of the GATS;

[1] ***See*, Arbitrators' Report, *EC – Hormones (US)*, para. 23; Antigua Submission, paras. 13 – 15.**

(3) the findings by the original panel and the Appellate Body that the "full" commitment requires the United States to provide market access to all services within the applicable sector; (4) the failure of the United States to prevail on its defence under Article XIV of the GATS; (5) the requirement that the United States ensures that its subordinate governmental bodies (such as states, counties, cities and other political subdivisions) observe the obligations of the United States under the GATS; (6) the determination by the Compliance Panel that the United States remains out of compliance with the DSB Rulings; (7) well-settled WTO jurisprudence to the effect that Members are entitled to expect no less from another Member than what is expressly stated in the text of the covered agreements; (8) the decisions of arbitrators in prior arbitrations under Article 22 of the DSU; and (9) the unprecedented decision by the United States to attempt the withdrawal of its commitment under the GATS with respect to all gambling and betting services.

Most of these need little further elaboration. However, certain of the points are discussed in more detail below and elsewhere within these Responses.

As Antigua noted in the Antigua Submission,[2] with respect to the "full" nature of the commitment contained in the US Schedule, the original panel observed that if the United States wanted to impose any restrictions, conditions or limitations on the provision of services within the applicable sector in the US Schedule it should have set those restrictions or limitations out in the US Schedule. Not having done so, it resulted in "a guarantee that the *whole* of that sector, i.e. *all* services included in that sector or sub-sector are covered by the commitment. Any other interpretation would make market access commitments under the GATS largely meaningless."[3] From this, as the original panel made clear, the "full" commitment requires that the United States allow the unrestricted provision of all services that come within the coverage of that sector, regardless of the method of delivery and *regardless of the treatment given by the United States to domestic suppliers of the same services*.[4]

Based upon this "full" commitment, Antigua had and continues to have a legitimate right to expect that the United States will comply with that commitment.[5] It is completely reasonable for Antigua to assume that the United States will observe its obligations under the express language of the GATS that requires it to provide Antiguan service providers with "full" market access to consumers in the United States. There is no basis on which Antigua should be

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[2] ***See* Antigua Submission, paras. 33, 82 - 85.**

[3] **Panel Report, *US – Gambling*, para. 6.290.**

[4] ***Id.*, paras. 6.264, 6.290. *See* Antigua Submission, paras. 84 – 85. The Appellate Body left these findings intact. AB Report, para. 220, fn. 262.**

[5] **Report of the Panel, *European Communities – Export Subsidies on Sugar, Complaint by Australia*, WT/DS265/R (15 October 2004), para. 7.370.**

required to expect the United States to do *anything other than* observe its legal obligations.[6]

Antigua is also entitled to ignore the failed Article XIV defence of the United States in making Antigua's assumptions in this proceeding. As is abundantly clear at this point, the Article XIV defence failed. The assertion of the United States that remote gambling is so pernicious that it must be *prohibited* has been exposed for what it really is—a "disguised restriction on trade."

In all prior arbitrations under Article 22 of the DSU, the arbitrators have based their awards upon a counterfactual that assumes compliance by the offending Member with its obligations under the covered agreement by a withdrawal of the offending measure.[7] **Because this is unambiguously the "first objective of the dispute settlement mechanism,"**[8] **Antigua's expectations in this regard cannot be *anything* but reasonable, nor is there any basis for expecting anything less.**

Further, Antigua would point to the pending action by the United States to withdraw its commitment for gambling and betting services under Article XXI of the GATS. In that action, the United States is attempting to withdraw its commitment with respect to *all* gambling and betting services across all modes of supply.[9] **Clearly, the United States must share Antigua's belief that the United States commitment extends to more than just remote gambling on horse race betting or anything else that is less than full market access. Under the circumstances it cannot legitimately argue that Antigua's expectations with respect to market access are not reasonable—*not, however,* to concede that under the circumstances subjective "expectations" are at all relevant.**

2*bis* Could any other scenarios also constitute "a situation that is consistent with the recommendations by the Appellate Body and the findings of the compliance panel"?

As will be discussed in Antigua's response to Question *2ter, (i)* below, it might be possible for the United States to bring itself into compliance with the DSB Rulings by prohibiting the provision of all remote gambling and betting services, whether foreign or domestic and whether provided on an interstate, intrastate or international basis. Otherwise, the *only* scenario that is consistent with the DSB Rulings is for the United States to provide Antiguan gambling and betting service suppliers with full market access to consumers in the United States.

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[6] **"The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement." Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996), p. 15.**

[7] **As will be explained below in Antigua's response to Question 7, this was even the case in *EC – Bananas (US)*.**

[8] **DSU, Article 3.7.**

[9] **S/SECRET/10 (8 May 2007).**

For the Arbitrators to base the level of nullification or impairment in this case upon a counterfactual where the United States complies with the DSB Rulings by prohibiting all remote gambling would be absurd and make a mockery of the entire WTO dispute resolution process. It would in essence give the United States the benefit of compliance without actually having to comply and vitiate the assumption of nullification or impairment to which Antigua is entitled.

Antigua recalls that the primary issue before the Arbitrators is whether the level of suspension of concessions or other obligations proposed by Antigua is equivalent to the level of nullification or impairment resulting from the failure of the United States to comply with the DSB Rulings. The DSB Rulings in turn call for the United States to bring itself into compliance with its obligations under Article XVI of the GATS. Accordingly, the level of nullification or impairment must be determined by reference to the benefits accruing to Antigua under Article XVI, including the trade loss suffered by Antiguan operators as a result of the failure of the United States to comply with its obligations under Article XVI.

Any other "compliance scenario" would require reference to some other provision of the GATS. Antigua does not see why or how compliance scenarios under or requiring recourse to *other* provisions of the GATS are relevant for determining the level of nullification or impairment suffered by Antigua as a result of a violation of *Article XVI* of the GATS. Further, recourse to a counterfactual not based upon simple compliance with Article XVI but rather some other scenario would move the Arbitrators into the realm of speculation that is simply not warranted in the face of the reasonable counterfactual proposed by Antigua in this matter. This is particularly true where any other scenario would involve other provisions of the GATS which the United States either failed to raise or were rejected during the course of the Original Proceeding. Should the Arbitrators set a counterfactual based upon some other permutation of a defence under Article XIV of the GATS? Would the Arbitrators be prepared to accept a counterfactual based upon speculation that the United States could bring itself into compliance by reference to national security considerations?

There is no reason (nor precedent) for the Arbitrators to engage in this kind of speculation. As Antigua noted during the 18 October hearing before the Arbitrators, it is important not to lose track of the purpose of recourse to Article 22 of the DSU. The purpose is to induce compliance by a non-conforming Member with its obligations under a covered agreement as contained in the recommendations and rulings of the DSB. Speculating on possible compliance scenarios with the objective of minimising the impact of the suspension of concessions or other obligations would not be consistent with the express object and purpose of Article 22 of the DSU, particularly where a clear, obvious and reasonable method for determining the level of nullification or impairment exists.

Should the United States believe it can bring itself into compliance with the DSB Rulings by doing something other than providing Antiguan operators with full market access, then let it take some other action or do some other thing. Then, "compliance" can be evaluated under Article 21.5 of the DSU as it is intended to

be. The parties can then fully develop their legal and factual arguments and recourse may be had to the Appellate Body to finally weigh in on any thorny legal issues. But for a panel of arbitrators under Article 22 of the DSU to sort out for themselves various possible ways of compliance in the face of disagreement and real uncertainty over *how else* compliance may be achieved other than withdrawal of the offending measures is not appropriate.

2*ter* Please clarify whether the two following scenarios might constitute such situations:

(i) total prohibition of remote gambling services?

Although the total prohibition by the United States of all remote gambling and betting services would not be *expressly* compliant with the DSB Rulings, Antigua believes that it may well constitute *de facto* compliance, consistent with the approach of the compliance panel in the *US – Shrimp* dispute.[10] As the United States Article XIV defence was predicated upon the prohibition of *all* remote gambling throughout the United States, if the United States took action to actually prohibit *all* remote gambling, then Antigua would be hard pressed not to assume that were the matter brought before a compliance panel under Article 21.5 of the DSU, the panel would find the United States compliant with the DSB Rulings. Of course, to presume the United States would actually do such a thing for purposes of setting the level of Antigua's nullification or impairment would be manifestly absurd.

(ii) removal of discrimination against foreign remote services providers in areas, such as horse racing, where domestic remote provision is accepted or tolerated?

The "removal of discrimination . . . in areas . . . where domestic remote provision is accepted or tolerated" would most certainly *not* bring the United States into compliance with the DSB Rulings. Both the original panel and the Appellate Body found that (i) the United States had made a commitment to "full" market access for gambling and betting services in the US Schedule and (ii) the Federal Trio were contrary to the United States' obligations under Article XVI of the GATS. The United States alleged that it was nonetheless entitled to maintain the offending measures by application of Article XIV of the GATS. In its defence, the United States asserted that it prohibited all remote gambling because, by its very nature, remote gambling possessed "risks" and other pernicious features that were not subject to amelioration through regulation or any other means. If, as is now patently obvious, the United States in fact allows *any* remote gambling, then the entire line of defence is proven false. Clearly, the United States cannot now assert that it is "necessary" to prohibit all remote gambling to protect its citizens if it expressly allows remote gambling in *any* context.

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[10] **Report of the Panel, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW (15 June 2001). Antigua notes that the United States misapplied the *US – Shrimp* ruling in paragraph 23 of its statement at the 18 October meeting. In that case, the panel was assessing the compliance of the United States with a prior ruling after the United States had undertaken a number of activities and measures in response to the earlier ruling.**

Although it could have, the United States never argued that some remote gambling was "better" than others. It never said that remote gambling on horse races was somehow "safer" than remote gambling on football matches or card games. Further, it never argued (nor is there any basis for it to do so under the GATS) that Antiguan service providers should be allowed to do only what and to the extent that domestic providers can lawfully do. In fact, as the original panel observed, a Member offering full market access may well be providing treatment to foreign service providers *more favourable* than that it offers to its domestic suppliers.[11] Constructing a counterfactual in this Arbitration based upon any of these speculative scenarios is without support under the DSU and would be unconscionable—in essence, allowing the United States the benefit of a defence or another argument under the GATS that it failed to assert (or prove) in the course of the Original Proceeding.

As noted above, if the United States wishes to take measures to remove discrimination against foreign remote service providers "in areas . . . where domestic remote provision is accepted or tolerated," then let it do so and have the status of its compliance assessed under Article 21.5 of the DSU—as did the EC in both the *Bananas* and *Hormones* cases. It is not for the Arbitrators to assess whether such hypothetical measures can bring the United States into compliance with its obligations under the GATS, particularly given the fact that no such measures currently exist.

3. *To the United States*: Could you please clarify whether you consider that the scenario envisaged by Antigua in its counterfactual, i.e. that the US would allow Antiguan operators to provide unrestricted access to cross-border remote gambling and betting services to US consumers, would *not* constitute compliance by the US with its WTO obligations?

3*bis* If you consider that such a scenario would or could constitute compliance by the United States with its WTO obligations, please clarify why you consider that it could not be used as the basis for a counterfactual to determine the level of nullification or impairment suffered by Antigua as a result of the US measures found to be inconsistent with US WTO obligations in the underlying proceedings.

3*ter* What other scenarios might constitute compliance by the US with its WTO obligations in this dispute?

3quater You have proposed, as a basis for the counterfactual in this case, a situation where the United States would allow foreign suppliers access to the remote gambling market in respect of horseracing. In light of your explanation that what is to be accounted for is "benefits that can reasonably be expected to accrue to the requesting party" (US written submission, para. 12), could you please clarify why you consider that this particular scenario adequately reflects the benefits that Antigua could have "reasonably expected" to accrue to it? Is this the same notion as the "most likely" scenario you refer to in paragraph 26 of your written submission?

4. *To both parties:* Would it be accurate to state that depending on the counterfactual scenario selected, either all or only a segment of remote gambling services exports by Antigua to the US, notably services exports of remote wagering on horse racing, would need to be looked at to determine the counterfactual level of exports?

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[11] **Panel Report, para. 6.264.**

Antigua disagrees with this proposition in the strongest possible terms. There is simply no basis in the DSB Rulings, under the GATS, under the DSU or otherwise for taking this approach.

