

**BEFORE THE  
WORLD TRADE ORGANIZATION**

*United States – Measures Affecting the  
Cross-Border Supply of Gambling and Betting Services –  
Arbitration Pursuant to Article 22.6 of the DSU*

WT/DS285

**ANSWERS OF THE UNITED STATES TO QUESTIONS FROM THE  
ARBITRATOR AND ANTIGUA AND BARBUDA**

**November 2, 2007**

## Answers of the United States to Questions from the Arbitrator

**Q1. 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.**

1. The United States agrees that the party referring the matter to arbitration has the initial burden of showing that the proposed level of suspension is not equivalent to the level of nullification and impairment.

2. The United States would emphasize, however, that this burden does not mean that the allegations and factual assertions of Antigua enjoy any presumption of correctness or any special weight simply because Antigua has put them forth in this arbitration. The situation is the same as in a panel proceeding - the fact that the complaining party bears the burden of proof does not equate to any special weight or significance or presumption in favor of the measure, evidence or argumentation of the responding party.

3. This arbitration presents unique methodological difficulties because (i) the gambling services Antigua wishes to provide are currently criminal in the United States, and (ii) Antigua's own estimates of nullification and impairment are based on past levels of criminal activity in the United States. As such, with respect to services imports, there are no official U.S. statistics on such activities. And, with respect to services exports, Antigua claims to have exempted operators licensed by Antigua from any form of official reporting requirements.

4. The United States submits that it has met its initial burden of showing that the level of nullification and impairment claimed by Antigua is far out of bounds of any economically realistic figure. Once that initial burden is met, the Arbitrator is left with the task of making an award based on the text of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), common sense, economic reality, and any reliable evidence that is presented in this arbitration. The United States submits that its estimate of nullification and impairment, which is based on internationally accepted figures, is indeed in accordance with common sense and economic reality. Moreover, as the United States has explained, and explains further in these answers, the data from the GBGC printouts is inherently unreliable and provides no useful information in this arbitration. Moreover, once the United States has met its burden of proof, the GBGC data is entitled to no special deference simply because Antigua (as opposed to the United States) has submitted it. Rather, the data must be evaluated for reliability just like any other evidence submitted in the arbitration.

**Q3. 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?**

**3bis 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.**

5. [Response to Question 3 and 3 bis.] The scenario of legalizing all forms of remote gambling would constitute one means of compliance with the recommendations and rulings of the Dispute Settlement Body (DSB). However, that scenario is extraordinarily unrealistic and thus does not form the basis for a useful counterfactual in this arbitration. As the United States has explained, it bans remote gambling for strong policy reasons of protecting public morality and public order, including to fight organized crime and money laundering and to protect vulnerable groups such as minors and compulsive gamblers. The United States is entitled under the *General Agreement on Trade in Services* (GATS) to maintain such a ban, so long as it is not applied in a manner that arbitrarily or unjustifiably discriminates between operators in different jurisdictions. If, as Antigua asserts, compliance would involve some lifting of restrictions on remote gambling, the only reasonably realistic scenario is that the U.S. ban would be lifted on as narrow a basis as possible that was consistent with the DSB recommendations and rulings.

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

6. Two other compliance scenarios, which are tied to the specific DSB recommendations and rulings in the dispute, involve the application of U.S. laws to remote gambling on horseracing.

7. The first scenario would be that the United States succeeds in establishing, as the United States Department of Justice has consistently maintained, that remote gambling on horseracing is unlawful in the United States. Under this compliance scenario, all forms of remote gambling would be covered by the U.S. measures at issue. In this arbitration, the United States has not argued that this first scenario must be used as the counterfactual in this dispute, although at a minimum it is useful context in considering the level of nullification or impairment.

8. The second scenario would be that the United States legalized remote gambling on horseracing, in order to respond to the DSB ruling that the United States has failed to meet the GATS Article XIV requirement of an absence of discrimination between operators in different countries.

9. This second scenario could be accomplished in two different ways – (1) by modifying the Wire Act so as to exclude remote gambling on horseracing, or (2) by modifying the Interstate Horseracing Act (IHA) – which Antigua believes contains an implicit exception to the Wire Act remote gambling prohibition – so as to allow participation by foreign operators. Using this latter version of the second scenario as the counterfactual would likely result in a lower level of nullification and impairment, because under the IHA gambling revenue must be shared with the

horseracing track. The United States, however, has not been able to quantify the level of this revenue sharing, and thus has not reduced its calculation of the level of nullification and impairment to reflect the effect of IHA revenue sharing arrangements on the projected level of Antiguan gambling exports.

**3quarter 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?**

10. The United States would emphasize that the phrase “reasonably expected” is not intended to refer to any matter involving the subjective expectations of either the complaining or defending party. Rather, the Arbitrator’s inquiry is simply what counterfactual – based on the specific facts or circumstances in the dispute and the specific DSB recommendations and rulings – would be the most likely form of compliance.

**Q4. 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?**

11. Yes.

**Q5. To both parties: 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?**

12. The United States submits that the single most important consideration must be the factual context of the dispute, as reflected in the prior proceedings and the DSB recommendations and rulings. In this dispute, the United States established its strong public policy and morality rationales for restricting remote gambling, and the Appellate Body indeed agreed that the United States had met its burden of showing that the U.S. measures were provisionally justified under GATS Article XIV. In these circumstances, the only reasonable scenarios for compliance are either a complete ban on remote gambling, or the adoption of measures that allow foreign and domestic operators to engage in remote gambling on horseracing.

13. The United States notes that, in contrast, Antigua’s proposed scenario entirely ignores the context of the dispute. In particular, Antigua treats this dispute as one in which the United States allowed domestic interests to offer all types of Internet gambling operations, but as a protectionist

measure kept foreign operators out of the market. If those were the facts and circumstances of the dispute, then Antigua's scenario – a complete legalization of all remote gambling services offered by foreign operators – might be plausible. But, of course, the actual facts and circumstances of this dispute – as reflected in the DSB recommendations and rulings – are far different. The U.S. criminal laws at issue have been in effect for decades, and the only reason that the United States was not able to meet the requirements of the Article XIV chapeau arose from the enactment of a civil law governing horse racing operations. In short, the United States severely restricts (rather than promotes) Internet gambling, and thus Antigua's proposed scenario does not match the particular facts and circumstances of this dispute.

