

**BEFORE THE
WORLD TRADE ORGANISATION**

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

WT/DS285

**Comments of Antigua and Barbuda
to
ANSWERS OF THE UNITED STATES TO QUESTIONS FROM THE
ARBITRATOR AND ANTIGUA AND BARBUDA**

13 November 2007

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.

The United States fails to take into account the precedent outlined in *EC - Hormones (US)*, in which the arbitrators expressly stated that the assertions of the wronged party in an Article 22 arbitration are given a presumption of correctness that the offending party must rebut.¹

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.

This Arbitration does not present any "unique methodological difficulties." The issues and the evidence are straightforward. What it does present are great difficulties for the United States. Why the legitimacy of an asserted level of nullification or impairment should be dependent upon "official U.S. statistics" is questionable, to say the least.

Antigua would observe at this point that complaints by the United States over alleged "criminal activity" are balanced by Antiguan frustration over the activities of the United States which have been found illegal under international law. There is no reason to be deferential to United States laws that have been found contrary to its obligations under the GATS.

Antigua has not "claimed" to "have exempted operators licensed by Antigua from any form of official reporting requirements." Submitting revenue and expenditure information to the ECCB is voluntary with respect to all market participants in Antigua, regardless of the enterprise.

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

¹ Arbitrators' Report, *EC - Hormones (US)*, para. 9; See Antigua Submission, paras. 13 - 15.

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.

Antigua agrees that the Arbitrators are entitled to determine that the GBGC data is “reliable.” But what Antigua does *not* agree with is that the data is unreliable simply because the United States attaches unfavourable adjectives to it or otherwise deems it not to be “in accordance with common sense and economic reality.” While the United States has spent much effort speculating on why the data could not be correct, it has never proven it to be incorrect, or presented *any* contrary data or evidence whatsoever (other than the useless ECCB statistics).

American legislators and public officials seem to have little objection to citing the enormous market for remote gambling in the United States when it serves their purposes. In 2006 and 2007, a number of federal legislators acknowledged that remote gaming is a massive US \$12 to US \$13 billion global industry. The legislative comments made in this regard include:

- Representative Barney Frank of Massachusetts introduced a bill on 26 April 2007 entitled the “Internet Gambling Regulation and Enforcement Act of 2007” (H.R. 2046) to establish a licensing and regulatory regime for Internet gambling in the United States. In the introductory portion of the Frank Bill, Rep. the bill states that it is based upon, among other things, a finding that “Internet gambling is a \$13,000,000,000 and growing industry worldwide.”
- Senator Bill Frist of Tennessee, the then Majority Leader of the United States Senate, stated to the United States Senate in December 2006 that Internet gaming is “a \$12 billion dollar industry today.”²
- Senator John Kyl of Arizona, who spent ten years seeking to pass a new federal ban on certain types of remote gambling, commented to his colleagues in the United States Senate in November 2006 that Internet gambling generates *billions*

² 152 Cong. Rec. S11404-03 (7 December 2006).

*of dollars of profits to what he considered illegal Internet gaming operations in Antigua and Costa Rica.*³

- **Representative Bob Goodlatte of Virginia stated to the United States House of Representatives that there were hundreds of foreign remote gambling operators that “are sucking billions of dollars” from the United States and that latest estimates showed the global remote gaming industry to be “a \$12 billion industry with more than half of that coming out of the United States . . .”**⁴
- **Representative Bob Goodlatte stated in a press release in July 2006: “Gambling on the Internet has become an extremely lucrative business. Numerous studies have charted the explosive growth of this industry, both by the increases in gambling websites available, and via industry revenues. *Internet gambling is now estimated to be a \$12 billion industry, with approximately \$6 billion coming from bettors based in the U.S.*”**⁵

Others in the United States government have acknowledged the size of the remote gaming industry. Note the testimony of John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, before the United States Senate Committee on Banking, Housing, and Urban Affairs (18 March 2003): “While there were approximately 700 Internet gambling sites in 1999, it is estimated that by 2003, there will be approximately 1,800 such sites generating around \$4.2 billion.”⁶

The United States General Accounting Office in *Internet Gambling: An Overview of the Issues*, GAO-03-89 (December 2002), stated “Internet gambling is a growing industry. Since the mid-1990s, Internet gambling operators have established approximately 1,800

³ 152 Cong. Rec. S11045-01 (16 November 2006) (“Knowing that their businesses are illegal in the United States and many other countries, Internet-gambling businesses have set up shop in countries with very few gambling regulations, such as Antigua and Costa Rica. These small countries benefit from the billions of dollars of profit generated by their local gambling operators. So when the United States tries to prosecute a criminal violation of its gambling laws, these countries are not interested in extraditing their wealthiest residents.”)

⁴ 152 Cong. Rec. H4969-04 (11 July 2006). See also Rep. Bob Goodlatte Press Release (11 July 2006) : “Gambling on the Internet has become an extremely lucrative business. Numerous studies have charted the explosive growth of this industry, both by the increases in gambling websites available, and via industry revenues. Internet gambling is now estimated to be a \$12 billion industry, with approximately \$6 billion coming from bettors based in the U.S.” (http://www.house.gov/goodlatte/press_2004_2006/061106.html).