5. <u>*To both parties*</u>: Assuming that various counterfactuals might be conceivable based on different scenarios for compliance, what considerations should, in your view, guide the Arbitrator's choice of a counterfactual for the purposes of its assessment?

Antigua believes that the only fundamental counterfactual available to the Arbitrators in this Arbitration is one based upon the United States giving Antiguan service providers full market access on the terms provided in the US Schedule. Assuming, *arguendo*, that other "counterfactuals might be conceivable based upon different scenarios for compliance," Antigua would argue that the overriding consideration of the Arbitrators should be the purpose of Article 22 of the DSU—to "induce compliance" by the offending Member with its obligations under the covered agreements.[12] With "compliance" being the objective, the Arbitrators should be mindful of selecting a counterfactual that not only is permitted and reasonable under the GATS and the DSU but that will encourage compliance. Settling on a counterfactual that imposes the least (or a lesser) level of suspension of concessions or other obligations would run contrary to the objective of encouraging compliance.

Additionally, the Arbitrators should be guided by the burden of proof applicable to this Arbitration. It is not for the United States to convince the Arbitrators that the United States' preferred counterfactual is somehow "better" than that of Antigua—*it is first the obligation of the United States to prove that the Antiguan counterfactual is inconsistent with Article 22.4 of the DSU*.[13] Thus, unless the United States has proven that the counterfactual proposed by Antigua is *not* consistent with the DSU, then the Arbitrators are bound to accept it.

Finally, the Arbitrators should be guided by the advice of prior arbitrators, and not allow themselves to be diverted by speculation encouraged by a Member seeking to minimise the adverse consequences of its own failure to observe its obligations under an international treaty.

6. <u>*To Antigua*</u>: Please comment on the US assertion that "only benefits that can *reasonably* be expected to accrue to the requesting party under the provision breached may serve as a basis for authorization to suspend concessions" (US written submission, para. 12) (emphasis added).

In making the quoted statement, the United States apparently suggests that the only benefit that Antigua is reasonably entitled to expect is market access in respect of horse racing, as this is the purported "most likely scenario" under which the United States can be expected to comply with the DSB Rulings.

This description of the benefit accruing to Antigua is manifestly wrong, as the United States confuses three completely different things. One is the "nature" of

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[12] ***See* the discussion and authorities on this point in the Antigua Submission, paras. 9 -10.**

[13] **Arbitrators' Report, *EC Hormones (US)*, para. 9. *See* Antigua Submission, paras. 13 – 15.**

benefits accruing to Antigua, another is the "level" of benefits that Antigua could reasonably expect and the third is what the United States considers itself "most likely to do" in terms of compliance. While the first two of these concepts each has a role to play in the context of setting the level of nullification or impairment in this Arbitration, the third is completely irrelevant.

Nature of the Benefits

The nature of benefits accruing to Antigua is reflected in Article XVI of the GATS and in the US Schedule.[14] For the purposes of this Arbitration it means that, as established by the original panel and the Appellate Body, the United States is under an obligation to provide unrestricted market access for Antiguan providers of *all* cross-border remote gambling and betting services to consumers in the United States.[15] Whether Antigua should "reasonably" expect such benefit is not an issue. The text of the treaty provides Antigua with a *right* to enjoy that benefit and sets an obligation upon the United States not to interfere with it. The enquiry as to the existence and the nature of Antigua's benefit should therefore start *and* end with where it belongs—with the text of Article XVI of the GATS.

To suggest that Antigua cannot have such expectations because the United States is somehow less likely to implement the DSB Rulings in this way is irrelevant. Antigua notes that the Appellate Body rejected attempts to introduce the concept of "expectations" in the interpretation of commitments in *India – Patents (US)* and *EC – Computer Equipment* by stating that all relevant expectations are already reflected in the text of the treaty.[16] Furthermore, the Appellate Body ruled in *EC – Sugar* that a complaining Member's expectations have no bearing on whether the benefit is nullified or not. There, as is the case with the United States in this Arbitration, the EC argued that to rebut the presumption of nullification or impairment it need only demonstrate that the complaining parties "could not have expected that the EC would take any measure to reduce its exports of C sugar,"[17] an approach that was rejected by the Appellate Body.[18]

Following these principles, the nature of the Antiguan benefit under the GATS in this proceeding has already been established by the DSB when it ruled on the violation by the United States of Article XVI. There can be no discussion before the Arbitrators whether this *benefit* is "likely" or "reasonable."

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[14] **The difference between the "nature" and the "level" of benefits as well as the fact that the "nature" of a benefit is to be assessed vis-à-vis the breached provision follows from the decision by the Arbitrators in *US –Copyright. See* Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1 (9 November 2001), paras. 3.9 - 3.14.**

[15] ***Id*., para. 3.15.**

[16] **Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (19 December 1997), paras. 36-48; Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (5 June 1998), paras. 80-84.**

[17] **Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (28 April 2005), para. 298.**

[18] ***Id*., para. 299.**

Level of the Benefits

Once the nature of benefits is established, the discussion on the level of benefits should focus on the level of nullification or impairment being suffered by the complaining party as a result of the impairment of the benefit by the offending Member. For the purposes of this Arbitration, it means the amount of actual and potential trade lost by Antiguan operators due to the maintenance of the Federal Trio in violation of the GATS. The discussion should not focus on what different types of the remote gambling services should be taken into account--this was already resolved by the original panel and the Appellate Body when they established the nature of impaired benefits—but rather it should focus on the assumptions to consider when determining the amount of the trade loss.

The assumptions applied by Antigua to determine the level of nullification or impairment—given the benefit Antigua is entitled to—are set forth in the Methodology Paper. If the United States takes issue with any of those assumptions, it has the burden to establish that the assumptions are not reasonable. This, however, has absolutely no bearing on the underlying nature of the benefits. In fact, the quotation referred to in paragraph 12 of the written submission of the United States refers to the reasonability of the "level" and not the "nature" of benefits.

"Most Likely" Compliance Scenario

In paragraph 26 of its opening statement to the Arbitrators at the 18 October hearing, the United States claims that in performing their assessment of Antigua's level of nullification or impairment, the Arbitrators should take into account the asserted fact that "compliance through providing market access for horse racing gambling only is by far the most likely scenario" under which the United States would actually comply with the DSB Rulings, if and when it ever chose to do so.

Antigua fails to understand the relevance of this "most likely" compliance scenario to the Arbitrators' task to set the level of nullification or impairment. As explained above, the level of nullification should be set against the nature and the level of benefits accruing to Antigua. The nature of the benefits clearly mandates that the United States provide unrestricted market access for Antiguan providers of *all* cross-border remote gambling and betting services to American consumers. That the United States ostensibly is unable to do so due to its internal politics does not affect Antigua's rights and benefits under the GATS. As the United States very well knows, it is a basic tenet of international law that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Overall, the attempt by the United States to introduce supposed internal problems with compliance into the assessment of the level of nullification or impairment puts the analysis on its head. Rather than determining the level of suspension of concessions or other obligations so as to induce the United States to bring its illegal measures into compliance with the GATS, the United States is inviting the

Arbitrators to set the level of nullification or impairment so low that the United States can avoid compliance altogether.

6bis In responding to this question, please comment on the relevance to the present proceedings of the approach of the Arbitrator in the *US – Copyright* case, as cited by the United States in footnote 9 of its written submission. In this context, please comment specifically on the determinations of the arbitrator in that case at paras. 3.25 to 3.33 of its award.

While the United States has referred to the approach of the arbitrators in *US – Copyright* as support for the proposition that the Arbitrators are to base the level of nullification and impairment upon what Antigua could have "reasonably expected" the United States to do in respect of compliance, this is to misread the *US – Copyright* arbitration award. In fact, a closer reading of the case provides strong support for the position of Antigua in this Arbitration.

In *US – Copyright*, the EC was asserting that the level of nullification and impairment should be set by determining the "value" of the denied rights. The United States, on the other hand, argued much as Antigua argues in this Arbitration, that the level should be equal to the annual benefits lost by EC rights holders as a result of the offending measure.[19] In point of fact, as the arbitrators observed, the parties were not in disagreement over the *nature* of the benefits that should accrue to the EC, but rather over the level of nullification and impairment occasioned by the denial of the benefits.[20]

In the referenced paragraphs of the *US – Copyright* report, the arbitrators were observing that the ability of the EC to extract "value" was largely dependent upon the acts of non-governmental, third party participants—including the EC rights holders themselves. The arbitrators first observed that "as a matter of US law, all users of copyright works by EC right holders *should* be licensed and *should* pay licensing fees. But is it reasonable, in the circumstances of the present dispute, for the European Communities to expect that all users of the works of EC right holders *would* be licensed and *would* pay licensing fees?"[21] In paragraph 3.25, the arbitrators made clear that the United States itself was not the party obligated to ensure that the EC right holders extracted the maximum value out of their rights:

> **"In considering this issue, it is important to recall that the rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii) do not exercise or enforce themselves. In this connection, the Arbitrators note that neither party to this dispute has suggested that, in the event those rights were available under US law, the United States would have any role to play in how those rights would be exercised. Nor has it been asserted that it would be the duty of the United States to enforce those rights on behalf of EC right holders. In the view of the Arbitrators, it is clear that the exercise and enforcement of the rights conferred by Articles 11*bis*(1)(iii) and 11(1)(ii) would not be the responsibility of the United States but of EC right holders."**

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[19] **Arbitrators' Report, *US – Copyright*, paras. 3.3 – 3.5.**
[20] ***Id.*, para. 3.10.**
[21] ***Id*., para. 3.24.**

In the opinion of the arbitrators, the EC could not reasonably expect that "all users of the works of EC right holders would be licensed and would pay licensing fees," particularly in the face of decreasing economic viability of doing so given the vast potential scope of the activity.[22]

However, what the arbitrators were discussing in this context was the ability of the EC to reap the full benefit of its rights from *non-governmental, third party participants* in the marketplace. There was no doubt, to put it in the language of Antigua's response to Question 6 above, as to the "nature of the benefit" in the case and the obligation of the United States:

> **"For purposes of the present dispute, this means that *the United States is under an obligation to make available to EC right holders the exclusive rights* set forth in Articles 11bis(1)(iii) and 11(1)(ii)."**[23]

There was no dispute in *US – Copyright* over what the obligation of the United States was. The "reasonable expectations" applied in that case referred to what the EC could reasonably expect of the non-governmental, third party participants in extracting the full value out of the impaired rights—and most emphatically *not* to what was expected out of the United States government.

In this case, Antigua is not dependent at all upon the acts of non-governmental, third parties—other than to the extent it might be considered dependent upon the use of its offered services by consumers in the United States. Based upon historical data, it is quite clear that American consumers want to use Antiguan gaming services. But what Antigua is entitled to, just as was the EC in *US – Copyright*, is for the United States government to observe *its* obligations under the covered agreements. And, of course, in light of Article I:3 of the GATS, Antigua is also entitled to see that subordinate political entities in the United States act in conformity with the obligations of the United States under the GATS.

Just as the United States argued in *US – Copyright*, in this case Antigua advocates a level of nullification and impairment based upon (i) an assumption on compliance by the United States government with its treaty obligations and (ii) actual historical financial data and reasonable assumptions as to what Antigua could expect in the way of trade were the United States to comply with the GATS.

6ter Please also explain, in this light, whether and, if so, why, you consider that the counterfactual you have proposed, i.e. unrestricted access to the remote gambling market for US consumers, adequately reflects the benefits that Antigua could have been "reasonably expected" to accrue to it as of the end of the reasonable period of time for implementation (RPT) in the circumstances of this case.

As explained above in Antigua's comments on Question 6 above, the nature of Antigua's benefits under Article XVI of the GATS has already been established by the original panel and the Appellate Body and is not before the Arbitrators. As

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[22] ***Id.*, para. 3.33.**
[23] ***Id*., para. 3.15 (emphasis added).**

also explained above, Antigua's benefits are based on its rights under the GATS and therefore cannot be judged by the Arbitrators as "reasonable" or "unreasonable," other than to the extent it is certainly "reasonable" for Antigua to expect the benefits expressly provided by the treaty to accrue to it. The fact is that these rights *exist* and the United States has and is committed to observe them. What is a "reasonable" or "legitimate expectation" in this context is irrelevant for the purpose of interpretation of the United States' treaty obligations and therefore Antigua's entitled benefit. Because the benefit accruing to Antigua under Article XVI of the GATS is "full" and unrestricted access to the remote gambling market for United States consumers it *has* to form the basis for the counterfactual applicable to this Arbitration—as of course has been proposed by Antigua.