14. This dispute also involves an important, second consideration. Namely, the Arbitrator should consider that the measures at issue were found to be provisionally justified under Article XIV(a) as being necessary to protect public morals and public order. As such, the Arbitrator should be sensitive to the appearance that the WTO would be improperly instructing a Member on what types of activity should be considered lawful or unlawful under the Member's public policies governing morality and public order. Although the adoption of any particular counterfactual in an Article 22.6 arbitration does not and cannot determine what measures would or should be adopted to achieve compliance, a counterfactual based upon a complete lifting of the ban on remote gambling could be viewed as a statement on the types of public policy measures that the United States should adopt. Recommendations on public morality, however, are not the role of the Arbitrator or WTO dispute settlement in general; rather, the means of compliance is up to the implementing Member, and Article XIV preserves the right of every WTO Member to adopt its own policies on public morals and public order, so long as those policies are not applied in a discriminatory manner.

15. The United States also would note, as it has explained in prior submissions, that the consideration primarily relied upon by Antigua is not relevant in choosing the counterfactual – namely, whether or not the WTO-consistency of the counterfactual depends on the application of positive obligations in a WTO Agreement, or instead on the application of exceptions set out in the WTO Agreement. In arguing for such a consideration, Antigua is improperly introducing the issue of the dispute settlement burden of proof into an unrelated inquiry – the choice of the most reasonable counterfactual to be considered for purposes of calculating nullification and impairment.

**Q9. 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.**

16. The United States' calculation (estimating \$500,000 per year in lost exports to the world of horserace gambling services) started with a figure for all remote gambling exports by Antigua,

and then reduced it by a factor based on the ratio of horseracing (non-remote) gambling to total (non-remote) gambling in the United States. This ratio was 7 percent. Accordingly, the U.S. calculation for the level of nullification and impairment for all remote gambling would be obtained by undoing the 7 percent horseracing allocation. That is, the U.S. calculation would be \$500,000 per year divided by 7 percent, or \$7.1 million per year.

**Q11. 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 and, for the purposes of this arbitration, can be considered as constituting the figure for Antigua's exports of remote gambling services?**

17. The United States agrees that for a calculation of Antigua's gambling exports, an important starting point would be the amount wagered versus the payout.

18. However, it has become increasingly clear in this arbitration that there is an important and major distinction between (i) remote gambling revenues for websites licensed by Antigua and (ii) any dollar amount which could be considered as a service export of Antigua. The fact that a website is licensed by Antigua does not necessarily indicate where the website's operations are located. To the contrary, as the United States noted in its question to Antigua, the same websites appear to be licensed in multiple jurisdictions, and may have major operations in yet other jurisdictions.<sup>1</sup> Thus, the mere fact that a website is licensed by Antigua does not indicate that the gambling revenue associated with that website is an Antiguan export. Furthermore, Antigua concedes in its written submission that many of the gambling revenues associated with websites licensed by Antigua are held in foreign banks by foreign nationals and are never returned to Antigua.<sup>2</sup> The United States submits that for gambling revenue actually to be considered an export of Antigua, that revenue must be generated from Internet operations actually located in Antigua and must be returned to those same operations in Antigua. Otherwise, such revenue is not associated with an Antiguan service export, and any reduction in that level of revenue cannot be considered nullification and impairment suffered by Antigua.

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<sup>1</sup> For example, the Internet gambling site Bodog is licensed in Antigua as well as in the United Kingdom 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>)

<sup>2</sup> Antigua's Written Submission, para. 106.

**Q12. To both parties: Since when does a market for remote gambling services exist? In addressing this question, please indicate:**

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

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

19. As the United States has noted, it does not maintain official statistics on remote gambling, which is a criminal activity in the United States. The United States would note that remote gambling predates the Internet. Indeed, the reason that the Wire Act was adopted in 1961 was to address the problems arising from remote gambling conducted by telephone.

**Q14. 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.**

20. The United States is not aware of any reliable source of such data. As the United States has explained, the only available data is on Antigua's exports to the world. The United States use of Antigua's exports of other services to the world was thus conservative, since some of Antigua's services exports would surely be to other jurisdictions.

**Q15. 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.**

21. The United States is not aware of any direct and reliable source of such data. Rather, the United States has estimated a figure for remote horse race gambling by using the ratio of non-remote horserace gambling to all non-remote gambling in the United States.

**Q16. 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.**

22. Because remote gambling is unlawful in the United States, the United States does not collect official statistics on revenues associated with various types of remote gambling. The United States used the 7 percent figure – based on those gambling activities (i.e., non-remote

gambling) which are lawful because this was the best available information. The United States does not assert that the ratios for remote and non-remote gambling are identical; rather, this is an estimate based on the reasonable assumption that there is a correspondence between the levels of remote and non-remote versions of the same types of gambling. The United States also notes that Antigua has not argued for a different estimate of the ratio between horserace remote gambling and all remote gambling.

**Q17. 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?**

23. The United States does not assume an identity of the 7 percent ratio between all suppliers and Antiguan suppliers, but uses the 7 percent ratio as a reasonable estimate of Antigua's ratio of horserace remote gambling exports to total remote gambling exports. The United States also notes that Antigua has not argued for a different estimate of the ratio between Antigua's horserace remote gambling exports and all of Antigua's remote gambling exports.

**Q22. 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.**

24. The United States understands that one or more gambling operators based in the United Kingdom are publicly listed, and that information on total annual revenues is available on those companies websites. However, the United States is not aware of a source of data for employment figures, or for a breakdown by activity and country.

**Q23. 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.**

25. The United States has no official information on global remote gambling revenues broken down by country of origin. The United States is also unaware of any reliable independent history of the growth of remote gambling, whether over the Internet or otherwise. However, while the United States does not find any of Antigua's data on the gambling market (from GBGC) to be credible, we note that Antigua's own data indicates that it has lost market share to gambling service suppliers from other countries.



26. Para 43 of the U.S. written submission refers to the data Antigua chose to provide from GBGC concerning world gambling revenues and its market share. This data indicates that world gambling revenues had increased from \$1.043 billion in 1999 to \$14.983 billion in 2006, while Antigua’s market share of gambling revenues had declined from 52% in 1999 to 7% in 2006. Antigua alleged that this decrease was due to restrictions on remote gambling in the United States, while the United States pointed out that there was no basis for such an allegation and that instead the change in market share was likely due to entry of non-Antiguan service suppliers.