⁵ See Congressman Bob Goodlatte, News Release: House Approves Goodlatte Legislation to Combat Illegal Gambling (11 July 2006) [http://www.house.gov/goodlatte/press_2004_2006/061106.html].

⁶ <http://www.usdoj.gov/criminal/cybercrime/malcolmTestimony318.htm>.

e-gaming Web sites in locations outside the United States, and global revenues from Internet gaming in 2003 are projected to be \$5.0 billion dollars.”

Conversely, in this Arbitration the United States says that the GBGC data is “inherently unreliable.” How is that so? The United States further says that the GBGC data “provides no useful information in this arbitration.” For the United States, having apparently failed to find any other source of remote gaming data in the world, to say that the GBGC data “provides no useful information in this arbitration” while at the same time insisting that the level of nullification and impairment be based upon “internationally accepted figures”⁷ that the compiler itself has admitted do not include the trade expressly at issue in this Arbitration lacks any credibility.

Further, although the United States considers the GBGC data “inherently unreliable,” there is a large body of very prominent international organisations that apparently do not consider the GBGC data “unreliable,” and use it to further their objectives on a regular basis. Although the United States government seems to argue that all private enterprise is not to be trusted, at least not in this Arbitration, Antigua would argue that the public marketplace itself is a much more reliable judge of reliability than is the office of the United States Trade Representative.

One very prominent organisation that considers the GBGC data “reliable” is the European Commission. In 2006, the EC commissioned a prominent academic institute to study and then issue a detailed report on gambling within the European Union (the “EC Report”).⁸ The results of the study published by the EC cite GBGC as the leading source of both remote and non-remote gaming data for both the European and global gambling markets.⁹ Indeed, the section of the EC Report devoted to remote gambling recognises GBGC as a prominent and conservative source of remote gaming data.¹⁰

⁷ The United States does not explain who precisely “internationally accepts” its preferred set of fatally flawed figures.

⁸ Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union: Final Report, prepared for the European Commission* (14 July 2006). http://ec.europa.eu/internal_market/services/docs/gambling/study1_en.pdf.

⁹ *Id.*, p. 1104 (Table 1: Gross Gaming Revenues for Member States by Sector, 2003), *see e.g.*, p. 1125 (Table: Summary of Austria’s Casinos); p. 1129 (relying on a GBGC report to describe Belgian gaming licenses); p. 1133 (Table: Summary of Belgian Casinos 2003); p. 1152 (citing GBGC for data on wagering in the Czech Republic); p. 1162 (citing GBGC for Danish gaming prize data); p. 1406 (summarising all types of remote gambling in the EC based upon GBGC data).

¹⁰ EC Report, Chapter 7: The Impacts of Internet Gambling and Other Forms of Remote Gambling on the EU Gambling Market, pp. 1400-1426.

The institute that published the EC Report corroborated GBGC's remote gaming data by (i) comparing the GBGC data to remote gaming data published by other organisations and (ii) conducting its own survey of remote gaming companies. Both of these comparisons lent strong support for the accuracy and integrity of the GBGC data.

The alternative sources of remote gaming data cited in the EC Report were Deutsche Bank, the Association of Remote Gambling Operators ("ARGO"), River City Group and CCA. These alternate sources of remote gaming data consistently corroborate the GBGC remote gaming revenue data provided to the Arbitrators in this proceeding.¹¹ River City Group and the ARGO, for instance, both reported US \$7.0 billion in global remote gaming revenues in 2003.¹² The GBGC data obtained by Antigua for its methodology indicates US \$6.7 billion in global remote gaming revenues for the same year.¹³

The EC Report contains its own independent data and conclusions about the size of the remote gaming market, and the data and conclusions are also consistent with the GBGC figures provided by Antigua. As part of the study leading up to the publication of the EC Report, a survey instrument was developed and disseminated to all known remote gaming operators in the EC, as well as the regulatory authorities in Gibraltar and Malta. A total of 19 remote gambling operators responded to the survey, which in the opinion of the authors of the EC Report, reflected approximately one half of the entire EC remote gambling market.¹⁴ The operators that responded to the survey reported gross gambling revenues of €1.2 billion [US \$ 1.7 billion] in 2006, corresponding to a total EC remote gambling market of approximately €2.4 billion [US \$ 3.5 billion] in 2006. The operators that responded to the survey further forecast gross gambling revenues of €6 billion [US \$8.7 billion] by 2009, corresponding to an approximate €12 billion [US \$17.6 billion] total

¹¹ The EC Report cites River City Group's report of global remote gambling revenues of US \$6.8 billion in 2003 and projected remote gaming revenues of US \$8.8 billion in 2004. EC Report, p. 1404. The GBGC data supplied by Antigua in this case, *Exhibit AB-14.2*, indicates global remote gaming revenues of US \$6.7 billion in 2003 and US \$9.1 billion in 2004. The EC Report also cites the ARGO as reporting global remote gaming revenues in 2005 of being in the range of US \$8.3 billion to US \$14.4 billion and growing. EC Report, p. 1404. The authors of the EC Report note that the lower range of the ARGO estimates is in accord with both the GBGC and River City data. The EC Report further notes that the GBGC data is more conservative than the CCA data on remote gaming revenues, as CCA reported US \$14.5 billion in global remote gaming revenues in 2005 (compared to US \$12.5 billion reported by GBGC for the same year) and CCA projected US \$29.4 billion in global remote gaming revenues by 2010 (compared to US \$21.3 reported by GBGC for the same year).