7. *To Antigua*: You indicated in your oral statement that your "key starting point" is "just the point used in every Article 22 arbitration in the past" (oral statement para. 21). Could you please elaborate on this statement ? In doing so, please comment on the developments in paragraphs 7.4 to 7.7 of the *EC – Bananas (US)* decision by the arbitrators under Article 22.6 with respect to their choice of a counterfactual.

As Antigua has explained in the Antigua Submission[24] and in these Responses,[25] the "key starting point" for any counterfactual in this Arbitration has to be "full" market access. There is not one arbitration under Article 22 of the DSU where the approach has been any different—the focus has always been on the violation of the particular provision of the applicable covered agreement without reference to hypothetical other methods of compliance that would depend upon recourse to some other provision of the covered agreement.

In this case, for the Arbitrators to apply a counterfactual that provides for any thing other than full market access for Antiguan service providers, the Arbitrators would have to condition what Antigua is entitled to under the strict language of the GATS by application of some other GATS concept, whether a theorised "successful" defence under Article XIV of the GATS, an unprecedented application of Article XVII of the GATS over top of Article XVI or something else entirely. This has never been done before, and for good reason.

The decision of the arbitrators in *EC – Bananas (US)* is wholly consistent with the approach of other arbitrations and of that proposed by Antigua in this Arbitration. In *EC – Bananas (US)* the arbitrators first identified the benefits nullified by the inconsistent EC measures—namely, those under Article XIII of the GATT and Articles II and XVII of the GATS—and then proceeded with the construction of counterfactuals under which those benefits would be restored. Although the arbitrators determined that at least four counterfactuals were feasible in that proceeding, it is without doubt that all four counterfactuals flowed directly from the violated provisions themselves and did not require application of other provisions of the covered agreements. In particular, it was the nature of the claim itself and the language of Article XIII of the GATT which allowed for the several alternatives. It is also clear from the language of the decision that the parties

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[24] **Antigua Submission, paras. 33 – 36.**

[25] ***See* responses to Questions 2 through 6 above.**

themselves did not dispute the feasibility of any of the proposed counterfactuals—nor, of course, was there any discussion about conditioning the level of nullification or impairment based upon what the EC could be "reasonably expected" to do faced with some hypothetical compliance mandate.

The arbitrators in fact quoted Article 3.7 of the DSU, noting that " . . . 'the first objective of the dispute settlement [sic] is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.'"[26] Accordingly, in the view of the arbitrators "what the EC is required to ensure is to terminate discriminatory patterns of licence allocation" in conformity with the applicable provisions of the covered agreements.[27]

The fact that in *EC – Bananas (US)* there were several feasible counterfactuals whereas in this Arbitration there is only one simply underlines the difference between the provisions in question. As the arbitrators in *EC – Bananas (US)* realised, the text of Article XIII of the GATT suggests a number of ways in which a Member can administrate quantitative restrictions in compliance with the provision, whereas by contrast under Article XVI of the GATS, "full market access" can only be accomplished in one way—by providing full market access.

In this respect, this proceeding is more analogous to the situation in *EC – Hormones (US)*, where the arbitrators had only one counterfactual available to them—"what would annual prospective US exports of hormone-treated beef and beef products to the EC be *if the EC had withdrawn the ban [at the end of the reasonable period of time]*?"[28]

8. <u>To Antigua</u>*:* Please clarify the relevance of the set of assumptions you make in relation to the counterfactual at section II.B of your Methodology Paper. Please clarify in particular how they affect the methodologies and calculations presented in the Methodology Paper.

As Antigua observed at the 18 October hearing, points 2 through 5 of the counterfactual presented in Section II.B of the Methodology Paper were intended to make clear what Antigua believes "market access" would entail by way of reference to actions being taken by the United States to impede the operations of Antiguan operators in violation of the GATS.

For example, with respect to point 2, although United States domestic law is fairly well-settled that a betting transaction takes place at the location of the person accepting the wager,[29] United States efforts to prosecute Antiguan operators have

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[26] **Arbitrators' Report, *EC – Bananas (US)*, para. 5.45, *quoting* Article 3.7 of the DSU.**

[27] ***Id*.**

[28] **Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS26/ARB (12 July 1999), para. 38 (emphasis in original).**

[29] ***See, e.g.*, *United States v. Truesdale*, 152 F.3d 443 (5th Cir. 1998); *Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, 55 A.D.2d 295, 296 (N.Y. 3d Dep't 1976), *aff'd*, 44 N.Y.2d 980 (1978);**

by and large ignored this long-held precedent. On the third point, as Antigua has well documented throughout this case, one of the key methods of the United States government in trying to prevent Antiguan operators from offering services to United States consumers has been interfering with the transmission of funds to and from customers and operators, with these efforts culminating in the 2006 passage of the UIGEA, criminalising financial transactions for any foreign service provider, none of whom can meet the various domestic exceptions provided in the statute. "Market access" while continuing to prevent the flow of funds would be virtually meaningless.

The final two points are directed at the concept that Antiguan operators should be allowed to conduct their business in the ordinary course, which would involve advertising and the conduct of their business without having to bear the extraordinary costs of the relentless persecution of the Antiguan industry by the United States government in contravention of international law.

9. *To the United States:* Assuming the counterfactual scenario proposed by Antigua, i.e. a situation where the US would give unrestricted access to Antiguan operators to the US market in order to provide cross-border remote gambling and betting services to US consumers, could you please calculate the level of nullification or impairment suffered by Antigua as a result of the US measures found to be inconsistent with US WTO obligations in the underlying proceedings.

10. *To Antigua*: Assuming the counterfactual scenario proposed by the United States, i.e. a situation where the United States would allow foreign suppliers access to the remote gambling market in respect of horseracing, could you please calculate the level of nullification or impairment suffered by Antigua as a result of the US measures found to be inconsistent with US WTO obligations in the underlying proceedings.

Even assuming this baseless counterfactual, Antigua is unable to meaningfully calculate a level of nullification or impairment based solely upon wagering in horse racing. GBGC does not maintain country-specific statistics broken down by particular sports betting gambling service, and despite substantial effort Antigua has been unable to locate any alternative data that would do so. Antigua believes that its operators do very little business in horse race betting, and it has no data itself, even informal, that would allow for the assignment of an annual revenue figure in respect of horse race betting. In light of this informational vacuum, any calculation that Antigua would perform would be so based upon speculation—as was that performed by the United States in its written submission[30]—as to be fundamentally worthless.

Data

11. *To both parties:* Would you agree that "remote gaming revenues" and "remote gambling revenues" are used interchangeably? Would you further agree that Antigua's remote gambling revenues (amounts wagered minus payouts) are a good proxy for Antigua's exports of remote gambling services? If such is the case, is it correct to assume that whenever reference is made in these proceedings to Antigua's remote gambling revenues it refers to amounts wagered minus payouts

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***McQuesten v. Steinmetz*, 58 A. 876, 877 (N.H. 1904); *Lescallett v. Commonwealth*, 17 S.E. 546, 548 (Va. 1893).**

[30] ***See* US 22 Submission, paras. 49 – 52.**

and, for the purposes of this arbitration, can be considered as constituting the figure for Antigua's exports of remote gambling services?

The terms "remote gaming revenues" and "remote gambling revenues" are the same and may be used interchangeably. Antigua further agrees that "remote gambling revenues" is defined as total amount wagered less payouts, and that remote gaming revenues are the best proxy for Antigua's exports of remote gaming services. All Antiguan remote gaming revenues are comprised of exports, and there are no domestic revenues in respect of remote gaming.

12. *To both parties*: Since when does a market for remote gambling services exist? In addressing this question, please indicate:

Although remote gambling services have likely been around since the invention of the telephone, the modern market for remote gaming started in the United States in the 1970s with the advent of sanctioned telephone betting on horse races. With the advent of the Internet, remote gaming as it exists today started around 1994.

Please see the letter dated 25 October 2007 from GBGC to Mark Mendel attached as *Exhibit AB-14* (the "*GBGC Letter*"), paragraph 6, as well as Chapter 2 of the *National Gambling Impact Study Commission Final Report* (18 June 1999) (the "*NGISC Final Report*") attached as *Exhibit AB-15*.

(a) whether it is possible to obtain earlier data than Antigua has provided in its Methodology Paper, e.g. as from 1995; and

Antigua believes the best and most reliable source of data for global remote gaming is GBGC, and GBGC did not compile statistics any earlier than 1998. The complete statistics are appended to the GBGC Letter as *Exhibits AB-14.1* and *14.2*.

(b) whether it is possible to obtain data on a quarterly basis instead of annual statistics.

GBGC maintains quarterly statistics on poker only at the current time, but updates and refines its annual figures on a quarterly basis. Please see the GBGC Letter, paragraph 4.

To the extent that earlier data and data on a quarterly basis are available in relation to any of the data-related questions below, it would be useful if you could provide the Arbitrator with quarterly and annual data for the 1995 to 2006 time period.

13. *To Antigua*: Please define precisely the following terms as used in your submissions or attachments thereto, and how they are calculated:

(a) "Remote gaming revenue";

This is the gross amount wagered minus payments or prizes.

(b) "Online gross gambling yield";

This is just another way of expressing remote gaming revenue.

(c) "Average margin of operators".

This is another way of expressing the "hold" percentage, or the amount earned by an operator with respect to the amount bet. For example, a margin of 3.5 percent means for every US $100.00 bet, the operator would retain on average US $3.50.

14. _To both parties_: Would it be possible that you provide the Arbitrator with quarterly/annual data for the time period 1995/1999 to 2006 on Antiguan remote gambling revenue from the United States.

There is no specific data available that breaks out Antiguan remote gambling specifically from customers in the United States. As noted in the Antigua Submission, Antigua believes that at least 80 percent of Antiguan remote gambling revenue is attributable to customers in the United States.[31] GBGC estimates the percentage at between 80 and 90 percent,[32] and Antigua's economic consultant observes in his Expert Report dated 28 August 2007 attached as *Exhibit AB-16* (the "*Expert Report*") that from conversations with Antiguan operators some estimate their United States revenues to be between 90 and 95 percent, while the Directorate[33] uses an 80 percent figure.[34] Public information of listed remote gaming companies generally supports these estimates.[35]

15. _To both parties_: For the same time period (1995/1999 to 2006) would it be possible that you provide the Arbitrator with a breakdown of Antiguan remote gambling revenue from the United States by type of remote gambling activity, notably gambling on horse racing.

Please refer to the response to Question 10 above. GBGC does not have this data, nor has Antigua been able to discover a credible source. As a general idea of the American market however, in August 2002, International Gaming & Wagering Business published a report on remote gambling that stated, of the total amount remote wagers placed by customers in the United States, 42 percent were placed on casino games, 31 percent on sports events, 22 percent on horse races and five percent in other categories, such as lotteries.[36]

16. _To the United States:_ You provide statistics that horserace gambling accounts for about 7 per cent of total non-remote gambling in the US market. Why do you think it is a fair assumption to make that the shares of different types of activities in the remote gambling market of the US are identical to the shares of the US non-remote gambling market, on which official statistics exist? If so, why? Would it be possible that you provide the Arbitrator with alternative statistics, such as a breakdown by type of remote gambling activity from other countries or individual states in the United States.

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[31] **Antigua Submission, para. 112.**

[32] **GBGC Letter, para. 7.**

[33] ***See* Antigua Submission, para. 62.**

[34] **Expert Report, p. 12, fn. 24.**

[35] ***See Exhibit AB-17*, Sections A and B (PartyGaming: 83 percent of revenues from United States customers prior to passage of the UIGEA; Sportingbet: reporting the United States as the dominant source of business; BetOnSports: reporting in 2005 that 80 percent of its customers and 98 percent of its revenue came from United States customers).**

[36] **The Rise and Rise of Internet Gaming, A Special Supplement to International Gaming & Wagering Business, p. 6 (August 2002).**

17. *To the United States:* You then apply the share for horserace gambling of the US non-remote market to Antigua's exports. You appear to assume implicitly that the composition of Antigua's gambling services exports to the US is exactly identical in terms of gambling activities, i.e. that Antigua serves the US market in exactly these proportions. Could you please explain how this assumption may be justified?