27. Antigua’s own data support the U.S. conclusion. GBGC reported that Antigua’s gambling revenues increased from \$546 million in 1999 to \$2.4 billion in 2001, then declined to \$1.1 billion in 2006.<sup>3</sup> However, other GBGC data submitted by Antigua, shows that world revenues from North America increased continually from \$620 million in 1999 to \$6.79 billion in 2006.<sup>4</sup> If Antigua’s revenues were declining while the overall North American market continued to increase, this implies that non-Antiguan suppliers have been entering the U.S. market, and doing quite well, up by over 1200% between 2001 and 2006 (while Antigua’s revenues declined by 55%).

(In Billions of dollars	1999	2000	2001	2002	2003	2004	2005	2006
N. American Market	0.62	2.0	2.83	3.35	3.47	4.84	6.11	6.79
Antigua’s Actual Revenues	0.546	1.716	2.392	2.109	1.416	1.125	1.138	1.086
				Change in revenues since 2001				-1.306
				Percent change in revenues since 2001				-54.6%
Rest of World N.A. Revenues	0.074	0.284	0.438	1.241	2.054	3.715	4.972	5.704
				Change in revenues since 2001				5.266
				Percent change in revenues since 2001				1202.3%

28. The GBGC data that was provided by Antigua also showed other countries increasing their remote gambling revenues during the 2001-2006 time frame, as Antiguan revenues declined. Of the 6 specific countries for which Antigua provided GBGC data, only Antigua’s revenues declined between 2001 and 2006.<sup>5</sup> GBGC reported Costa Rica’s world revenues increased by \$638 million (up 74%), Curaçao’s revenues by \$186 million (up 339%), Malta’s revenues by

<sup>3</sup> Exhibit AB-3, Methodology Paper of Antigua and Barbuda.

<sup>4</sup> Written Submission of Antigua and Barbuda, Exhibit 2 – “Online gross gambling yield by player location 1998 – 2012E”

<sup>5</sup> Exhibit AB-9, 2<sup>nd</sup> chart of Methodology Paper of Antigua and Barbuda

\$860 million (up 267%), Gibraltar's revenues by \$2.9 billion (up 1,023%), and Kahnawake's<sup>6</sup> revenues by \$2.2 billion (up 916%). In fact, according to GBGC, Malta did not enter the market until 2001.

29. Antigua has presented no convincing reason to believe that U.S. actions could have such a disproportionate and unique effect on gambling service providers in Antigua as opposed to other gambling service providers located in other markets. Indeed, Antigua itself states that its initially high market share was due to the fact that it was an early entrant in the market,<sup>7</sup> and that its initial market share eroded over time.<sup>8</sup> Absent any characteristic which would make Antiguan service providers uniquely vulnerable to U.S. regulatory measures, then there are only two other possible explanations for such a decrease in market share: either Antigua has not effectively exploited new opportunities in a growing market, or other service providers have eroded Antigua's market share (or some combination of both). In either case, there is no information to support a conclusion that U.S. actions had any effect on Antigua's market share, nor is there reason to believe that Antigua would benefit uniquely from any future change in U.S. regulations.

**Q24. 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.**

30. The United States has no official information on the remote gambling market in the United States because it is an illegal activity. The United States does not have information on any specific state's statistics on remote gambling.

31. The United States does keep statistics for the non-remote gambling market in the United States. The Bureau of Economic Analysis of the U.S. Department of Commerce reports data on Casino Gambling and Pari-mutual net receipts.<sup>9</sup> They are reported annually or quarterly on-line in **Table 2.4.5U. Personal Consumption Expenditures by Type of Product**. The table below presents the annual data from 1995-2006.

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<sup>6</sup> Kahnawake Mohawk Reserve, located in Canada.

<sup>7</sup> Written Submission of Antigua and Barbuda, para. 115.

<sup>8</sup> Exhibit AB-2.

<sup>9</sup> Horse racing, Jai Lai and dog racing is included in the Pari-mutual net receipts. It is believed that horse racing accounts for 90 percent of the pari-mutual value.

Table 2.4.5U. Personal Consumption Expenditures by Type of Product [Millions of dollars; quarters and months are seasonally adjusted] Bureau of Economic Analysis Downloaded on 10/30/2007 AT 4:24:02 PM Last Revised September 28, 2007							
Line		1995	1996	1997	1998	1999	2000
256	E1CAS1 D Casino gambling	28,528	32,454	36,248	38,812	43,142	49,046
258	E1PAR1 C Pari-mutual net receipts	3,702	3,857	4,018	4,412	4,853	4,986
Line		2001	2002	2003	2004	2005	2006
256	E1CAS1 D Casino gambling	52,328	56,357	62,887	70,851	75,454	81,556
258	E1PAR1 C Pari-mutual net receipts	5,085	5,312	5,236	5,656	6,164	6,580

Source: Data on Personal Consumption Expenditures by Type of Product, table 2.4.5U, published on the website of the Bureau of Economic Analysis, U.S. Department of Commerce, [http://www.bea.gov/national/nipaweb/nipa\\_underlying/SelectTable.asp](http://www.bea.gov/national/nipaweb/nipa_underlying/SelectTable.asp).<sup>10</sup>

**Q25. 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?**

32. The United States has not located a source of data on gambling revenues in other markets.

**Q33. 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**

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<sup>10</sup> In the United States, the Bureau of Census, U.S. Department of Commerce, is generally the collector of data on U.S. economic activity. In this Census data, however, there is no breakout for pari-mutual activity including horseracing. The Bureau of Economic Analysis (BEA), U.S. Department of Commerce, analyzing Census data, estimates and publishes additional breakouts including in the area of pari-mutual gambling. The United States has relied upon these published BEA estimates as a source of useful information on the ratio among various types of gambling activities.

**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.**

33. The United States understands that exports, given reexports and the incorporation of imported value added in domestically produced exports, may exceed the value of a country's gross domestic product. Based on official government data, this phenomenon is at its maximum in the case of the great trade entrepot nation of Singapore where in 2005, goods and service exports – at nearly \$284 billion – were 143% greater than GDP – at nearly \$117 billion. On such an official basis, Antigua's goods and services exports in 2001 (the year it claimed net revenues from internet gambling were at their maximum), at \$442 million, were roughly 64% of its \$697 million GDP. However, with \$2.4 billion in claimed net revenues from exported internet gambling services included, Antigua's hypothesized exports would jump to 307% greater than its GDP, twice in excess of Singapore, the country in the world with highest ratio of exports to GDP on the basis of official data. Even accepting that exports can and do exceed GDP, the Antiguan claims, based on non-existent data, are so out of bounds relative to the experience of other Members that we believe the GDP comparison is of relevance in questioning Antigua's export claims.