¹² *Id.*, xxix - xxi ("Figures published by the River City Group and by the Association of Remote Gambling Operators indicate that the global interactive gambling market currently provides a GGR of about €5,700 million (US \$7,000 million) per annum as of 2003 . . ." citing to both Deutsche Bank, "Online Gaming: Real or Surreal Returns?" (19 July 2005) and to CCA).

¹³ *Exhibit AB-14.2*.

¹⁴ *Id.*, pp. xxxviii and xxxiv. (Executive Summary: 4.3 The Remote Gambling Industry in the EU).

EC remote gambling market by 2009. The EC Report noted that the revenue growth rate reported by the responders to the survey was higher than the revenue growth rate projected by GBGC.

The authors of the EC Report independent estimate of global remote gambling revenues was higher than that reported by GBGC. The EC Report concludes global remote gaming revenues to be at €5.7 billion [US \$8.3 billion] per year as of 2003, in comparison with GBGC's more conservative figure of US \$6.7 billion for the same year.¹⁵ The EC Report further estimated that the total employment of the EC remote gaming industry was approximately 1,600 employees as of 2003 and 3,500 employees as of 2006.¹⁶ Data from the EC Report indicates that the EC remote gaming operators earned approximately US \$1.0 million -per-employee in 2006, which is also consistent with Antigua's methodology.

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.

Antigua has already shown, as is well accepted under international law, that purported domestic difficulties are of no relevance to a country's performance of its international legal obligations. The more the United States asserts this argument—that the Arbitrators

¹⁵ See GBGC eGaming Report May 2007, *Exhibit AB-14.2*. However, the EC Report projects EC remote gambling revenues of €2.4 billion in 2012, whereas GBGC estimated EC remote gambling revenues of €2.9 billion in 2012.

¹⁶ *Id.*, p. 1422 (Table: EU Remote Gaming Employment All Locations 2000-2009).

must set their sights very low because they cannot expect the United States to actually perform its obligations as agreed—the more absurd it reveals itself to be.

The United States continues to insist that the rulings of the original panel and the Appellate Body stand for something that they most clearly do not. A failed defence is just that, a failed defence, and the argument of the United States that it “bans” remote gambling for public morals reasons has been revealed to be just what it is—a disguised restriction on trade.

Even a cursory reading of the Federal Trio—as well as the UIGEA—reveals that the United States does not “ban remote gambling for strong policy reasons of protecting public morality and public order”—what it *does do* is ban foreign suppliers of remote gambling so that the American states can be free to establish monopolies, profit from lotteries or otherwise decide how they want to handle gambling within their own borders.

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.

If the United States believes that to do this would bring it in compliance with its obligations under the GATS, then it should do so and have the issue assessed by the WTO in conformity with Article 21.5 of the DSU. But to not do so and insist before an Article 22 panel of arbitrators that they should pretend as if the United States *had*, is just overreaching.

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.

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?

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.

Antigua fails to see how “reasonably expected” could refer to anything but the “subjective expectations” of someone.

That being said, Antigua reiterates what was said at the 18 October session with the Arbitrators, and that is what the USTR might assert in this particular proceeding is “reasonable to expect” may be different from what other branches of the United States government believe. For example, as recently as Sunday, 11 November 2007, Representative Charles Rangel, a senior member of the United States Congress and Chairman of the powerful House Ways and Means Committee, in a visit to Antigua observed that the legislative process might best be used to bring the United States into compliance with the DSB Rulings on a basis quite different from that being proposed by the United States in this Arbitration:

“What we can weigh in is that we can discuss our position, from a legislative point of view, with the USTR—a part of the executive branch. But in the final analysis, if legislation has to be determined, it may not be on the moral issue because some of my friends in the Congress are anxious for other reasons to legalise gambling, and not as a moral issue but as a revenue enhancement issue. So there are a lot of other things—moving parts—that may allow us to reach the same conclusion.”¹⁷

Rather typically, the USTR itself is prone to present a different opinion altogether depending upon its audience. In an open press teleconference call held on 4 May 2007,

¹⁷ Patricia Campbell, “‘AMERICA WRONG’ . . . US congressman speaks on gaming dispute,” Antigua Sun (11 November 2007) (*Exhibit AB-21*).

the USTR expressed its opinion that its “inadvertent” commitment for gambling and betting services applied to *all* gambling and not just gambling on horse racing:

“USTR Official: But the real question of whether the term ‘other recreational services’ included gambling.