18. *To Antigua*: In paras. 118-119 of your written submission, you mention that Antigua has always been predominantly sports betting oriented. Could you provide a breakdown of Antigua's exports of remote gambling services (global or to the US) by type of gambling activity, e.g. along the lines of the one contained in Exhibit US-1 of the US written submission, or at least provide a breakdown of sports betting as compared to other forms of online gambling. We also note that in response to our questions, on 18 October 2007, you mentioned that GBGC has an "underlying" gambling data base from which data by country, by remote/non-remote market and by type of activity can be extracted upon request.

There is nothing within the GBGC data that would provide this kind of information and despite Antigua's best efforts over the past days no data has been located to assist in this regard. Trying to extrapolate from the public company filings is not helpful, as most of them concentrate on one basic product or have affiliates in a number of jurisdictions offering different products. Antigua attempted to acquire anecdotal information from operators, but there is such a variety among the operators that this was impossible to do as well.

19. *To Antigua*: In your methodology paper, you provide historical GBGC data of Antigua's global remote gambling revenues. Could you provide data on the US market share in Antigua's global remote gambling revenue for the period 1995/1999 to 2006.

Please see the response to Question 14 above.

20. *To Antigua*: Would it be possible that you provide the Arbitrator with historical data (1995/1999-2006) on Antigua's share of the global remote gambling market excluding the United States market.

Without being able to definitively ascertain what share of Antiguan remote gaming revenue comes from United States customers, it is of course not possible to determine what its share of the global remote gaming market excluding the United States is. However, given Antigua's belief that United States consumers account for substantially all of Antigua's remote gaming revenue, it would follow that the Antiguan share of the global market, excluding the United States, would be materially less than its share of the overall global remote gaming market as presented in the Methodology Paper.

21. *To Antigua*: In section II.A of your methodology paper, you mention that in 1999, there were 119 licensed remote gaming operators in Antigua employing an estimated 3,000 persons. In our meeting of 18 October 2007, you stated that currently there are around 30 operators left. Would it be possible that you provide the Arbitrator with an annual/quarterly time series of employment in the Antiguan remote gambling sector covering the years 1995/1999 to 2006.

The following chart has been compiled from information provided by the Directorate, and reports employment directly by remote gaming operators within Antigua. Antigua believes that the earlier, unofficial references to "an estimated

3,000 persons" probably took into account indirect employment (such as suppliers, contractors and other support personnel) as well as direct employment.

Year	Total Licence Holders/ Operators	Interactive Wagering Licence Holders	Interactive Gaming Licence Holders	Total Licencing and Regulatory Fees Paid to Directorate**	Number of Employees Directly Employed by Licence Holders
1998	29	12	17	US $1,650,000	*
1999	71	36	35	US $6,650,000	*
2000	93	19	74	US $8,825,000	1,900
2001	59	13	46	US $4,154,000	1,014
2002	38	14	24	US $2,634,000	328
2003	39	14	25	US $1,894,755	431
2004	47	18	29	US $3,233,770	492
2005	44	18	26	US $2,778,500	628
2006	41	15	26	US $1,984,750	442
2007	30	13	17	US $2,779,250	333

* Data for these years cannot be located.

22. *To both parties*: For comparison purposes, would it be possible that you provide the Arbitrator with information (preferably time series data for the 1995/1999 to 2006 period) from leading international publicly listed companies, which are active in the online gambling business, in particular quarterly/annual employment and revenue data. On the latter, a breakdown by type of gambling activity and by country, where revenues are generated, would be useful.

Antigua has gathered as much of this information as reasonably possible in the time allocated, and compiled it within the Gaming Industry Data Summary (the "*Data Summary*") attached as *Exhibit AB-17*. Further, GBGC has compiled a list of the top 32 global remote gaming operators with annual revenue figures for 2001 through 2006, which is included with the GBGC Letter as *Exhibit AB-14.3*.

23. *To the United States*: In para. 43 of your written submission, you state that it is plausible that operators in other locations have increasingly entered the market. In order to substantiate that claim, could you provide data, for the 1995/1999 to 2006 time period, on global remote gambling revenues broken down by country of origin.

24. *To both parties*: Would it be possible that you provide the Arbitrator with quarterly/annual data on total revenues (i.e. the market size) for both the remote and non-remote gambling market in the United States for the 1995/1999 to 2006 time period. Could you also provide a breakdown for both the remote and non-remote gambling market in the United States for the 1995/1999 to 2006 time period by type of gambling activity, notably horse racing. If data for remote gambling is not available at the country level, could you provide the above information for individual states in the United States.

CCA publishes data on the gross total revenues earned within the United States gambling market. This data has been published most years in "International

Gaming & Wagering," a leading gaming publication. Some data is also published by CCA on its Internet web site. Antigua has obtained the gross annual wager reports for the period of 1996 through 2006, excluding 1998 (which was not available to Antigua).

The first chart shown below is a summary of the total revenues of the United States gaming market, excluding remote gambling, for the 1995 to 2006 time period (excluding 1998). The charts thereafter provide CCA's annual breakdown of these revenues among different gaming products.[37] Figures are in billions of United States dollars.

United States
Total Gaming Revenues 1995 to 2006

Year	United States Gross Annual Gaming Revenues	United States "Internet Gambling" Revenues*
1995	$ 44.4	--
1996	$ 47.9	--
1997	$ 50.9	--
1998	---	--
1999	$ 58.3	$ 1.1
2000	$ 61.6	$ 2.2
2001	$ 64.2	$ 3.0
2002	$ 68.6	$ 4.0
2003	$ 72.9	$ 5.7
2004	$ 78.8	$ 4.2
2005	$ 84.4	$ 5.9
2006	$ 90.9	$ 5.8

* Remote gambling revenues are not included in CCA's total gross wagering revenue figures.

[37] Sources: 1995 figures from Christiansen/Cummings Associates, Inc., 1996 Gross Annual Wager: Table 4: 1995 Gross Gambling Revenues by Industry and Change from 1994, International Gaming & Wagering (August 1996); 1996 and 1997 figures from Christiansen/Cummings Associates, Inc., Gross Annual Wager: Table 4: 1997 Gross Gambling Revenues by Industry and Change from 1996, International Gaming & Wagering Business (August 1998); 1999 figures from Christiansen Captial Advisors, 2000 Gross Annual Wager of the United States: Table: 2000 Gross Gambling Revenues by Industry and Change from 1999, International Gaming & Wagering (August 2001); 2000 and 2001 figures from Christiansen Capital Advisors, 2001 Gross Annual Wager of the United States: Table: 2001 Gross Gambling Revenues by Industry and Change from 2000, International Gaming & Wagering (August 2002); 2002 and 2003 figures from Christiansen Capital Advisors, 2003 Gross Annual Wager of the United States: Table 4: 2003 Gross Gambling Revenues by Industry and Change from 2002; 2004 figures from Christiansen Captial Advisors, 2005 Gross Gambling Revenues by Industry and Change from 2004, International Gaming & Wagering (November 2006); 2005 and 2006 from Christiansen Captial Advisors, 2007 Gross Annual Wager: Exhibit 1: 2006 Gross Gambling Revenues by Industry and Change from 2005.

1995

Category	Revenues
Pari-mutuel	$ 3.7
Lottery	$ 15.2
Casino	$ 18.0
Sports Book	$ 0.1
Indian	$ 4.0
Other (Bingo, Charitable, Cardrooms)	$ 6.2
Total	**$ 44.4**

1996

Category	Revenues
Pari-mutuel	$ 3.8
Lottery	$ 16.2
Casino	$ 19.1
Sports Book	$ 0.1
Indian	$ 5.6
Other (Bingo, Charitable, Cardrooms)	$ 3.1
Total	**$ 47.9**

1997

Category	Revenues
Pari-mutuel	$ 3.8
Lottery	$ 16.6
Casino	$ 20.5
Sports Book	$ 0.1
Indian	$ 6.7
Other (Bingo, Charitable, Cardrooms)	$ 2.3
Total	**$ 50.9**

1999

Category	Revenues
Pari-mutuel	$ 3.9
Lottery	$ 16.3
Casino	$ 24.9
Sports Book	$ 0.1
Indian	$ 9.6
Other (Bingo, Charitable, Cardrooms)	$ 3.5
Internet (not included in the total)	*$ 1.1*
Total	**$ 58.3**

2000

Category	**Revenues**
Pari-mutuel	$ 3.8
Lottery	$ 17.3
Casino	$ 26.5
Sports Book	$ 0.1
Indian	$ 10.4
Other (Bingo, Charitable, Cardrooms)	$ 3.5
Internet (not included in the total)	*$ 2.2*
Total	**$ 61.6**

2001

Category	**Revenues**
Pari-mutuel	$ 3.8
Lottery	$ 17.6
Casino	$ 27.3
Sports Book	$ 0.1
Indian	$ 12.1
Other (Bingo, Charitable)	$ 3.3
Internet (not included in the total)	*$ 3.0*
Total	**$ 64.2**

2002

Category	**Revenues**
Pari-mutuel	$ 3.9
Lottery	$ 18.7
Casino	$ 27.9
Sports Book	$ 0.1
Indian	$ 14.5
Other (Bingo, Charitable)	$ 3.5
Internet (not included in the total)	*$ 4.0*
Total	**$ 68.6**

2003

Category	Revenues
Pari-mutuel	$ 3.8
Lottery	$ 19.9
Casino	$ 28.7
Sports Book	$ 0.1
Indian	$ 16.8
Other (Bingo, Charitable, Cardrooms)	$ 3.6
Internet (not included in the total)	*$ 5.7*
Total	**$ 72.9**

2004

Category	Revenues
Pari-mutuel	$ 3.7
Lottery	$ 21.6
Casino	$ 30.6
Sports Book	$ 0.1
Indian	$ 19.4
Other (Bingo, Charitable, Cardrooms)	$ 3.4
Internet (not included in the total)	*$ 4.2*
Total	**$ 78.8**

2005

Category	Revenues
Pari-mutuel	$ 3.3
Lottery	$ 22.9
Casino	$ 31.8
Sports Book	$ 0.1
Indian	$ 22.6
Other (Bingo, Charitable, Cardrooms)	$ 3.7
Internet (not included in the total)	*$ 5.9*
Total	**$ 84.4**

2006

Category	Revenues
Pari-mutuel	$ 3.6
Lottery	$ 24.6
Casino	$ 34.1
Sports Book	$ 0.2
Indian	$ 25.1
Other (Bingo, Charitable, Cardrooms)	$ 3.3
Internet (not included in the total)	*$ 5.8*
Total	**$ 90.9**

25. *To both parties*: Would it be possible that you provide the Arbitrator, for the 1995/1999 to 2006 time period, with quarterly/annual data on total revenues (i.e. the market size) for the remote gambling market in other countries, such as Australia, Canada or the United Kingdom. To what extent could that information be relevant to the Arbitrator in the present case, and if not, why?

GBGC's Quarterly eGaming Statistics Report includes data on the annual remote wagering markets broken down by certain countries and regions. In its summary of the global online gaming industry (which can be found within the Excel spreadsheet data accompanying the GBGC Letter under the tab "Online"), GBGC provides remote gaming revenue broken down into six global regions.[38] The remote gaming revenues are presented both in terms of "player location" and "operator location." The revenues are presented annually, with historical data from 1998 through 2006 and estimates for 2007 through 2012. GBGC's Quarterly eGaming Statistics Report also includes certain data on a country-by-country basis (found under the tab "Nations"). This portion of the report includes the number of accounts, revenues-per-account and market size for most large economies, including the United States, the United Kingdom, Australia and Canada.