34. There is yet another implausible implication of accepting that Antigua had \$2.4 billion in unrecorded exports in 2001. Antigua, which has made no claim that its \$483 million of imports in 2001 are undercounted, would have seen its goods and services trade balance move from a deficit of \$41 million, without counting the \$2.4 billion, to a surplus of \$2.36 billion. Since there is no evidence that Antigua's imports are understated, then the whole of additional, unrecorded exports could only have derived from additional unrecorded value added within the Antiguan economy itself. Antigua is thus asking the Arbitrator to believe that Antigua's GDP would have been roughly \$3.07 billion (\$667 million official recorded GDP plus \$2.4 billion in unrecorded exports, without additional imported inputs). The level of \$3.07 billion is almost 360% larger than Antigua's officially reported GDP. It is implausible to believe that such an enormous understatement of the size of the Antiguan economy exists, particularly since Antigua itself in its written submission states that at the height of its internet gambling trade in 2001, that industry employed just 10% of Antiguan workers.

35. In para 66 of Antigua's written submission, Antigua states that in 2001 internet gambling accounted for \$15.8 million in wages and salaries and \$4.2 million in licensing fees to the government. Suppose, for the sake of argument, that the Antiguan internet gambling industry actually received all of the net revenue arising from the relevant internet gambling; in other words, that there are no foreign resident owners. Also suppose that the direct labor costs in the Antiguan gambling industry account for just 20% of all labor costs in all of the value-added comprising what was ultimately the net revenue. In such a case, labor costs outside of the direct labor costs of the Antiguan internet gambling industry would be another \$79 million – whether those labor costs were incurred inside or outside Antigua. The total wage bill would be roughly

\$95 million. Further suppose that total labor costs account for 70% of net revenues and that capital costs/profits in the Antiguan gambling industry and all the Antiguan and non-Antiguan industries contributing value added to the gambling industry accounted for the other 30%. This would result in an additional \$41 million, bringing the total for labor and capital costs plus profits to \$136 million. \$136 million is less than 6% of the total net revenues of \$2.4 billion claimed from internet gambling by Antigua in 2001. Even if one were to assume much higher profit rates, such that total labor costs were only 50% of net revenue, total net revenues would rise to only \$190 million – a figure that is just 8% of the claimed \$2.4 billion figure. However, once one calculates a reasonable estimate of net revenues based on Antigua's own allegation of salaries of gambling operators, the \$2.4 billion in Antiguan net revenues in 2001 is not only without statistical support, it is also beyond the bounds of credibility.

**Q34. 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?**

36. This calculation, which was proposed by Antigua's statement, is not an effort to derive export revenue from GDP statistics. The United States understands that the gross value of exports can exceed GDP due to imported inputs. Bearing in mind that Antigua denies that its gambling and betting services sector is included in its GDP statistics, we can only conclude that Antigua's statement that "gambling and betting services sector accounted for more than ten percent of the gross domestic product of Antigua and Barbuda" is a statement about the relative sizes of Antigua's exports to its GDP.

**Q35. 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.**

37. As an initial matter, the United States notes that Antigua has not established that IMF and WTO data do not include export revenues associated with Antiguan gambling operators. The United States submits that WTO and IMF data must be presumed to be reliable, unless Antigua provides information to the contrary. Nonetheless, the United States has been making inquiries with IMF officials, but as of yet has not received a response.

38. The United States also notes, as mentioned above, that the fact that a website is licensed by Antigua does not determine whether gambling revenues associated with that website are in fact services exports of Antigua. Rather, from the information available to the United States, it

appears that websites may obtain licenses from various jurisdictions for marketing or other purposes, while in fact operating out of a different jurisdiction altogether. Thus, to the extent that an Antiguan-licensed website has operations in other jurisdictions and income from such websites is not returned to Antigua, such gambling revenue properly should not be included in international trade or monetary statistics.

39. Furthermore, if internationally accepted data (IMF and WTO) does not reflect direct information on gambling services exports, the reason – as Antigua itself asserts – is that Antigua shields its operators from financial disclosure requirements. There is no basis for believing that all of the other GDP, trade, and monetary flow data collected by international organizations would be in any way inaccurate. And, as the United States has explained, even leaving aside any data problems with direct gambling exports, the internationally accepted data cannot be squared with Antigua’s claimed level of nullification and impairment. In particular, if Antigua indeed had billions of dollars of lost gambling revenue – a figure that dwarfs the rest of Antigua’s economy – this change in its overall revenues would be reflected in other components of GDP, as Antiguan consumers would have less money to spend on imports and Antiguan produced goods and services. Conversely, when in 2001 (as Antigua claims) its revenues skyrocketed by about \$1 billion, other components of GDP would have increased as Antiguan consumers increased purchases of goods and services.

40. Finally, if – as Antigua claims – no direct data is available on Antigua’s exports of gambling services, then the absence is total – and would include data collected by the gambling consultant GBGC. Perhaps most notably, GBGC would have no apparent basis for determining, or ability to determine, whether any claims of gambling revenue were tied to websites actually operating in Antigua (as opposed to websites that may simply have an Antiguan license). Other problems with the GBGC data have been discussed in prior U.S. submissions and in the following response to question 36.

41. If indeed no direct data on operations in Antigua were available, the only means of determining historical Antiguan gambling revenues that would comport with economic reality would be to start with what is known about the Antiguan economy, and with Antigua’s own claims of the number of persons who work in that economy in the Internet gambling business. A discussion of such a methodology is included in the United States response to Question 33. Only this type of methodology would comport with economic reality, and would ensure that the level of nullification and impairment is based on actual services provided by Antiguan, as opposed to by international criminal organizations that operate in many jurisdictions.