Question: Did it include horse racing?

USTR Official: It doesn’t matter because the question is when we put the words in our schedule [inaudible] other recreational services did anybody think that meant gambling. That’s the question. Gambling on any sense.”¹⁸

In that teleconference, the USTR also opined that a withdrawal of the United States’ commitment with respect to gambling and betting services was the *only way* in which the United States could comply with the DSB Rulings:

“At this point why we are now turning to Article 21 under the GATS is it is the only way that we see that we can in fact bring ourselves into conformity with the panel and appellate body’s decision. Obviously we can’t change U.S. law. U.S. law is what it is.”¹⁹

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.

¹⁸ Conference Call, Ambassador John K. Veroneau, Deputy U.S. Trade Commissioner & A USTR Official (4 May 2007), p. 10. (*Exhibit AB-22*)

¹⁹ *Id.*, p. 8. The transcript of this conference call is revealing in a number of very interesting respects, but the last sentence of the quoted language is particularly interesting.

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.

In the first instance, Antigua disagrees with the assertion that "remote" gambling is somehow worse than "non-remote" gambling. It is important to realise that the Federal Trio predate the Internet by decades. There is nothing in the legislative history of the Federal Trio or otherwise to support the assertion that those laws were developed to stop any inherently pernicious effects of "remote" gambling. There is, however, plenty of evidence that those laws were developed to allow the various states to set and enforce their own gambling laws as they saw fit. The United States does not "severely restrict" Internet gambling, it just "severely restricts" most Internet gambling that crosses a border and all Internet gambling that crosses an international border. The recent UIGEA clearly reflects this fact.

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.

Antigua submits that when an affirmative defence has failed, then it has no relevance left to the enquiry at all. To assert that the WTO would be overstepping its bounds by following the express terms of the covered agreements to the unhappiness of the United States is incredible. Antigua wonders what the objective of the United States is in saying such a thing.

Contrast this case, for example, with the situation in *EC - Hormones*, where despite a complete and comprehensive ban by the EC on hormone-fed beef—not only foreign but domestic as well—the United States insisted that it be granted access to the EC markets notwithstanding the EC’s own strong (and consistent) public policy against hormone fed beef. In the *Hormones* cases, the EC had asserted what was in effect an affirmative defence, which also failed under the scrutiny of the panel and the Appellate Body. The United States sought and obtained in that case a level of suspension of concessions or other obligations equal to what the trade would be if the EC prohibition were *removed*. The level was not computed based on “how likely” it would be for the EC to comply with the ruling by removing the ban, or whether it was “reasonable” for the United States to expect that the Irish or French governments would allow hormone fed beef into their countries.

In this proceeding, there is a strong United States government policy against *foreign* remote gambling, with a fundamentally *laissez faire* attitude towards domestic remote gambling.

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.

Antigua disagrees with this paragraph in the strongest possible terms. The second sentence is particularly baseless. There is no doctrine whatsoever that says that arbitrators under Article 22 of the DSU are to choose “the most reasonable counterfactual” nor is there any doctrine whatsoever that says arbitrators are to set the level of nullification and impairment based upon a hypothetical method of compliance that the offending Member itself has deliberately chosen not to do.

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. 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. 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.

This paragraph illustrates how the United States attempts to re-write important economic and legal concepts to fit its own devices. Antigua has shown that remote gambling revenues are allocated among countries by the location of the server that processes the wagers—the generally accepted way of assessing Internet commerce on a global basis (and as was the methodology used in the EC Report).²⁰ As some of the statistics regarding e-commerce companies submitted by Antigua in this Arbitration illustrate, electronic commerce is vastly different in many ways from traditional forms of commerce. The engine of e-commerce in gambling and betting services is software and hardware, and traditional concepts of adding value to make a product are of much lesser relevance.

Unlike a number of remote gaming jurisdictions, Antigua requires a significant physical presence from its operators and while, as is very true of global business today in general, some Antiguan operators may have call centres or support personnel in other

²⁰ EC Report, p. 1404.

jurisdictions as well, the physical presence of computer services is matched by material physical presence as well.

What is particularly wrong about the United States' response to this question is the assertion that revenues generated by an Antiguan operation somehow don't count if they accrue for the benefit of "foreign nationals" or if the revenues are held in "foreign banks." There is simply no basis upon which the United States is entitled to set for itself what should be considered Antiguan revenues nor impose conditions such as the harbouring or spending of every dollar of revenue in Antigua for the dollar to somehow "count." Antiguan remote gaming revenues are *earned* through the operation of its computer services, and who owns the Antiguan companies and where the profits go are just not relevant.

Although Antigua does not believe GDP provides an accurate way of measuring trade loss in remote gaming exports, if GDP *is* to be a measuring point for remote gambling revenues, it is clear that GDP ignores the ownership of an enterprise or where "profits" are lodged in allocating productivity to a jurisdiction. There *is* a measurement that takes into account ultimate ownership of the facilities of production, but that is called "gross national product," or GNP. That is a much different measurement and of much less relevance in determining revenues generated by a particular jurisdiction.