Under the national breakdown of the report, the remote gambling market size of most nations can be determined. For example, this portion of the report shows that in 2006 the remote gaming markets of the United States, United Kingdom, Australia and Canada were:

United States: 2006 Remote Gaming Market

Remote Wagering Product	Market Size	Global Share
Sportsbetting	$2.1 billion	42 percent
Casino wagering	$2.2 billion	52 percent
Poker	$1.8 billion	58 percent
Bingo	$ 0.2 billion	27 percent
Total	**$6.3 billion**	

United Kingdom: 2006 Remote Gaming Market

Remote Wagering Product	Market Size	Global Share
Sportsbetting	$ 595 million	12 percent
Casino wagering	$ 160 million	5 percent
Poker	$ 288 million	9 percent
Bingo	$ 185 million	26 percent
Lottery	$ 384 million	
Total	**$1,612 million**	

Australia: 2006 Remote Gaming Market

Remote Wagering Product	Market Size	Global Share
Sportsbetting	$ 311 million	6 percent
Casino wagering	$ 246 million	7 percent
Poker	$ 21 million	>1 percent
Bingo	$ 12 million	2 percent
Total	**$ 590 million**	

Canada: 2006 Remote Gaming Market

Remote Wagering Product	Market Size	Global Share
Sportsbetting	$ 156 million	3 percent
Casino wagering	$ 174 million	5 percent
Poker	$ 202 million	6 percent
Bingo	$ 25 million	4 percent
Total	**$ 557 million**	

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[38] **The six global regions are (1) Africa; (2) Asia and the Middle East; (3) Central/South America and the Caribbean; (4) Europe; (5) North America; and (6) Oceania.**

Note as well that the GBGC data on the size of the United States remote gaming market (US $6.3 billion in 2006) roughly correlates with the same data published by CCA (US $5.8 billion in 2006).[39]

26. To Antigua: As regards the GBGC estimates referred to in your methodology paper:

(a) Would you be able to support the GBGC estimates with any published official statistics? Could you give a more complete picture of which organizations or businesses refer to and back up the GBGC data and to what end these organizations and businesses use the GBGC data?

Please see paragraph 2 of the GBGC Letter and the related attachment, *Exhibit AB-14.4*.

(b) In your written submission, you indicate that "the GBGC data was not prepared for Antigua and is publicly available (para. 96). However, in its written submission, the US notes that the "Quarterly eGaming Statistics Report" is not referred to on the GBGC website (para. 28). Please clarify.

As Antigua said at the 18 October hearing, the GBGC data—including the Quarterly eGaming Statistics Report, is publicly available in the sense that any one who is willing to pay for the information may have access to it. Obviously, just because something must be paid for does not make it not "publicly available." It is perhaps a truism to note that virtually all publicly available goods and services must be purchased in one way or another.

(c) For the purposes of this arbitration procedure, would Antigua be in a position to supply a copy of the entire "Quarterly eGaming Statistics Report" from which it has extracted certain tables attached to its methodology paper and written submission?

Please see the data included with the GBGC Letter (*Exhibits AB-14.1* and *14.2*).

(d) In para. 45 of your written submission you mention that GBGC produces a quarterly online industry data set, supposedly in the "Quarterly eGaming Statistics Report". In Exhibit AB-2, you only provide annual statistics contained in that report. Does the report contain quarterly statistics as well?

As a general matter, GBGC updates its annual information on an on-going basis which is reflected in the data presented in the Quarterly eGaming Statistics Reports. As stated in paragraph 4 of the GBGC Letter, currently the only quarterly statistics maintained by GBGC are for remote gambling on poker.

(e) How is the GBGC data, and especially the data concerning Antiguan operators, collected?

Please see *Exhibit AB-1*, included with the Antigua Submission, and paragraphs 4 and 5 of the GBGC Letter. A key facet of the GBGC data gathering methodology

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[39] **Christiansen Capital Advisors, 2007 Gross Annual Wagers: Exhibit 1: 2006 Gross Gambling Revenues by Industry and Change from 2005.**

is to assign revenues to the location of the server that processes the wager. This is in conformity with generally accepted practice regarding transactions that take place on the Internet and is also consistent with United States law on the subject.[40]

(f) The extracts of the Quarterly eGaming Statistics Report attached to your written submission in Exhibit AB-2 do not contain Antigua's global remote gaming revenues, but only a breakdown by region. Have the Antiguan figures used in your methodology paper been established by GBGC upon your request or are they a standing feature of the report?

They have been *provided* (not *established*) by GBGC to Antigua upon its request, and are not a standing feature of the report.

27. To Antigua: Would you be in a position to support the GBGC estimates and other data which you have made available to the Arbitrator by providing financial statements of the Antiguan companies concerned for the years in question, together with evidence that the financial statements have been audited by an independent outside auditor? We note, in this regard, that in our meeting of 18 October 2007, you mentioned that Antiguan remote gambling operators, at least since one and a half years ago, were required to file financial statements with the Director of Gaming. Could you provide this information to the Arbitrator.

After consulting with the Directorate and select Antiguan operators, Antigua has determined that it would not be appropriate under the circumstances to provide this information in this Arbitration. Antigua realises that the Arbitrators are simply seeking confirmation of the GBGC data as well as the conclusions of the Directorate expressed in the letter included with the Antigua Submission as *Exhibit AB-10*. However, in light of the prosecution efforts of the United States government against Antiguan and other remote gaming operators, as well as service providers to the industry, Antigua believes the disclosure of this information would subject the applicable operators to significant risk.

In recent prosecutions, the United States government has used filings of public companies as a "road map" of sorts to the criminal charges brought against the companies or their principals. For example, in the criminal complaint brought against the two founders of Neteller plc ("*Neteller*"), the United States asserted that Neteller violated federal criminal law based upon statements made in the prospectus from Neteller's initial public offering to be listed on the London Stock Exchange as well as in the company's 2004 and 2005 annual reports.[41] According to the Neteller prospectus, the majority of Neteller's services were for North American online gamblers. As of 2004, Neteller reported in its prospectus that it had over 685,000 member accounts, 88 percent of which belonged to North American residents, and that 95 percent of its revenues were derived from processing money transfers pertaining to the remote gambling market. Neteller's

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[40] ***See* the response to Question 8 above, footnote 29.**

[41] ***Complaint* filed by the United States on 16 January 2007 against Stephen Eric Lawrence; U.S. v. Lawrence, Case No. 1:07-mj-00059-UA pending in the United States District Court for the Southern District of New York, para. 6, 7(a), 7(b), and 7(c). *See also Complaint* filed by the United States on 16 January 2007 against John David Lefebvre; U.S. v. Lefebvre, Case No. 1:07-mj-00060-UA pending in the United States District Court for the Southern District of New York, para. 6, 7(a), 7(b), and 7(c). *See Exhibit AB-18*.**

annual reports further stated that the company processed US $3.4 billion in financial transactions in 2004, US $7.3 billion in 2005 and US $5.1 billion in the first half of 2006. The company's filings also indicated that approximately 75 percent of revenues are derived from American customers. It is clear from the charging instruments that the United States prosecutors used the public information as the primary basis for the criminal complaints.

As another example, in 2006, the United States indicted a number of individuals and companies associated with Betonsports plc, an AIM listed company ("*BOS*") with a significant Antiguan presence. In an excellent illustration of how the United States is more than happy to rely on "big numbers" when it suits its purposes, in the indictment[42] the United States government used figures supplied in BOS public filings as the primary basis for the criminal complaints. For example (i) in paragraph 24 of the indictment the United States alleges that 98 percent of BOS customers were from the United States; (ii) in paragraph 40 the United States claims that BOS received wagers of over US $1.1 billion in the one year period from 29 January 2001 to 3 February 2002; (iii) in paragraph 41 the United States claims that wagers for the next annual period were in excess of US $1.2 billion; (iv) in paragraph 42 the United States claims that wagers for the next annual period were also in excess of US $1.2 billion; and (v) in paragraph 46, the United States makes the claim that BOS has available for forfeit to the United States "at least $4.5 billion dollars."

Under the circumstances, it should not be difficult to understand why no Antiguan operators want to disclose their financial information to the United States government.

28. *To Antigua*: In section II.A of your methodology paper, you mention that in 1999, there were 119 licensed remote gaming operators. Do these operators have any reporting requirements? Do they pay license fees? If so, on what basis are the amounts due assessed?

Under the current Gaming Regulations,[43] Antiguan operators are subject to a number of reporting obligations, including:

- **to identify and provide background information about all key persons associated with a licenced operator (sections 62 – 79);**
- **to report any change in control of the licenced operator (sections 22-26);**
- **to report any other gaming licences held by the operator (section 92);**
- **to provide the identity of any payment processors used by the licenced operator (section 89);**
- **to report any suspicious transactions, money laundering or dishonest or fraudulent acts (sections 96, 221, 223);**

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[42] ***Indictment* filed by the United States on 1 June 2006 against the criminal defendants in *United States v. BetOnSports Plc, et. al*, Case Number 4:06-cr-00337-CEJ pending in the United States District Court for the Eastern District of Missouri. *See Exhibit AB-19.***

[43] **Statutory Instruments Antigua and Barbuda, 2001 No. 16, The "Interactive Gaming and Interactive Wagering Regulations of 2001." In connection with the 2007 amendments, they have been redesignated as the "Interactive Gaming and Interactive Wagering Regulations 2007."**

- **to provide a submission describing all control systems so they may be reviewed and approved by the Directorate (sections 102-110);**
- **to provide the Directorate with a certificate that all gaming systems have been tested by an approved testing entity (sections 121-122);**
- **to inform the Directorate as to the location of backup servers (section 131);**
- **to provide the Directorate with any financial or other information requested by the Directorate in an investigation (section 161);**
- **to provide the Directorate, at least once per year, access to and examination of the books, accounts and financial statements of each licence holder for the financial year to be by an appropriate official or an examiner appointed by the Directorate; (section 187);**
- **to provide the Directorate with a semi-annual statement of assets and liabilities, an annual audited return and an annual certification attesting to the ownership of the operators, and with the identity of the directors and officers of the operator (section 191); and**
- **to report all complaints or disputes, concerning: (a) underage gaming or wagering; b) compulsive, problem or pathological gaming or wagering; or (c) fairness (section 192).**

Licencing fees imposed by the Directorate are in the nature of "flat" fees, and are not dependent upon the size, revenues, profits or any other individual characteristics of the particular operators. Current fees are as follows (and historically have been relatively similar):

****Licensing and Regulatory Fees**	**Amount**
Interactive Wagering Licence	US $50,000
Interactive Gaming Licence	US $75,000
Key Person License (Initial)	US $ 1,000
Annual Key Person Licence	US $ 250
Due Diligence Fees	US $10,000
Annual Renewal Application Fee	US $ 5,000
Incorporation Fees	US $ 300
Registration	US $ 300
Reserve Requirements Per Company (effective 2007)	US $100,000

** The fee structure was increased in 2007 for most categories but remains "flat" in nature.

29. *To Antigua*: In para. 99 of your written submission and in the letter by the Director of Gaming (Exhibit AB-10), it is mentioned that five Antiguan remote gaming operators "confidentially reported collectively earning gross profits of US$ 895.7 million in 2005". Would it be possible to get financial statements of, at least, these companies?

Please see the response to Question 27 above.

30. *To Antigua*: In para. 45 of your written submission, you mention that GBGC "produces a quarterly online industry data set based on *listed company results*" etc. (emphasis added). Have any Antiguan companies been (or still are) listed on the stock exchange and have they accordingly followed (or still follow) certain disclosure requirements? If so, please provide any historical data of

these publicly listed companies, notably on their revenues and employment. Please also clarify how GBGC obtains the data specifically on Antiguan online gambling operators that are not publicly listed companies.

At one time, subsidiaries of four publicly listed companies held Antiguan licences and conducted remote gaming services from premises in Antigua. The public companies were Sportingbet plc, Betcorp Ltd. and BetonSports plc (all London Stock Exchange, AIM companies) and Unibet Group plc, listed on the Stockholm Stock Exchange. As a result of the aggressive actions of the United States against non-domestic remote gaming operations in the 2005 to 2006 time period, all of these companies have either ceased doing business altogether or have terminated operations in Antigua.

Historical data for each of these companies is included within the Data Summary attached as *Exhibit AB-17* (Section B).

The information contained in the Data Summary is interesting in a number of respects—particularly in the wide disparities between the various companies with respect to revenue per employee. As Antigua said at the 18 October hearing, in an Internet-based business, revenue per employee is not as reliable a measurement of overall revenue as it might be in a manufacturing industry or a bricks-and-mortar service industry.

Further, confirming what was said at the hearing, the differences between even remote gaming companies can be very significant from operator to operator. Some operators rely almost completely on their software to run their businesses, providing very little in the way of customer service. Other companies have significant call centre support for customer enquires, and some actually do a considerable amount of wager acceptance over the telephone. In any event, the reported revenue per employee numbers are broadly supportive of the GBGC revenues reported for Antiguan operators.

With respect to how GBGC obtains non-public data, see paragraph 4 of the GBGC Letter.