**Q36. 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?**

42. GBGC data should not be relied upon for this case because (1) the data do not purport and cannot be assumed to be measuring exports, (2) the data do not report any estimate on Antigua's supply of gambling services exports specifically to the United States, (3) of the selective GBGC data that Antigua does provide, neither the United States nor the Arbitrator knows the basis for such data, (4) the data are not internally consistent, and (5) the data do not comport with the existing economic landscape (i.e., the data are totally out of line with reported exports, as well as in comparison to the value of GDP for Antigua).

**GBGC Data does not claim to be services exports**

43. GBGC does not purport, nor should it be assumed, that its data is the appropriate measure of the export of any particular country. GBGC is not in the business of measuring national exports. GBGC is a private consultant working for the gambling industry. The GBGC data is, at best, the estimation of net revenues of the overall industry, not a measure of the export from Antigua or any other country. For example, Antiguan firms may be acting as points of sale for business owners in third countries. In such a case, Antigua's exports and foregone exports in this case would be measured by the stream of payments it receives or foregoes from foreign firms for its selling services. In such a case, Antigua's exports are likely to be only a modest fraction of the relevant net revenues. Moreover, there has been no statistical evidence presented in Antigua's gross domestic product data, or in its trade or balance of payments data of international movement of goods, services or capital, to support its claims of one billion dollars plus in foregone internet gambling exports.

**GBGC Data does not measure Antigua's gambling revenue from the United States**

44. Antigua provided 17 GBGC charts in its methodology paper and its written submission. In none of the charts, however, does GBGC report the supply of Antigua's gambling revenues from the United States, for either horseracing specifically or for gambling overall. The closest data that GBGC does provide is Antigua's supposed remote gambling revenues from the world (exhibit AB-2 from Antigua's methodology paper), the world's supposed remote gambling revenues from North America (the 2<sup>nd</sup> chart listed in Antigua's exhibit 2 from its written submission), and the world's supposed remote and non-remote gambling revenues from horseracing (the 9<sup>th</sup> chart listed in Antigua's exhibit 2 from its written submission).

**Antigua has not provided the methodology supporting the GBGC estimates**

45. Antigua has not provided any methodology regarding how the GBGC revenue estimates were calculated, how country shares of supply or demand were determined, or how specific gambling products were determined. As a result, the following types of fundamental issues regarding the data remain unresolved: were revenues allocated on the basis of where licensing existed, where the operations were located, or where the company headquarters were located?; how were these allocations made if the company has multiple sites?; how was the information requested?; and was sampling used, and if so, how? In short, Antigua has provided no basis for

believing that the data it has provided was collected using a methodology likely to result in a reliable figure of Antigua’s gambling exports.

**There are internal inconsistencies within the selective GBGC data that Antigua provided**

46. Even taking the GBGC data on its face, there are internal inconsistencies.

47. First, as noted in the answer to Question 23 above, the GBGC data shows that Antigua’s revenues significantly declined from 2001-2006, while other operators in the North American market significantly increased by over 1,200 percent. U.S. measures apply to all operators and not only to Antiguan operators. Therefore, either the data is wrong, or (contrary to Antigua’s assertions) factors other than the U.S. measures affected Antigua’s revenues.

48. Secondly, GBGC reports that revenues for the selected 3 Central American and Caribbean countries (Antigua, Costa Rica, and Curaçao), surpassed the total for the entire Central American and Caribbean region. For 2000-2003, the yield for these 3 countries surpassed the total for the region by 9 percentage points in 2000, 20 percentage points in 2001, 10 percentage points in 2002, and 2 percentage points in 2003. (See Exhibit AB-9 from Methodology Paper of Antigua and Barbuda).

Billions of U.S. dollars	1999	2000	2001	2002	2003	2004	2005	2006
Central America and the Caribbean (CA)	0.78	2.32	2.75	2.89	2.65	3.03	3.13	3.36
Antigua/Barbuda	0.5461	1.7161	2.3915	2.1094	1.4157	1.1246	1.1375	1.0861
Share of CA	70.0%	74.0%	87.0%	73.0%	53.4%	37.1%	36.3%	32.3%
Costa Rica	0.2023	0.7845	0.8605	0.9517	1.1121	1.3602	1.4363	1.499
Share of CA	25.9%	33.8%	31.3%	32.9%	42.0%	44.9%	45.9%	44.6%
Curacao	0.0127	0.0364	0.0548	0.1056	0.1635	0.251	0.2532	0.2407
Share of CA	1.6%	1.6%	2.0%	3.7%	6.2%	8.3%	8.1%	7.2%
Total of the 3 as share of CA	97.6%	109.4%	120.2%	109.6%	101.6%	90.3%	90.3%	84.1%

Sources: IMF Balance of Payments; Exhibit AB-2 Methodology Paper of Antigua and Barbuda

GBGC data, if believed to be gambling services exports, is significantly outside the parameters of reasonableness given the reported size of Antigua’s exports and GDP



49. As show in the table below, GBGC data on Antigua’s global gambling revenues between 1999 and 2005 ranged between 24 percent and 497 percent greater than Antigua’s overall services exports, and between 1,150 percent and 6,909 percent greater than the services category, “other business services,” where gambling services revenues would fall. As shown in Figure 1 (attached to these answers), the GBGC gambling revenues that are attributed to Antigua seem to be extreme outliers.

(In Millions of U.S. Dollars)	1999	2000	2001	2002	2003	2004	2005
Antigua Global Gambling Revenue (from GBGC)	546	1,716	2,392	2,109	1,416	1,125	1,138
Antigua Total Services Exports (IMF)	439.21	414.5	400.68	394.22	413.34	467.54	460.79
Antigua Other Business Services Exports (IMF)	43.69	33.45	34.77	30.09	27.98	30.03	31.58
Gambling Revenues exceeding Total Services	24.3%	314.0%	497.0%	435.0%	242.6%	140.6%	147.0%
Gambling Revenues exceeding Other Business Services	1149.7 %	5030.0 %	6779.5 %	6909.0 %	4960.8 %	3646.3 %	3503.5 %

Sources: IMF Balance of Payments; Exhibit AB-2 Methodology Paper of Antigua and Barbuda

50. Similarly, GBGC data on Antigua’s supposed global gambling revenues between 1999 and 2005 even dwarfs Antigua’s GDP, ranging between 157 percent and 407 percent of GDP. It has been suggested during the course of the arbitration that small island economies typically have high trade to GDP ratios. However, Figure 2 (attached to these answers) shows that exports of goods and services for these small island economies generally range between 40 percent and 75 percent of GDP (with Antigua’s official statistics being at the high end).<sup>11</sup> Adding the GBGC estimated gambling revenues to Antigua’s goods and services exports for the time period 1999 and 2005, increases the ratio to between 156 percent and 406 percent of GDP. Even Singapore, which is recognized as having extremely high (if not the highest) trade to GDP ratios, only registers exports at 243 percent of its GDP in 2005. Again, inclusion of the GBGC estimated gambling revenues seems to be beyond any rational boundary of reasonableness.