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.

Antigua would like to clarify that it “has not argued for a different estimate of the ratio between horserace remote gambling and all remote gambling” because remote gambling on horse racing as such has no relevance to this Arbitration. Antigua has also demonstrated that remote gambling on horse racing is not even relevant to the United States–otherwise, there would be no reason to attempt to withdraw its gambling and betting services commitment.²¹

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.

²¹ This is eloquently confirmed by the USTR in the teleconference. *See Exhibit AB-22.*

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. 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. 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. 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 \$860 million (up 267%), Gibraltar's revenues by \$2.9 billion (up 1,023%), and Kahnawake's 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, and that its initial market share eroded over time. 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.

Antigua has explained why it has lost market share (which is of course not the same as losing revenues). While some market share loss was inevitable as the result of the growth of poker on the Internet, the growth of remote gaming in other parts of the world and the positioning of Antigua as primarily a United States facing, sports betting jurisdiction, it is also true that Antigua has been heavily targeted by United States authorities in their attempt to destroy foreign competition for gaming services. In fact, the three highest profile prosecutions of foreign remote gaming brought by United States authorities in the past few years have been brought against operators with Antiguan licenced subsidiaries and substantial Antiguan operations. The 2001 to 2003 time frame saw a large number of operators move from Antigua to European jurisdictions that were perceived as being less likely targets of United States efforts than Antigua. There is simply no doubt about this, as the Directorate has been informed on many occasions. In 2001, most of the largest gaming companies in the world had significant Antiguan operations. Now, none of these operators remain.

This perception of safety in other jurisdictions has to a great extent been realised, as to date the United States has not prosecuted any remote gaming operators licenced and located in European jurisdictions, such as Gibraltar, Malta and Guernsey, nor has it prosecuted any operators licenced by the Kahnawake Mohawk Tribe of Canada.

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. 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.

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.

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 concept 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.

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.

Antigua notes that the United States' incredulity over the profitability of remote gambling may be indicative of what this case is really about. This very recent phenomenon of remote gambling is a highly profitable industry by any measure, and comparisons with the expectations of the United States based upon other industries are simply not helpful. The United States insistence on evaluating the remote gaming industry with the historical businesses it seems to be most familiar with just doesn't work in this case.

The United States' efforts to compare Antigua's GDP and other trade statistics with other ECCB nations, or Singapore, is an "apples to oranges" comparison that is of no value whatsoever to the Arbitrators because Antigua is the only one of those nations that is a developed remote gaming jurisdiction. None of the other ECCB nation members or Singapore has remote gaming industries and, therefore, these countries cannot serve as a relevant comparator to Antigua. Remote gaming is an unprecedented form of trade. It is massive in terms of reach and size, and can be engaged in from anywhere without much labor or capital investment. There is no comparable industry in history. Even bricks and mortar gaming is probably not the best comparator – indeed, online services

such as those provided by Google (low labor needs, no inventory, little equipment, little physical space needed, little interaction with customers and very high margins) is more comparable.

The only comparisons that are relevant in this arbitration are between Antigua and similarly-situated small economies that fostered remote gaming industries for economic diversification reasons at the outset of the remote gaming boom that began in the mid 1990s.

One highly-relevant comparator is the Mohawk Territory of Kahnawake, a Native American tribal reserve within Canada.²² Although the Kahnawake people number fewer than 10,000 residents and have historically existed in an economically disadvantaged state, the Kahnawake have nevertheless established themselves within the past ten years as one of the leading remote gaming jurisdictions in the world.²³ In 1996, pursuant to tribal law, the Kahnawake established the Kahnawake Gaming Commission and also established regulations governing remote gaming within the Kahnawake Territory.²⁴ The decision to serve as a remote gambling hub has been an amazing success for the Kahnawake. There are currently more than 400 independent gambling Internet web sites regulated and licensed by the Kahnawake Gaming Commission.²⁵ These remote gaming operators are required to keep all gaming servers within the Mohawk Territory of Kahnawake.²⁶ In 2005 and 2006, without material United States government interference,²⁷ remote gaming operators within the Kahnawake

²² See <http://en.wikipedia.org/wiki/Kahnawake>; <http://www.kahnawake.com/>.

²³ See <http://en.wikipedia.org/wiki/Kahnawake>; <http://www.kahnawake.com/>; see also Jean-Pierre Girard and Isabel Faubert-Maillous, Case Study Analysis: Co-operative in Aboriginal Communities in Quebec, Indian and Northern Affairs Canada (reporting that the population of the Kahnawake Territory is only 6,839 people according to 1992 figures and that, historically, the economic situation within the Kahnawake Territory was difficult with very high unemployment rates). Staff with the Mohawk Council of Kahnawake informed Antigua that there are approximately 6,500 total residents of the Kahnawake Territory, of which approximately 4,500 are adults aged 18 or older. The Kahnawake's own count of its membership is slightly less than that of the Canadian government, which reports approximately 9,000 members of the Kahnawake band. Additional Source: Alexis Shackleton, Mohawk Council of Kahnawake, Social Development Unit [Tel: 450.638.0500] and Terry Patton, Kahnawake Economic Development Commission [Tel: +1.450.638.4280] [Discussions 8 November 2007].