31. To Antigua: The 2007 Trade Policy Review on Antigua and Barbuda, Report by the Secretariat (document WT/TPR/S/190/ATG dated 1 October 2007) reads as follows: "Offshore business companies must be incorporated under the International Business Corporations (IBC) Act (as amended), and are regulated by the Financial Services Regulatory Commission. These companies enjoy the same tax exemptions as offshore financial services companies (see above), with the exception of an income tax of 3% introduced in 2001, which they must pay. (footnote: This tax was introduced by The International Business Corporation (Amendment) Act, 2001.) [...] At May 2007, there were 44 licences issued for the operation of interactive wagering and/or gaming in Antigua and Barbuda, for 25 such companies. Gaming companies contributed US$2.5 million in revenue for the FSRC in 2006." Could you clarify the tax status of remote gaming operators, the basis on which the US$2.5 million revenue has been calculated and collected, and provide the same data for each year since the entry into force of the International Business Corporation (Amendment) Act, 2001.

The three percent tax introduced in 2001 was repealed in 2003. This tax was in fact never imposed, implemented or collected. Currently, remote gaming operators are

subject to no taxes in Antigua other than to the extent employees are subject to the Antiguan income tax. Also, in January 2007 a country-wide sales (or value added) tax was introduced which applies to most domestic transactions. The only direct fees paid by remote gaming operators to the Antiguan government are in respect of licencing and related fees. The historical fee structure is in the chart in the response to Question 28 above, and the historical revenue in respect of those fees is in the chart in the response to Question 21 above.

32. *To Antigua*: Would you be in a position to identify the "independent, third party group of economic consultants" referred to in your Methodology Paper and Written Submission?

The economist that gathered the data and prepared the economic analysis for Antigua was Alan P. Meister, Ph.D. of Analysis Group (www.analysisgroup.com), an independent group of economic consultants with offices across the United States. Dr Meister was selected by Antigua on the basis of his reputation as an expert in the area of economic issues relating to the gaming industry. Prior to his selection, Dr Meister had no connection with Antigua or its legal advisors. The Expert Report prepared by Dr Meister and included with these Responses formed the basis for the preparation of the Methodology Paper.

33. *To the United States:* You observe that the GBGC estimation of Antigua's remote gambling revenue dwarfs Antigua's officially reported GDP. GDP is a value-added concepts and, in addition, contains net exports (i.e. the difference between exports and imports). Small economies are known to be "naturally open" and have export plus import to GDP well over 100 per cent. Could you please elaborate why large export revenues as a share of GDP make Antigua's claims unrealistic? In other words, please explain why you do not believe that a situation in which trade revenues exceed GDP, common in several other trading economies, could also exist in Antigua.

34. *To the United States:* You note that, in its request pursuant to Article 22.2, Antigua had stated that its "gambling and betting services sector accounted for more than ten percent of the gross domestic product of Antigua and Barbuda". Calculating a ten per cent share of Antigua's GDP in 2001, you conclude that Antigua's gambling services exports to the entire world in 2001 must have been on the order of US$ 68 million. Could you please explain the logic behind these calculations? In other words, how do you get from value added figures based on GDP statistics to export revenues?

35. *To the United States:* Assuming it is correct that the ECCB (and IMF and WTO) data on services exports do not include export revenues earned by operators who are licensed to engage in interactive wagering and gaming, on the grounds that such data are not reported, are these data sources any useful, and if not, what alternative data sources do you propose? Please confirm the sources on which the IMF data are based.

36. *To the United States:* Why do you consider the GBGC data unreliable? Under which conditions could industry data such as the data gathered by the GBGC serve as a basis for the calculation of counterfactual revenue from the export of remote gambling services to the US?

37. *To Antigua*: In your recourse to Article 22.2, you indicate that "[p]rior to the actions taken by the United States to prevent the provision of gambling and betting services from Antigua and Barbuda to consumers in the United States, it is estimated that the gambling and betting services sector accounted for more than ten per cent of the gross domestic product of Antigua and Barbuda". Which year does this refer to? Please explain how the Antiguan gaming revenues (as quoted in your methodology paper) are related to the contribution of the gambling industry to the Antiguan economy, i.e. its ten per cent share in GDP.

Following considerable efforts to determine precisely where the quoted language originated,[44] Antigua, unfortunately, must concede that it cannot trace the source of the statement. Viewed in the context of its first use in the Original Proceeding, it would appear to relate to 1999. In discussing the possible origin of the assertion within the government and Antigua's economist, Antigua believes that the statement could be attributable in whole or in part to (i) basic ignorance within the government as to the true size of the remote gaming industry;[45] (ii) estimates on the direct impact of the industry on the country in the nature of salaries paid, domestic rents and purchases and similar direct expenditures; and (iii) correlations made between estimated employment and the size of the overall domestic workforce.

38. *To Antigua*: Could you elaborate on the points mentioned in para. 106 of your written submission, and address the question of how the inflows of export revenue from remote gambling are counterbalanced so as not to affect GDP in the same order of magnitude. Would it be possible that you provide the Arbitrator with a breakdown of Antigua's remote gambling revenues in terms of domestic profits, expatriated profits, labour costs, costs for equipment (domestic and imported), imported services etc.

Antigua does not really have much to elaborate on the points made in paragraph 106 of the Antigua Submission. The reality is that the remote gaming industry was and remains an industry in its infancy. Antigua very strongly believes that due to the youth of the industry and the relentless assault on the industry by the United States government, it has not only never had a chance to develop to its potential in the ordinary course but it has also not had the opportunity to have its full impact on the country felt and assessed. While not intended to be an excuse, it is indeed true that an extremely small developing country seeking its way in the world has many pressing matters upon which to dedicate its slender governmental resources, and at this point it would appear that definitive and exhaustive economic data gathering is not one of them.

Despite what the United States may say about the revenue numbers attributable to Antigua being "impossible," the only available data indicates that they are indeed accurate. Nothing at all has been submitted to the Arbitrators that directly calls into question the economic data provided by GBGC, and in fact what other information is available only confirms the basic revenue numbers provided by GBGC. On the other hand, the reported GDP and balance of trade data for Antigua compiled by the ECCB and relied upon by other compilers and assessors of this kind of information has been unquestionably proven to be fatally flawed.

At this stage of the proceeding, and mindful as well of the factors mentioned in the response to Question 27 above, Antigua does not believe it is possible to come up with in essence a recalculation of Antiguan GDP including the revenue figures

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[44] **This statement shows up as early as Antigua's first written submission in the Original Proceeding.** ***See*** **First Submission of Antigua and Barbuda,** ***United States – Measures Affecting the Cross-Border Supply of Gambling and Betting*** **Services, WT/DS285 (1 October 2003), para. 30.**

[45] **The lack of a corporate income tax for the remote gaming companies and the lack of any financial reporting requirements until recent years explains, in large part, the dearth of information.**

from GBGC. In particular, there is simply no information available detailing the costs, expenditures, profits or investments of the remote gaming industry that would be central to such a determination. Ironically, the United States prosecution efforts have resulted in serious, adverse consequences to those operators that were willing to provide transparency (*i.e.*, the public companies), resulting in increasing opacity with respect to the remaining industry.

Nor does Antigua believe that trying to extrapolate remote gaming revenues from the flawed GDP as reported is going to prove in any way meaningful.

39. <u>*To Antigua*</u>: In your methodology paper (footnote 5) you indicate that "the remote gaming industry is not *fully or properly* reflected in Antigua's GDP" [emphasis added] given "a low response rate by remote gaming operators to GDP-related survey" and that "the few remote gaming operators that have responded to the GDP-related survey, have not often reported a key component of GDP – profits". The letter of the ECCB in Exhibit AB-12 to your written submission indicates that "the Statistics Act of Antigua and Barbuda cannot *enforce* an obligation on these entities to provide data for compilation of the GDP as they are outside the jurisdiction of the Act". [emphasis added] Please provide additional information on the legal basis for and the procedures of GDP-related surveys of remote gaming operators referred to in your methodology paper, the response rate, and what kind of erroneous data may have been provided in some cases. Also please clarify the statement by the ECCB as to whether a reporting obligation under the Statistics Act does not cover gaming operators or whether such reporting obligation under the Act does cover them but cannot be enforced on them.

Antigua has determined that remote gaming revenues are simply not included within the ECCB statistical data base, as there are no records of any responses by Antiguan remote gaming operators. As the ECCB itself has observed in connection with its overall data gathering "a major problem has been weak survey response."[46] There is in fact no legal obligation on behalf of the remote gaming operators (or any other private component of the Antiguan economy for that matter) to answer ECCB surveys or respond to ECCB enquiries.

40. <u>*To Antigua*</u>: In your methodology paper (footnote 5), you note that GDP is underestimated, because it excludes, *inter alia*, unreported transactions. In para. 106 of your written submission, you appear to suggest that remote gaming revenues may not be reported for national accounts purposes, and hence, not be reflected in GDP. Would, therefore, GDP be higher if remote gaming revenues were reported? If so, by how much would GDP be higher on an annual basis?

Antigua does not "suggest" that remote gaming revenues may not be reported for national accounts purposes, rather it is *beyond dispute* that such is the case. If remote gaming revenues were taken into account when determining GDP, GDP

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[46] Eastern Caribbean Central Bank, Balance of Payments: For Year Ending December 2005, p. 2-3; ("Sources of Data: The statistics in this publication are based for the most part on four data sources – 1. Surveys of private and public sector establishments conducted by the national statistical offices and the ECCB; 2. Interviews held by national statistical officers and ECCB staff with enterprises not covered by the survey; 3. Financial statements and other statistical data issued by private and public sector enterprises; 4. Financial statements and foreign exchange records reported by the commercial banks to the ECCB; [and] 5. ECCB's financial statement. . . . The surveys request information on the respondents' current transactions with the rest of the world regarding service receipts and payments, as well as investment and other capital flows. A major problem has been weak survey response, but there has been considerable improvement as a result of ongoing public relations programmes.").

would be higher than as reported, but not dollar for dollar, as adjustments would have to be made for expenditures and other items. As stated in the response to Question 38 above, the data does not exist to make other than a completely speculative estimate of what GDP would be if the ECCB had captured the revenues and expenditures of the remote gaming industry.

Methodology

41. *To both parties:* Is it correct that you agree that the end of the reasonable period of time (3 April 2006) determines the point in time at which the comparison between actual and counterfactual export revenues should be undertaken?

Antigua considers that, consistent with the approach in (and to paraphrase) the *EC – Hormones* decisions, the "starting-point" should be "what would the annual prospective Antiguan exports of remote gambling and betting services to the United States be if the United States had withdrawn the ban on those services on 3 April 2006?" This is not to say, however, that in developing the counterfactual and coming to a determination of the level of those "annual prospective exports" only information as of that date is to be taken into consideration. Please see the response to Question 42 below.

42. *To both parties:* Is it correct that you agree that export developments in the 2001-2002 time period are somewhat instructive of when the inconsistent measures by the US for remote gambling services began to affect Antiguan exports of remote gambling services to the US? In other words, do you agree that historical levels of remote gambling services exports by Antigua to the US *before that time period* are instructive as to the levels that might exist in the absence of the inconsistent measures?

In developing the Expert Report, Antigua's economist concluded that 2001 was the last "good year" for the Antiguan remote gaming industry and that from 2002 on, the collective impact of the United States' efforts to destroy the industry had a definite, conclusive and accelerating impact on the maintenance and development of the industry. Accordingly, export developments in 2002 signal the beginning of the decline in the industry, and "but for" the United States actions from 2002 on Antiguan imports would have been at least as great as they were in 2001. In the opinion of the economist this is not an example, illustration or proxy—rather, 2002 is simply and conclusively the year when measurable damages began to accrue. Note that in the modelling used by the economist in the Expert Report (as well as by Antigua in the Methodology Paper), no "lost revenues" are proposed for 2001 and earlier. The increasing disparity between actual revenues and reasonably expected revenues is a direct result of even more severe United States action to inhibit the industry.

Very much so, historical levels of remote gaming services exports by Antigua to the United States prior to 2002 are "instructive as to the levels that might exist in the absence of the inconsistent measures."

43. *To Antigua*: In the Constant Market Share Model, the starting point for the calculation of the counterfactual is Antiguan share of the global gaming revenue in 2003. In the Constant Growth Model and the Fixed Revenue Model, the starting point is the actual Antiguan remote gaming revenue

in 2001. Please explain what the appropriate starting date for calculations should be and why a different time period has been chosen as the starting point for the calculations in the different models?