51. Moreover, incorporating GBGC data as missing Antiguan exports also shifts its share of Net Exports beyond the realm of believability. Figure 3 (attached to these answers) shows that

<sup>11</sup> Selected island economies are members of the Eastern Caribbean Currency Union.

net exports of goods and services (exports minus imports) for these small island economies are always negative and generally ranging between negative 1 percent and negative 50 percent of GDP during 1999 and 2005. Antigua's official statistics report net exports ranging between negative 5 percent and negative 12 percent of GDP during 1999 and 2005. Adding the GBGC estimated gambling revenues (as exports) to Antigua's net exports calculation reverses its net export values from being a moderate negative to being a significant positive ranging between 75 percent and 336 percent of GDP. If this increase in exports is totally applied to GDP (since there has been no report of imports being undercounted), Antigua's GDP would be almost 360 percent larger than Antigua's officially reported GDP (see answer to Question 33 for calculation).

52. In none of the IMF annual Article IV consultations with Antigua, nor in the WTO Trade Policy Reviews with Antigua, has either the Antiguan Government, the IMF staff, or the WTO staff questioned the services trade data in the Balance of Payments display. The most recent IMF consultations concluded in July of 2007, and the Trade Policy Review with Antigua is occurring in November of 2007. Antigua provided a letter from the ECCB that GDP figures presented for Antigua does not include revenues earned by operators who are licensed to engage in interactive wagering and gaming. However, the ECCB does not comment on whether it was included or not in its balance of payment information. Also it makes no comments on whether it believes that the lack of including this data significantly affected its reported balance of payments information for Antigua. If the understatement of actual exports was this dramatic, it should have been mentioned.

53. Furthermore, the footprint of the massive inflow and outflow of revenues during the 1999-2005 period should have been felt in the rest of the Antiguan economy, and would have been measured by the ECCB and the IMF. Gambling revenues reportedly increased in 2000 by \$1.2 billion (175 percent of GDP) while GDP was up only \$26 million. Gambling revenues reportedly declined in 2003 by \$693 million (92 percent of GDP), while GDP was up \$40 million. Again no explanation has been provided by Antigua as to how these massive changes occurred in the economy with so little impact on reported GDP.

**Q41. 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?**

54. The precise point in time should be the date of the referral of the matter to arbitration, as this is the date when the terms of reference of the arbitrator were established..

**Q42. 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?**

55. The United States agrees with the first part of the first sentence, but not the second. That is, the United States agrees that historical levels of Antiguan services exports (should such data be available and reliable) are somewhat instructive as to the level of Antigua's nullification and impairment resulting from U.S. non-compliance with the DSB's recommendations and rulings. The United States does not agree, however, that U.S. measures first began to affect Antigua's exports in 2001-2002, and that this is reflected in the GBGC data submitted by Antigua. To the contrary, the U.S. measures have been in force for decades, and the Cohen prosecution – which was the enforcement action against an Antiguan operator that is the genesis of this dispute – began in March 1998, and Mr. Cohen was convicted in March 2000.<sup>12</sup> Moreover, Antigua's GBGC data show that other operators from other jurisdictions increased their illegal operations in the U.S. market after 2001, showing that it simply cannot be true that the U.S. criminal laws were the cause of any absolute or relative loss of Antiguan market share in the provision of criminal gambling services to U.S. consumers. The United States submits that Antigua's contentions about the changing U.S. enforcement environment were developed after the fact, in order to match the GBGC figures.<sup>13</sup>

56. Similarly, as the question is rephrased in the second sentence, the United States agrees that historical levels are relevant, but the United States does not agree that any such historical levels cease to be relevant after Antigua reached its alleged peak (based on the GBGC figures) in 2001. Rather, if any historical levels are relevant, then all historical levels are relevant. In fact, Antigua's own data show a growth in exports to the U.S. by operators in other jurisdictions, showing the historical trend that Antigua is losing market share.

**Q45. 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:**

**(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;**

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<sup>12</sup> Exhibit to Antigua Written Submission AB-13, page 1.

<sup>13</sup> To support its point that 2002 declines in revenue were due to enforcement efforts, Antigua relies on the denial by the U.S. Supreme Court of a review of the Cohen conviction. Exhibit to Antigua Written Submission AB-13, page 2. But the notion that Antiguan gambling operators would radically alter their behavior in 2002 as a result of a Supreme Court non-review of a 2000 criminal conviction is lacking in any credibility. The Supreme Court reviews only a tiny fraction of the cases before it, and overturns even fewer. The United States suggests that Antigua has highlighted the 2002 denial of Supreme Court review as a post-hoc attempt to explain the GBGC data series.

- (b) **Changes in supply of remote gambling services;**
- (c) **Changes in the supply of close substitutes.**

57. The United States does not agree that the “inconsistent US measure” affected the evolution of Antigua’s gambling revenues. To the contrary, the U.S. measures have remained unchanged throughout the relevant period, and Antigua’s own data show that other operators have actually increased exports to the United States. Thus, there is no basis for Antigua’s assertion that any changes in the enforcement of U.S. measures had any special or particular negative impact on Antigua’s export of gambling services to U.S. consumers.

58. With respect to the remainder of the Arbitrator’s question, the United States does not maintain or have access to information on changes in the composition of these unlawful activities.

**Q48. 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?**

59. The U.S. measures affect all foreign operators, not just those of Antigua. Thus, any reliable market share data concerning gambling exports to the United States would reflect other factors (such as degree of competition from various markets), as opposed to the existence of U.S. anti-gambling measures.

**Q45. 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?**

60. The United States agrees that it has the initial burden. At the same time, it is important to recall that Article 22.3(e) of the DSU required Antigua to state in its request its reasons for seeking authorization in another sector. As a result, in meeting this burden, the United States is entitled to examine and rely on the rationales set out in Antigua’s Article 22.2 request.