²⁴ www.kahnawake.com/gamingcommission/.

²⁵ www.kahnawake.com/gamingcommission/ (Permit Holders page).

²⁶ Kahnawá:ke Gaming Commission, Regulations Concerning Interactive Gaming [<http://www.kahnawake.com/gamingcommission/Kahnawake%20Regulations%20Concerning%20Interactive%20Gaming.pdf>], Sec. 32(a). Additional source: Murray Marshall, Legal Counsel to the Kahnawá:ke Gaming Commission [Discussion 8 November 2007, Tel: +1.403.689.2370].

²⁷ Mr Murray Marshall, Legal Counsel to the Kahnawá:ke Gaming Commission reported to Antigua that the United States has never targeted any of the Kahnawake gaming operators with criminal or civil enforcement actions [Discussion 8 November 2007, Tel: +1.403.689.2370]. See also, Mohawk Council of Kahnawake, Kahnawá:ke Issues Statement on Gaming Jurisdiction (12 July 2005) (the Grand Chief of the

Territory generated US \$2.5 billion in revenues each year.²⁸ Gaming operators within the Kahnawake Territory are projected to earn revenues between US \$2.0 and US \$2.5 billion through 2012, well above the projected revenue figures for Antigua.²⁹ These revenues generate millions in fees for the tribal government.³⁰

Another relevant comparator is Gibraltar. Gibraltar has also enacted a remote gaming regulatory scheme and developed and promoted its remote gaming industry. In 2005 and 2006, prior to the adoption of the UIGEA, its remote gaming operators earned US \$2.5 billion and US \$3.2 billion in revenues, respectively. These revenues are well in excess of Gibraltar's reported GDP.

If the Arbitrators look to the Kahnawake Territory or Gibraltar, which are proper comparators for the purposes of establishing Antigua's trade loss, then these comparison jurisdictions lend considerable support for the GBGC data upon which Antigua has based its computation of the level of nullification and impairment.

It is equally important, however, for the Arbitrators to understand that the United States is making a grossly misleading statement when it calculates "Antigua's hypothesized exports . . . [as being] 307% greater than its GDP. . . ." This is an incorrect statement that overstates the ratio significantly. The United States' calculation is improper because the United States is making a self-serving and unjustifiable adjustment to only *one-half* of the equation – the numerator – in a way that distorts Antigua's ratio of goods and services exports as gauged against its GDP. In its calculation, the United States increases the numerator of the equation (Antigua's goods and services exports), but leaves the denominator constant (ECCB reported GDP). In order to present a truthful and accurate ratio of adjusted goods and services exports to GDP, if such a calculation could be done, the United States would need to apply a corresponding upward adjustment to Antigua's GDP to include the value-added of remote gaming that is not captured by the ECCB in its data. Accordingly, if the United States wants to cite the Arbitrators to the true ratio of good and services exports to GDP, if it can be done at all, in order to do so in a truthful and responsible manner, the United States would need to increase the numerator by the

Kahnawake publicly commenting that no Kahnawake remote gaming operators are being threatened with legal action by other jurisdiction) [www.kahnawake.com/news/pr/pr07122005b.pdf].

²⁸ GBGC Data May 2007, *Exhibit AB-9*.

²⁹ *Id.*

³⁰ The Kahnawake Tribal Nation operates Mohawk Internet Technologies ("MIT"), the exclusive internet provider within the tribal territory. MIT generates millions of dollars in revenue for the Kahnawake band. See Annual Report 2007 (discussing operation of MIT) [www.kahnawake.com/news/annual/ar2007.pdf]; see Mohawk Council of Kahnawake, MCK supports Mohawk Internet Technologies Memorandum of Understanding (7 March 2006) (noting that MIT is the exclusive internet provider within the territory) [www.kahnawake.com/news/pr/pr03072006a.pdf]; and Mohawk Council of Kahnawake, MCK Releases 2006/2007 Budget (5 April 2006) (providing revenue figures of the Mohawk Council of Kahnawake) [www.kahnawake.com/news/pr/pr04052006b.pdf].

amount of unreported exports (in the United States hypothetical, the US \$2.4 billion in remote gaming exports in 2001) and the denominator by a corresponding amount as well. Specifically, to do this calculation correctly, the United States would need to increase the denominator by the value-added of remote gaming to Antigua's GDP. The United States itself (in paragraph 35 of its responses) assumes gross profits of 50 percent in the remote gaming industry. If gross profits in the remote gaming industry are 50 percent of gross gambling revenues, then in conducting this calculation the denominator would be increased by US \$1.2 billion (half of the gross revenues). If this logical step is done, then the calculation of the ratio of exports to GDP is as follows:

$$\begin{aligned} \text{Numerator} &= \text{Reported Goods/Services Exports} + \text{Unreported Goods/Services Exports} \\ &+ \\ \text{Denominator} &= \text{Reported GDP} + \text{Value-Added of Unreported Remote Gaming Revenues} \end{aligned}$$