With the Constant Market Share Model, if Antigua had used the same starting point as in the other models, the Antiguan share of the global remote gaming market would have been pegged at 59 percent. Antigua did not believe that this was a realistic market share number, given the growth in global remote gaming generally and, in particular, the fact that much of that growth was occurring in areas such as poker that were not the major market segment served by Antigua. In discussing the issue with operators and based upon demand and market trends, Antigua believes that if the United States had not been so actively and aggressively pursuing ways to prevent Antiguan (and other, primarily sports betting operators) operators from doing business with customers in the United States Antigua could have maintained the 21 percent market share it had in 2003 for some time.

As shown by the GBGC data, Antigua's early entry into the remote gaming market was in fact a huge advantage. Even though remote gaming had been around for some time, and had been prevalent on the Internet as early as 1994, by 2000 Antigua still had an astounding 61 percent of the global market. Other factors identified by the economist and referenced in the Expert Report[47] and the Methodology Paper[48] had positioned Antigua as perhaps *the* global leader in remote sports betting. Further, in 2003 gambling on sporting events comprised over 56 percent of all global remote gambling.[49] The persecution of the sports betting industry in general and the Antiguan industry in particular by the United States during the time period from 2001 to 2006, combined with the ambiguity under United States law with respect to non-sports gaming during this same period[50] led to an accelerated decline in the Antiguan industry, bringing Antiguan market share down to the single digits currently.

44. *To Antigua:* Part of the drop in Antiguan revenues from remote gambling (including in the US) may be due to factors other than the inconsistent US measures. In constructing a counterfactual level of exports, these factors could be expected to be taken into account in order not to be falsely attributed to the inconsistent US measures. In part II.A of your methodology paper, you assert that Antigua's own regulations in mid-2001 were among the two primary reasons for decline in the Antiguan remote gaming industry and that they were enacted as a result of direct pressure from the United States. Do you suggest that, therefore, no adjustment to the counterfactual level of export revenues needs to be made to take account of the fact that part of the reduction in Antigua's remote gambling revenues is due to stricter domestic regulations in Antigua? If, however, such adjustments were to be made, how should this be done?

Antigua and its economist agree that the decline in the Antiguan industry is *solely* attributable to the efforts of the United States to destroy the industry. In particular, the decline in revenues in the face of an expanding market can *only* be explained by the United States actions. Antigua agrees that there should be no

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[47] **Expert Report, p. 12, fn. 24.**
[48] **Methodology Paper, p. 4, fn. 12.**
[49] **GBGC eGaming Quarterly Report (October 2007), attached as *Exhibit AB-14.1*.**
[50] ***See* the timeline included with the Antigua Submission as *Exhibit AB-13*.**

adjustment in the counterfactual level of export revenues on the basis of "stricter regulations" or any other possible factor. This is particularly the case when examining the three different models presented by Antigua in the Methodology Paper. In the most conservative model, the "Fixed Revenue Model," revenues are frozen at the 2001 level, despite global remote gaming growth over succeeding periods. In the "Constant Growth Model," the 2001 figure is increased by the GBGC estimated annual average growth in the industry. Both of these models are by their very nature extremely conservative. On the other hand, the "Constant Market Share Model" in effect already reflects the loss of overall ***market share*** **that, as Antigua explained in its response to Question 43 above, Antigua was experiencing due to factors perhaps unrelated—or less related—to the activities of the United States government.**

The conservative nature of Antigua's models do not lend themselves to further "adjustment" for the possible effect of speculative or hypothetical "other factors," even were they determined to exist and be measurable.

At the end of the day it must be said that Antigua has a sound basis for concluding that the responsibility for the steep decline in its industry rests squarely on the shoulders of the United States government. Under WTO jurisprudence applicable to Article 22 of the DSU, it is really for the United States to prove now that Antigua does not so have a sound basis for its conclusion. This the United States has patently failed to do.

45. _To both parties:_ Please clarify whether factors other than the inconsistent US measure(s) and Antigua's own domestic regulations could have [had] an impact on the evolution of Antigua's revenues from exports of remote gambling services to the US. Assuming that other factors may have had an impact on the evolution of Antigua's revenue from exports of remote gambling services to the US, how could they be measured/proxied and how should the necessary adjustments to the presumed loss in export revenues be made? In responding to this question, please address specifically the potential role of the following factors:

As Antigua noted in its response to Question 44 above, it does not believe that other measurable factors exist which could have contributed to a decline in Antiguan ***revenues*** **from remote gambling services. Further, in the absence of any factual information and data relating to it, this once again moves into the realm of extremely remote speculation.**

(a) Changes in US demand for remote gambling services. The reasons for this could be changes in income, changes in tastes/habits, technological improvements as well as other (legitimate) policies discouraging online gambling;

Demand for these services from United States consumers is and has been astronomical. In particular, the "non-sanctioned" sports betting industry in the United States is estimated to be in the multi-billions. Antigua has no doubt that if its operators were given market access to consumers in the United States, the industry would skyrocket beyond all current estimates (which do not assume

compliance by the United States with its GATS obligations).[51] Sports betting on professional and amateur sporting events is "the most widespread and popular form of gambling in America."[52] The United States sports betting market consists of two components: the state-sanctioned sports betting market, predominately made up of Nevada's sports books, and the significantly larger non-sanctioned market. The non-sanctioned sports betting market in the United States operates without the benefit of any advertising and under persistent interference and risk of prosecution from law enforcement agencies. Even with these detriments, sports betting has been and remains one of the largest and most popular components of the United States gambling market.

There is a consensus among gambling experts that the non-sanctioned sports betting market in the United States is vast in terms of wagers and revenues. The reported estimates of this market include:

- David G. Schwartz, a leading gambling expert, reported in 2005 that the sanctioned sports betting market represents only one to five percent of the total sports betting market in the United States.[53]
- The National Gambling Impact Study Commission reported in 1999 that "[e]stimates of the scope of illegal sports betting in the United States range anywhere from $80 billion to $380 billion annually."[54]
- International Gaming & Wagering Business, a leading gaming periodical, reported in 1996 that more than US $85 billion in wagers were placed each year in the non-sanctioned United States sports betting market.[55]
- By way of historical data, CCA estimated in 1989, based on a careful examination of all available evidence, that there were US $28 billion in illegal sports bets each year in the United States, generating approximately US $896 million in revenues.[56] The non-sanctioned market was more then

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[51] The GBGC data included with the GBGC Letter does, under the tab "Online," have an estimate of the United States remote gambling market assuming adoption of legislation such as that proposed by Rep. Barney Frank which would legalise federally regulated remote gambling.

[52] NGISC Final Report, Chapter 2, p. 2-14.

[53] David G. Schwartz, Cutting the Wire: Gambling Prohibition and the Internet (University of Nevada Press, 2005), p. 174.

[54] NGISC Final Report, p. 2-14.

[55] The Case for Legal Sports Betting, International Gaming & Wagering Business (Vol. 17, No. 4, April 1996). In 1996, the sanctioned sports betting industry accepted US $2.5 billion in wagers. With the application of the multiplier of 34, we can calculate that the non-sanctioned sports betting market accepted approximately US $85 billion in wagers in 1996. Eugene M. Christiansen, 1997 Gross Annual Wager of the United States, International Gaming & Wagering Business (August 1998). International Gaming & Wagering further reported in 1996 that the Council on Compulsive Gambling conservatively estimated at the time that $88 billion was wagered each year in the United States' non-sanctioned sports betting market. The Case for Legal Sports Betting, International Gaming & Wagering Business (Vol. 17, No. 4, April 1996), p. 40.

[56] Eugene M. Christiansen, Sports Betting: A Franchise Up for Grabs, Casino Gaming, New Racetracks, Off-Track Betting and Inter-Track Wagering, Teletheaters, Greyhound Racing, Sports Betting, Lotteries and Wagering Statistics: Recent Articles (1990). *See also* Eugene M. Christiansen, Trends in Gross Wagering 1982-1986, Gaming & Wagering Business (July 1987) (concluding that in 1988 there were US $27 billion in non-sanctioned sports and race wagers in the United States).

16 times larger than the sanctioned sports betting market, which consisted of US $1.73 billion in wagers in 1987.[57]

Antigua expects that if the United States were to comply with its obligations under Article XVI of the GATS, for all of the reasons discussed at paragraphs 115 through 116 of the Antigua Submission a large share of this non-sanctioned market would follow in the ordinary course to Antigua. If Antigua were to capture only 20 percent of the currently non-sanctioned market (and assuming the sports betting industry did not grow significantly, which would probably occur upon its "legitimisation"), Antiguan operators could have easily earned US $ 500 million to US $2 billion in annual revenues that they did not otherwise earn due to the United States' illegal maintenance of its GATS-inconsistent measures.

Additionally, international trends seem to be running in favour of remote gambling over the Internet. As the Arbitrators are aware, the United Kingdom has endorsed remote gambling recently with the adoption of its own regulatory scheme similar to that of Antigua. The most recent scientific study regarding behaviours with respect to sports betting on the Internet concluded that in general people are gambling on the Internet responsibly and without any increase in additive behaviours.[58]

In short, neither the decrease in Antiguan gaming revenues from 2001 on nor expectations for the near-term future of the industry can be tagged to declining demand for or acceptance of these services.

(b) Changes in supply of remote gambling services;

As Antiguan operators have been and are offering remote gambling services from state-of-the-art platforms, this could not be a factor at all.

(c) Changes in the supply of close substitutes.

Antigua has no knowledge of any "close substitutes" that would have had any impact on revenues from remote gambling services.

46. _To Antigua:_ In your methodology paper, you estimate that gaming revenue has a "multiplier effect" of 1.4 on the Antiguan economy, which you suggest that the Arbitrator should include in its calculations starting from the year 2006.

(a) Please clarify why the difference between actual and counterfactual revenues in your models are augmented by a multiplier, although this has not been done in previous arbitrations?

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[57] **Eugene M. Christiansen, Sports Betting: A Franchise Up for Grabs, Casino Gaming, New Racetracks, Off-Track Betting and Inter-Track Wagering, Teletheaters, Greyhound Racing, Sports Betting, Lotteries and Wagering Statistics: Recent Articles (1990).**

[58] **LaBrie, R. A., LaPlante, D. A., Nelson, S. E., Schumann, A., & Shaffer, H. J. (2007),** ***Assessing the Playing Field: A Prospective Longitudinal Study of Internet Sports Gambling Behavior*. *Journal of Gambling Studies,*** **23, 347-362.** ***See Exhibit AB-20*.**

Antigua can only reiterate the points made in the Antigua Submission and at the 18 October hearing. Just because it has not been done before does not mean it cannot or should not. Antigua's economist believes a multiplier is appropriate under the circumstances as a measurement of the indirect damages suffered by Antigua as the result of the maintenance by the United States of its illegal measures. Not only should Antigua's status as a developing country Member be relevant in this regard,[59] but the impact of the remote gambling industry on the economy and prospects of Antigua—had it been allowed to grow and develop in the ordinary course—would be substantial. Multipliers are frequently used in economic modelling and are not generally considered speculative. Please see part VI.B.5 of the Expert Report.

(b) The GBGC estimates of Antigua's remote gaming revenue from 1999 to 2006 and the ECCB figures on Antigua's GDP for the same period do not reflect such a relationship between the growth of revenues and of GDP, and for a number of years there is an inverse relationship between them. If the loss in remote gambling revenues experienced by Antigua as of 2002 indeed had a multiplier effect on the economy, would this effect not show up in reduced GDP figures? Please comment.

It *could* show up in reduced GDP figures, but not of necessity. There are at least three other factors to consider. In the first place, the remote gaming industry in Antigua is truly still in its infancy, and its full effect has yet to be measured and felt within the overall Antiguan economy. While there has been in recent years significant increases in wealth and investment on the island, a substantial increase in building activity and increased employment and consumer spending, Antigua is simply unable at this point to fully understand and explain these developments. Second, and perhaps related to the first, a substantial portion of the "knock-on" effect of remote gaming revenues in the economy may itself find its way back into the remote gaming sector or into other sectors of the Antiguan economy that are under- or incorrectly reported or under-represented (a not uncommon feature of developing economies). Third, to some extent activities within the reported sectors of the Antiguan economy influenced by remote gaming revenues have decreased with the decline of the industry, it would not be usual to see a substitution effect within the economy, in essence working to mitigate losses as much as possible.