61. In other words, the United States does not have the burden of establishing, for example, what types of suspension would be “practicable and effective.” Rather, the United States has the burden of showing that Antigua in its Article 22.2 request has not followed the principles and procedures. Thus, for example, if Antigua’s Article 22.2 request does not show that Antigua properly stated in its request for suspension sufficient reason to seek authorization in another sector, the United States could meet its burden by explaining to the Arbitrator how Antigua had not done so.

62. The United States respectfully refers the Arbitrator to the extensive discussion of Article 22.3 in the *EC-Bananas (Ecuador)* arbitration, in which it is clear that (1) the focus was on Ecuador's asserted rationales under Article 22.3, and (2) that it was not (for example) the burden of the EC to show that a suspension of concessions on consumer goods would be practicable and effective. Rather, the Arbitrator required Ecuador to first suspend concessions on consumer goods, because Ecuador had not followed the Article 22.3 principles and procedures by adequately considering the possibility of suspending concessions on such goods.

**Q48. 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?**

63. The United States considers that the phrase "suspension of concessions or other obligations" includes all obligations set out in the relevant WTO covered agreement, whether contained in the main text or in the complaining party's schedule of concessions. Thus, in the context of this case, "concessions or other obligations" includes the general MFN obligation set out in Article II of the GATS.

**Q49. 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.**

64. Under Subparagraph (a) of Article 22.3, Antigua must first seek to suspend concessions or other obligations in Sector 10, covering Recreational, Cultural and Sporting Services. This would include GATS Article II MFN obligations under Sector 10, as well as the national treatment obligations set out in Antigua's GATS schedule for Sector 10.

65. If suspension in the same sector is not practicable or effective, under Subparagraph (b) of Article 22.3, Antigua may seek to suspend concessions or other obligations under the GATS. This would include GATS Article II MFN obligations for all services, as well as the national treatment or other obligations set out in Antigua's GATS schedule.

66. Only if it is not practicable or effective to suspend concessions under the GATS, and if circumstances are serious enough, may Antigua seek to suspend concessions under another covered agreement.

**Q51. 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.**

67. The information cited in the question is contained in paragraph 52 of Antigua’s written submission. The footnotes to that paragraph cite to an ECCB Table 2.2, and the United States was not able to locate ECCB Table 2.2 in the exhibits submitted by Antigua. (Exhibit AB-6 to Antigua’s Article 22.2 request contains excerpts from an ECCB report, but not a Table 2.2). The United States does note, however, that Antigua’s figures on services imports appear to be consistent with the IMF Balance of Payment statistics contained in Exhibit US-2.

68. With regard to footnote 39 of the U.S. written submission, this was a reference to page 2 of Antigua’s Article 22.2 request. In that paragraph, Antigua asserted “On an annual basis, approximately 48.9 percent of these imported goods and services come from single source providers located in the United States.”

**Q52. 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.**

69. Practicable or Effective: The United States does agree with Antigua that in deciding whether suspension of concessions would be “practicable or effective,” the Member requesting suspension of concessions may make the case that suspension of obligations under the same sector or same agreement would not be practicable or effective because suspension would cause more harm to the suspending Member than the likely benefit. In this dispute, in light of the reliance of the Antiguan economy on tourism, the United States has not contested Antigua’s assertion that it would not be practicable or effective for Antigua to suspend concessions in a manner that might discourage U.S. tourists. Thus, the United States has not argued, for example, that Antigua should suspend concessions with regard to U.S. travel services. Instead, the United States has shown that Antigua improperly failed to consider suspending concessions on other types of services, unrelated to tourism.

70. The United States also notes that Antigua’s argument about the importance of tourism to its economy – which Antigua raises in the Article 22.3 context – is fundamentally at odds with Antigua’s argument – made in the context of the claimed level of nullification and impairment –

that Antigua’s economy relies on gambling revenue.

71. The United States does not agree with Antigua’s contention that “effectiveness” somehow relates to the disparate sizes of economies, or to the fact that the United States (in Antigua’s view) would not be concerned with losing services exports to Antigua. Antigua’s view of “effectiveness” proves too much, and is ultimately meaningless in terms of deciding under what sector or agreement authorization to suspend concessions or other obligations should be granted.

72. In any dispute where the level of nullification or impairment is low compared to the economic size of the Member concerned, suspension of concessions will be less effective than the complaining party might wish. (And, it would be noted, this is true regardless of the relative sizes of economies, and regardless of the absolute size of the economy of the complaining Member.) But under Antigua’s approach, this type of “effectiveness” or “ineffectiveness” would depend ultimately on the absolute levels of nullification and impairment as compared to the size of the economy of the Member concerned, and not on the type of suspended concession or obligation. Thus, Antigua’s approach is inconsistent with the text of Article 22.

73. Antigua’s approach does not address the question of the sector involved, but rather the level of the suspension of concessions or other obligations. In other words, for Antigua, effectiveness does not depend on the sector in which the suspension occurs; the only thing that matters is the level of suspension. Furthermore, Antigua’s approach is at odds with the agreement in Article 22 that the suspension of concessions is to be equivalent to the level of the nullification or impairment. Under the DSU, equivalence is to be sought between the level of suspension and the level of nullification or impairment, yet under Antigua’s approach, the Arbitrator would not be considering this equivalence but rather would be comparing the level of suspension and the size of the economy of the Member concerned.

74. In the only other DSU Article 22.6 arbitration to consider this matter, Ecuador similarly argued that it would not be “effective” to suspend concessions against EC goods because the EC could withstand such a suspension. The Arbitrator properly did not accept this argument – instead, Ecuador was first required to suspend concessions on consumer goods and on certain services, and only after these levels were exceeded was Ecuador given the authority to suspend concessions under other WTO Agreements.<sup>14</sup>

75. Serious Circumstances: Whether “circumstances are serious enough” is not explicitly explained in the DSU, and the United States believes this factor must be considered on a case-by-case basis. As noted by the Arbitrator in the EC-Bananas dispute, an evaluation of “serious circumstances” would seem to include the factors set out in DSU Article 22.3(d).