Applying the figures suggested by the United States, the proper calculation in this context would be as follows:

$$\begin{aligned} \text{Numerator} &= \text{US } \$ 442 \text{ million [reported exports]} + \text{US } \$ 2.4 \text{ billion [gaming revenues]} = \text{US } \$ 2.84 \\ &\text{billion} \\ &+ \\ \text{Denominator} &= \text{US } \$ 697 \text{ million [reported GDP]} + \text{US } \$ 1.2 \text{ billion [gross profits]} = \text{US } \$ 1.70 \text{ billion} \end{aligned}$$

The proper ratio of exports to GDP would therefore be 167 percent, which is actually generally in line with a high exporting trade island nation such as Singapore. In fact, in paragraph 34 of its responses, the United States claims that the entire amount of exports of gaming services should be considered value added to the Antigua GDP. If that is the case, then the ratio of exports to GDP is US \$2.84 billion to US \$3.1 billion, or 92 percent, further in line with comparator economies.

As the above discussion reveals, the United States' computations do not take into account expenditures associated with remote gambling, which would also have to be taken into account to determine the true impact on GDP of the remote gaming industry. While it is likely that some domestic spending by operators, on things such as employee wages, facilities expenses and the like, might find their way into GDP—even if not actually reported by the operators—many would not. The greatest expenses of most remote gaming operators are financial services, advertising, computers, servers and other hardware and software development, and these expenditures would take place primarily if not exclusively outside of the jurisdiction.

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.

Again, what the United States finds "implausible" it cannot refute with any evidence at all. And, as observed above, because both the revenue *and* expenditures of Antiguan operators are not taken into account by the ECCB, trying to recalculate GDP based solely upon revenues is not very helpful. Antigua would point to the revenues per employee of some of the e-commerce companies submitted in its response to the Questions of the Arbitrators to show just how much revenue can be generated by a relatively small number of employees in this highly automated, technical industry.³¹

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.

The "example" in this response is itself so full of conjecture and removed from the economic reality of the remote gaming industry to be of no use. None of the figures are supported by any data, nothing supports the convoluted methodology and the assumptions are groundless.

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

³¹ See *Exhibit AB-17*.

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.

This response triggers the query "why must WTO and IMF data be presumed to be reliable, whereas GBGC data must be presumed *not* to be reliable?" There is no basis for that whatsoever. As Antigua has demonstrated, the global economic marketplace has chosen to rely upon GBGC data. Further, Antigua did point out information to the contrary with respect to the IMF and WTO data—both having been based upon information reported by the ECCB.

The ECCB is, by its own admission, not capturing the revenues or expenditures of the Antiguan remote gambling industry in its entirety. This means that exports data is way off, trade balance data is way off and imports data is way off. Furthermore, the ECCB data is unreliable because—as in the case of most small developing nations—it is attempting to make assumptions based on small sample sizes. As Antigua's economic consultant has explained, if you extrapolate from small sample sizes, your margin of error is huge.

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.

As it has elsewhere in its responses, here the United States is manufacturing its own definition of what constitutes trade revenues that has no support.

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.

The United States’ simplistic (and repetitive) assumptions regarding revenues and GDP cannot be accepted, particularly in the glaring absence of any supporting data.

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.

In the first instance, Antigua argues that the GBGC data is “direct data” removed from the generators of remote gambling revenue themselves no further than any other source.

GBGC is an independent company that relies upon industry participants and other parties for its revenues. It has every reason to be as accurate as it can possibly be in order that its data will be considered reliable and useful by its customers. In the absence of that, Antigua doubts that GBGC would be long in business. GBGC and its data existed before Antigua’s economic consultants undertook their estimation of the level of nullification or impairment. The United States’ belief that GBGC would somehow fabricate Antiguan revenues or allocate revenues to Antigua on an unsound basis is not supported by any evidence nor is it supported by common sense.

Further, as Antigua has demonstrated throughout this proceeding, the GBGC figures are broadly supported by reference to a number of sources, including (i) the CCA data; (ii) an analysis of revenues per employee in similar businesses; (iii) comparators such as Kahnawake and Gibraltar; (iv) the EC Report; and (v) statements of American Congressmen and government representatives.

By way of contrast, the approach of the United States is supported *only* by the ECCB figures, sourced from the ECCB without inclusion of the remote gaming industry.

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.

Antigua does not see any reason why what the United States considers to “comport with economic reality” has any relevance. Nor does Antigua believe that Antiguan remote gaming revenues are something that must be, as such, “based on actual services provided by Antiguan.”

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).