47. <u>To Antigua</u>: In part II.C of your methodology paper, you indicate that the time period used in the methodology for the calculation of the level of nullification or impairment is "from 4 April 2006 (the end of the "reasonable period of time " in the dispute) *through 31 December 2012 (the last year for which independent third-party remote gaming revenue projections are available*)" (emphasis added). Please clarify what the relevance of projections from 2007 to 2012 is, if any.

Antigua believes that the method used by its economist provides a more accurate estimate of its trade loss due to the United States' failure to comply with the DSB rulings. While, as Antigua observed in its response to Question 41 above, the end of the reasonable period of time marks the point at which Antigua's trade loss begins to accrue for purposes of Article 22 of the DSU, that does not mean that the

[59] **DSU Article 21.8.**

level of Antigua's nullification or impairment should be determined by reference to a "snapshot" of sorts on that date. This is most obviously true when, in a case such as this, the amount of the nullification and impairment continues to grow based upon actions of the United States that are inconsistent with the GATS and the DSB Rulings. For example, a 3 April 2006 "snapshot" would miss entirely the enactment of the UIGEA in October of that year, which has had a massive adverse impact upon the actual amount of revenues Antiguan operators are able to earn despite the United States' efforts to destroy the industry. Antigua observes that this is a somewhat unusual case in that Antigua has continued to mitigate its damages by offering its services to American consumers despite the contrary efforts of the United States, and thus the level of nullification and impairment is more dynamic than it would have been in most other arbitrations.

Using historical data together with reasoned, professional estimates of the market going forward for a reasonable period of time, and then averaging the annual projected trade loss for each year, is a reasonable and generally accepted method for addressing anomalies that might arise in one year as opposed to another. Although prior Article 22 arbitration reports are not exactly models of clarity when it comes to expressly precisely how the levels of nullification or impairment are determined, it is clear that averaging has played a role in more than one report.[60]

48. *To the United States:* You use 2001 WTO statistics of other commercial services exports by Antigua as your starting point. In order to obtain Antigua's counterfactual exports in 2006, you then appear to attempt some kind of projection of the calculated 2001 figure to 2006 by reducing it in the same proportion as the fall in Antigua's share of global remote gaming revenue according to the GBGC report, i.e. by multiplying it with the term 7 per cent (in 2006) over 50 per cent (in 2001). However, the 2006 market share must be assumed to reflect, at least in part, the effect of the inconsistent US measure(s), and not only of other factors. Could you please explain?

REQUEST FOR CROSS-RETALIATION

45. *To the United States*: Could you please clarify whether you agree that the United States, as the party challenging Antigua's proposed suspension of concessions and other obligations, bears the burden of proving that this proposal is not consistent with the principles and procedures of Article 22.3 of the DSU?

46. *To Antigua*: Please clarify whether you still seek to retaliate in any sector of GATS or whether your now seek to suspend concessions and other obligations only under the TRIPS Agreement.

Antigua seeks to retaliate only under the TRIPS Agreement.

47. *To Antigua*: Could you please clarify whether you agree with the United States that, for the purposes of defining the "same sector" in which a violation was found, within the meaning of Article

[60] ***See, e.g.*, Arbitrator's Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse to Arbitration by the United States under Article 22.6 of the DSU (Original Complaint by Brazil)*, WT/DS217/ARB/BRA (31 August 2004), paras. 3.123, 3.145; Arbitrators' Report, *US – Copyright*, para. 4.50.**

22.3(a), all of sector 10, rather than only subsector 10.D, is relevant? (see US written submission, para. 59)?

Yes, Antigua agrees with this.

48. *To both parties*: In light of the reference, in Article 22.3 of the DSU, to "suspension of concessions *or other obligations*" (emphasis added), could you please clarify whether you consider that, for the purposes of an assessment of whether the conditions of subparagraph (b) or subparagraph (c) have been met, only scheduled commitments should be taken into account as possible obligations to be suspended, or also other obligations incurred under the relevant agreement, such as general MFN obligations?

This is an interesting question, although most likely academic in the context of this dispute. Hypothetically one could imagine a scenario where only an MFN obligation is suspended so that instead of, for example, increasing a tariff on the offending Member's goods, tariff preferences are granted to third-party Members but not to the offending Member. Under this scenario however, it is unlikely to result in a practical and effective remedy, as the harmed Member would be reducing the overall amount of revenue due to the budget from customs duties while having an insignificant effect on the offending Member (at least in cases such as this one where the economic disparities are so great).

The same holds true even if this enquiry were carried to its farthest extent to where Antigua had no obligations to the United States under the GATS *at all*. The trade disparity is so great that United States service providers would suffer little harm at all, if any, while Antiguan consumers would be forced to scramble for replacement services at uncertain cost.

49. *To both parties:* Assuming that all obligations incurred under the GATS are to be taken into account for the purposes of these assessments, please indicate how this affects your arguments. Specifically, please indicate which relevant sectors might need to be accounted for and how this should be done, both in relation to subparagraph (b) and in relation to subparagraph (c) of Article 22.3 of the DSU.

It does not affect the arguments of Antigua at all. Antigua has demonstrated that it has followed the principles and procedures set out in Article 22.3 of the DSU and the United States has not demonstrated otherwise. Nor has the United States argued that Antigua has a practical and effective remedy in respect of "other obligations" under the GATS.

50. *To Antigua*: Please comment on the figures cited by the US as representing total levels of Antigua's services imports for 2005 in respect of transport, travel and other services (US submission paras. 60 and 61). Please also comment on the US observation that Antigua has indicated that about half of its goods and services imports come from the US (US written submission, footnote 39). If you disagree with that estimation, please indicate what would represent an accurate assessment of the US share in Antigua's imports of services.

Antigua's services imports for 2005, as measured by the ECCB, were US $208.11 million.[61] As Antigua pointed out in the Antigua Submission, it has not been able

[61] *See* **Antigua Submission, para. 49.**

to allocate these service imports among its various trading partners. According to the World Factbook published by the United States Central Intelligence Agency, the United States accounts for 21.1 percent of Antigua's imports[62]—but how and where that 21 percent falls is simply not known to Antigua.

51. *To the United States*: Please comment on the figures cited by Antigua for its levels of imports of services, including the figures for transportation, travel and insurance services. Please also clarify the source of your assertion, in footnote 39 of your written submission, that Antigua has noted that about half of its goods and services imports come from the US.

52. *To the United States*: You suggest that Antigua's level of services exports is such that it "would have the option of suspending concessions with respect to services imports" (US written submission, para. 60. Could you please clarify whether, in your view, this would be a sufficient condition, by itself, for Antigua to be able to suspend concessions under the GATS? Specifically, could you please comment on the relevance of the other factors identified by Antigua and Barbuda in its written submission that affect, in its view, the practicability or effectiveness of seeking suspension in the same or in other sectors under the GATS, including:

(a) the potential for suffering more harm itself than it would cause to the United States and lack of expected effectiveness of retaliation within GATS;

(b) the "serious circumstances" that it identifies in paragraphs 54 to 64 of its written submission; and

(c) the importance of the relevant trade and broader economic elements and consequences that it identifies in paragraphs 65 to 69 of its written submission.

53. *To the United States*: Please comment on the relevance to the Arbitrator's determination in this case of the observation made by the arbitrators in the *EC – Bananas III (Ecuador)* case (at para. 73 of their decision) that, "in a situation where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party"

(a) "it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the [other] party"; and

(b) "in these circumstances, a consideration by the complaining party in which sector or under which agreement suspension may be expected to be least harmful to itself would seem sufficient to find a consideration by the complaining party of the effectiveness criterion to be consistent with the requirement to follow the principles and procedures set forth in Article 22.3".

54. *To Antigua*: please clarify how exactly you took into account, in applying the principles of Article 22.3 subparagraphs (b) and (c), the trade and broader economic elements and consequences that you identify at paragraphs 65 to 69 of your written submission.

Antigua believes that the discussion of this issue contained in the Antigua Submission at paragraphs 54 through 70 is comprehensive. In making its assessment of how to induce the United States to comply with the DSB Rulings, the government of Antigua has thoroughly reviewed the best information

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[62] United States Central Intelligence Agency, *The World Factbook 2007* [https://www.cia.gov/library/publications/the-world-factbook/geos/ac.html#Econ].

available to it in coming to a determination of where it will have a practical and effective remedy under Article 22 of the DSU. In doing so, it has been unable to locate any practical and effective remedy under the GATS—a proposition which Antigua is quite certain the United States agrees with, whether or not it will admit so in this Arbitration.

Antigua was in the right place at the right time when it decided to encourage the trade in gambling and betting services, and the GBGC data demonstrate just how successful the early efforts of the country were. Until the United States decided to crush this rapidly growing industry, it held immense promise for Antigua and its citizens. If, as Antigua believes to be the case, the United States will eventually—after foreign competition has been effectively eliminated—embrace the remote gaming industry on a domestic basis (as the UIGEA and even the Federal Trio as they currently exist allow it to do), this will only continue to cement the role of the United States as the world's largest consumer and supplier of gambling and betting services. It is truly unfortunate that the United States does not seem prepared to share just a slender portion of its enormous gaming economy with its tiny neighbour and loyal ally to the south east.

EQUIVALENCE

55. *To both parties*: In your view, would the Arbitrator need to have knowledge of how Antigua intends to calculate the retaliation value under each relevant sector of the GATS and TRIPS agreements in order to be in a position to ensure correspondence between the "level of nullification or impairment" it is to determine and the "level of suspension of concessions or other obligations"?

In Antigua's view, the Arbitrators do not need to have knowledge of how Antigua intends to achieve its remedy under the covered agreements, nor is such an enquiry within the scope of the Arbitrators' role under the express language of Article 22.7 of the DSU. This position is supported by all available authority.[63]

56. *To Antigua*: Without prejudice to the position on the previous question, would Antigua be in a position to indicate how it intends to calculate and track the retaliation value in each sector of the TRIPS Agreement under which it seeks to suspend concessions or other obligations, and to ensure that the level of suspension of concessions does not exceed the level of nullification and impairment?

As Antigua explained at the 18 October hearing, it would not be in a position to do so. Once Antigua is given authorisation to suspend concessions or other obligations, and once the level of authorisation is set, then Antigua will assess its alternatives. Authorisation does not require Antigua to actually impose any retaliatory measures and, as Antigua also said on 18 October, the government has decided to make that decision when the time comes.

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[63] ***See* the discussion at Antigua Submission, para. 128.**

Question from the United States for Antigua and Barbuda

1. The United States notes that the economic calculations of Antigua and Barbuda ("Antigua") refer to operators "licensed" in Antigua, without stating whether or not those operators might also be licensed by other jurisdictions, and without stating whether those operators might have operations or facilities in other jurisdictions. For example, according to its website, the internet gambling site Bodog is licensed in Antigua as well as in the U.K. and by the Mohawk Territory in Canada. (http://www.bodoglife.com/about/) Although Bodog is licensed in Antigua and other jurisdictions, Bodog's major operations reportedly are in Costa Rica:

> "[Bodog's] core business is based on two floors of an office complex in Costa Rica, with employees running the main gambling business -- setting odds and taking bets. His revenue is processed through the Royal Bank of Scotland in London where payments are received and winnings are paid out." (ABCNews, *Online Gambling Mogul Living it Up*, published at http://abcnews.go.com/Nightline/print?id=2108601)

(a) Is it the position of Antigua that its nullification and impairment should be based on all gambling revenue of all operators licensed by Antigua, even if some of those operators have operations located in jurisdictions outside of Antigua. If so, what is the basis for Antigua's position?

No. As stated by GBGC in paragraph 5 of the GBGC Letter, revenues are allocated to jurisdictions according to where the applicable servers are located. An operator with multiple servers will have its revenue allocated among the various jurisdictions where the servers are located in accordance with the wagering processed by each.

(b) If not, what steps has Antigua taken to ensure that its claims of lost revenue for operators licensed by Antigua only reflect activities actually conducted in Antigua, as opposed to in other jurisdictions?

Antigua has relied upon the sound data gathering of GBGC and the assessment of its economist in making its determination of Antiguan remote gaming revenues. Nothing has come to the attention of Antigua during the course of this Arbitration or otherwise to call into question the GBGC data, and has been noted, all available sources tend to confirm the GBGC revenue assessments.