76. Antigua’s argument on the “seriousness” of circumstances relies on its allegations that its

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<sup>14</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, Award of the Arbitrator issued 24 March 2000, paras. 88-102, 173 (hereinafter “*EC – Bananas (Ecuador)*”).

level of nullification and impairment is huge in relation to the size of the rest of its economy. However, as noted in the U.S. written submission, the accepted international data (and leaving aside any issues regarding the reporting of direct gambling revenue) show that Antigua's economy in fact has shown steady growth, like other nations in the region. Despite Antigua's assertions to the contrary, the economic data show an absence of serious circumstances. The United States would contrast the current situation with that of Ecuador in the *Bananas* dispute. In particular, in that case, Ecuador showed that its economy shrank by 7 percent and that unemployment rose to 17 percent.<sup>15</sup> Contrast the current dispute, in which there is no evidence (aside from the unsupported assertions on lost gambling revenue) that Antigua's overall economy has suffered any harm.

**Q53. 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".**

77. As noted above, the *Bananas* arbitrator did not base its "effectiveness" finding on the "great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party." In the above quotation, the arbitrator is pondering whether any suspension would be effective (in terms of promoting compliance) in the face of an imbalance in economic power. But, as noted in the U.S. response to question 52, such theoretical questions are ultimately unrelated to which particular sector or agreement should be included in the authorization to suspend concessions. And, as also noted above, despite the economic imbalance between the EC and Ecuador, the *Bananas* arbitrator in fact required Ecuador to first seek to suspend concessions on certain goods and service, prior to suspending concessions under other WTO Agreements.

**Q55. 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**

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<sup>15</sup> *EC–Bananas (Ecuador)*, para. 132.



**concessions or other obligations"?**

78. Yes, this is the view of the United States. Without this information, it would be impossible for the Arbitrator to determine the equivalence of the level of suspension of concessions with the level of nullification and impairment, as is required by DSU Article 22.7.

**Answers of the United States to Questions from Antigua**

**Please reconcile your statement in the written submission (para. 20) as well as in the oral statement (para. 6) to the effect that the WTO "provisionally" cleared the "Federal Trio," with the statement of the Article 21.5 Panel that "there is no concept recognized under the DSU of provisional or transitional consistency with a recommendation of the DSB."**

79. The two quoted statements address different matters. The United States statement, cited above, is a recital of the well-established methodology for the order of analysis used in disputes involving exceptions under GATT Article XX or GATS Article XIV. In particular, the first step is to determine whether the measure is provisionally justified under one of the specific subparagraphs setting out the exceptions (in this dispute, GATS Article XIV(a)). If so, then the next step is to see whether the measure is applied in a manner consistent with the chapeau's requirements.

80. The second statement is addressed to a different matter – namely whether a particular measure in an Article 21.5 measure is to be considered to be a measure taken to comply with recommendations and rulings of the DSB.<sup>16</sup> In particular, this statement of the Panel was made in the context of addressing the U.S. position that the same measures at issue in the original proceeding in this dispute constitute "measures taken to comply".

**By analogy with the erroneous counterfactuals proposed by the U.S. in this dispute explain by reference to the EC – Hormones dispute what would be the counterfactual that the EU could have advanced there to set the level of nullification at zero? Would you agree with such counterfactual? Why not, and why is the EC – Hormones dispute different from the dispute at hand?**

81. The *Hormones* dispute is not helpful in examining the issue of the proper counterfactual to be used in determining the level of nullification and impairment – in that dispute, the parties agreed that the relevant counterfactual would be the EC's removal of its ban on imports of meat produced from hormone-treated animals.

82. A relevant arbitration would be the *EC-Bananas (U.S.)* arbitration, in which the parties did disagree over the proper counterfactual. In fact, the arbitrator considered four different counterfactuals, based on four different possible WTO consistent measures.<sup>17</sup> The arbitrator chose what it believed to be the most "reasonable" counterfactual, based on the facts and circumstances of the dispute. Notably, the counterfactual chosen by the arbitrator was not the

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<sup>16</sup> *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services, Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW, Report of the Panel adopted 22 May 2007, para. 6.29.

<sup>17</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB, Award of the Arbitrator issued 9 April 1999, paras. 7.4 to 7.7.

complete removal of the TRQ which was found to be WTO-inconsistent. Instead, the arbitrator based its calculations on a hypothetical modified and WTO-consistent TRQ. The *Bananas* arbitration thus shows – contrary to Antigua’s assertions – that the proper counterfactual may involve a modification of, rather than the total removal of, the measure at issue.

**What is the difference between the counterfactual based on a failed affirmative defence and a counterfactual based on the successful affirmative defence (assuming hypothetically that the Article 22.6 arbitration takes place in the last case as well)?**

83. The United States does not accept the premise of this question; contrary to what Antigua is suggesting, the counterfactual proposed by the United States is not “based on” a failed affirmative defense. In addition, with regard to the second part of the question, a successful invocation of an affirmative defense would not result in a finding of non-compliance, and thus there would be no Article 22.6 arbitration in such a case.

**What is the basis in the DSU for your statement that the counterfactual should be based on a "realistically available course of achieving compliance" (Oral statement, para. 8)?**

84. Article 22.2 of the DSU makes clear that the level of nullification and impairment must be tied to the failure of the Member concerned “to bring the measure found to be inconsistent with a covered agreement into compliance therewith.” The DSU does not specify how the Member concerned should bring its measure into compliance. Given that compliance has not in fact been achieved, the only possible means of determining the level of nullification and impairment is to use a realistic scenario for a WTO-consistent measure that could be adopted by the Member concerned. This has been the methodology used in other arbitrations (such as the *Bananas* arbitration discussed above). And, surely Antigua is not proposing that the Arbitrator should use an unrealistic scenario as the basis for the counterfactual.

**Is the United States suggesting that the Arbitrators should use the ECCB/IMF/WTO data with respect to Antigua to set the level of nullification and impairment, despite the fact that that data expressly does not take into account revenue from Antiguan remote gaming operations? If so, what would be the basis for doing so?**

85. The ECCB/IMF/WTO do not “expressly [fail to] take into account revenue from Antiguan remote gambling operations.” To the contrary, the data – which includes the catch-all category of “other” services exports – expressly cover all services exports from Antigua. At most, Antigua has shown that the ECCB was not able to include in its figures data on Antiguan gambling operators, because Antigua has chosen to shield those companies from any disclosure requirements. Antigua has not provided any evidence to show that the “other services” categories contained in IMF and WTO data exclude gambling services.

86. The remainder of this question is similar to Question 35 from the Arbitrator, and the United States refers Antigua to that response.