Much of what the United States says here is repetitive. However, Antigua observes that the GBGC data consist of revenues earned by Antiguan operators from servers located and functioning on Antigua. Whether or not they purport to be “measuring exports,” what is relevant is the loss of *remote gaming revenue* due to the failure of the United States to observe its international obligations—and that is precisely what this data is. Antigua has already observed that all remote gaming revenues are exports as there is no domestic market for these services.

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.

Again, this is inaccurate and repetitive.

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 2nd 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 9th 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.

First, Antigua has provided considerable information on how GBGC collects its data. Second, the intense scepticism of the United States over the accuracy and rigour of the GBGC data gathering is ironic given the insistence of the United States on using financial information that expressly doesn't include any of the relevant data at all.

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

According to GBGC, its ongoing process of refining its data (including allocating revenue as accurately as possible to particular jurisdictions) and adjusting figures for the changing value of the United States currency can lead to relatively minor inconsistencies among data sets, particularly those compiled at different points in time.

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). 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 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).

These repetitive kinds of calculations are improper, misleading and irrelevant. Why the United States believes that the level of nullification and impairment to be set by the Arbitrators in this proceeding should be based upon the complete speculation of what the United States considers economically “reasonable” from its own perspective is beyond Antigua’s ability to understand.

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.

The ECCB has made clear that the revenues and expenditures from the Antiguan remote gaming sector were not in its possession and not used or taken into account for any reason. This was made apparent to the United States as early as the Methodology Paper. What the United States believes that Antigua or the ECCB “should have” done, said or mentioned is irrelevant.

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. 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.

Antigua does not have to speculate on why its remote gaming industry is in decline. As Antigua has observed throughout this Arbitration, it knows from direct acts and effects precisely what impact the United States efforts have had on the Antiguan industry. Neither does Antigua need to (nor would it) fabricate any facts at all—the things that are outlined in the time line submitted as Exhibit AB-13 are real events that actually happened at the described times. And, there is no doubt that Antigua as a jurisdiction has suffered disproportionately from United States efforts to quash the foreign remote gaming industry.

Antigua did not bring this matter before the WTO because it was losing market share to competitors. It brought this matter before the WTO because observable, tangible actions on the part of the United States government have had the object and affect of destroying the ability of Antiguan service providers to provide gambling and betting services to consumers in the United States, contrary to the obligations of the United States under the GATS.

While the United States denies that Antigua's revenue losses are attributable to its actions, it offers no actual evidence in support of any other theory.

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, than 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;**
- (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.

In fact, the United States *does* have the burden of establishing that Antigua has a practical and effective remedy under the GATS.³² This it has manifestly failed to do.

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

³² Arbitrators' Report, *EC - Bananas (Ecuador)*, para. 75.

and procedures by adequately considering the possibility of suspending concessions on such goods.

Antigua did consider the possibility of suspending concessions or other obligations under the GATS but determined that they would not be practical or effective. If there were a practical and effective remedy for Antigua under the GATS, even in part, Antigua would be pleased to resort to such a remedy. Unfortunately, as the United States well knows, there simply is not.

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.

The proper table is Table 3:2 in Exhibit AB-6.

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.

The United States mis-speaks in this response. Antigua considered sectors as well as the level of nullification or impairment. As said above, if Antigua determined that it had a practical and effective remedy under the GATS at any level, it would be pleased to suspend concessions or other obligations under that covered agreement. After careful analysis by Antiguan government trade and economic experts, it was determined that—regardless of the level—recourse to other sectors under the GATS would be punitive to Antiguan citizens. This is true even without taking into consideration the effect that any GATS suspension would have on the United States. While it may in practice be true that in circumstances where there is great economic disparity between trading partners recourse to suspension of concessions or other obligations under the GATS or the GATT may prove of little impact to the offending Member, that is not true of necessity.

It should also be kept in mind that if, as Antigua argues there should be, a balancing of equities should play a role in the resolution of these kinds of issues, the offending Member can always avoid the affect of the suspension of concessions or other obligations by doing precisely what Article 22 expects—bring itself into compliance with its obligations under the covered agreements.

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.

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 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. 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.

By this response the United States would appear to assert that Antigua is at best only entitled to “steady growth” of its economy; and that the destruction of an immensely profitable Antiguan industry, in violation of international law, is not itself “serious” unless the Antiguan economy suffers some *other* kind of harm or contraction. There is no basis for this. The destruction of a multi-billion dollar industry in a small economy is *per se* a very serious matter. Had the industry been allowed to continue and develop in the ordinary course without the illegal efforts of the United States, it is incredible to consider the benefits that would have flowed through over the course of time to the entire Antiguan economy. To say that Antigua has not been “harmed” under these circumstances is absurd and patently dismissive.

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 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.

The "equivalence" is achieved by first setting the level of nullification and impairment and thereafter Antigua setting the suspension of concessions or other obligations at the same level.

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. 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.

This response would seem to imply that all an offending Member need do is disagree with the normal and preferred method of compliance (the withdrawal of the offending measures) and thereby provide itself with a less troublesome (and costly) alternative measure of the level of nullification or impairment. There is no support for this.

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. 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 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.