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

WT/DS285

Oral Statement of the United States
October 18, 2007

1. I would first like to express the appreciation of the United States for your willingness to serve as the Arbitrator in this new phase of this dispute. I of course also would like to thank the staff of the Secretariat for their work in assisting the Arbitrator.

Introduction

2. In prior arbitrations under Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), arbitrators have based their awards on hard economic data, and have rejected requests to increase awards based on speculative claims founded on speculative predictions and assumptions. In the statement below, the United States has followed the approach of basing nullification and impairment calculations on actual economic statistics, and without making speculative assumptions. Based on official, internationally accepted economic statistics, and on Antigua's own reasoning regarding the operation of the U.S. gambling market, the level of Antigua's nullification and impairment should be no more than $0.5 million per year in lost exports of gambling services.

3. In stark contrast to the U.S. calculations of the level of nullification or impairment, the calculations presented by Antigua are wildly disconnected from any official economic statistics, and indeed disconnected from economic reality. Antigua's request to suspend concessions in the amount of $3.4 billion per year is nearly four times greater than Antigua's entire gross domestic

product, and at least 1000 times higher than any figure that could be based on actual economic data. Antigua has based its request on an incorrect, unsupportable assumption of what United States compliance would entail, and on unsupported and unrealistic figures of gambling revenue found only in an unpublished report prepared by a private consultant working for the gambling industry. In short, Antigua has provided no factual basis for its incredible request for authority to suspend concessions in the amount of $3.4 billion per year.

4. The United States has also shown that Antigua in its request for suspension of concessions has not followed the principles and procedures set forth in paragraph 3 of Article 22 of the DSU. In particular, the United States has shown that Antigua has presented no valid basis for departing from the general principle of seeking to suspend concessions in the same sector or same agreement with respect to which the Dispute Settlement Body ("DSB") has found nullification or impairment. In fact, Antigua has levels of services imports that are far greater than the level of nullification or impairment to its services exports, and Antigua's authorization to suspend concessions should be limited to services concessions under the *General Agreement on Trade in Services* ("GATS").

5. Before addressing the specific legal matters at issue in this arbitration, the United States would like to comment on the language of Antigua's submission, which includes statements such as that certain U.S. arguments are "unconscionable." The United States was surprised to see such language in a WTO dispute settlement submission and hopes that, from this point forward, this proceeding can move forward without it.

6. The United States is also concerned that Antigua, by employing this sort of language, is implying that the United States has somehow acted improperly and thus that Antigua is entitled

to some sort of punitive award not in accordance with the legal standards set out in Article 22 of the DSU. Contrary to Antigua's implications, the United States has at all times acted in good faith in accordance with the letter and spirit of the DSU. From the time of the first U.S. submission in the panel proceeding, the United States was entirely clear that it had not intended to schedule a commitment for gambling services, that it did not believe its Schedule reflected such a commitment, and that even if the U.S. Schedule was interpreted otherwise, U.S. anti-gambling laws were consistent with GATS obligations. The Panel and the Appellate Body found otherwise. But along the way, the Appellate Body made an important finding: that the U.S. anti-gambling laws are provisionally justified under Article XIV as measures necessary to protect public morals and public order. The U.S. measures would have fallen within the Article XIV(a) exception, but for an ambiguity involving the interaction of U.S. criminal laws and a civil law governing betting on horse racing.

7. During the reasonable period of time, the United States tried to resolve this ambiguity involving the treatment of interstate remote gambling on horse racing by showing, as our Department of Justice has long maintained, that such activities are unlawful in the United States. It is worth noting that if this objective had been achieved during the reasonable period of time, Antigua, as well as U.S. operators, would have had zero access to any market for remote gambling on horse racing.

8. The Article 21.5 compliance panel ultimately found that the United States did not achieve its goal of resolving the ambiguity involving horse racing. This left the United States out of compliance with its GATS obligations. As a result, the United States decided to follow the only realistically available course of achieving compliance, which was to follow the established

multilateral procedures to correct the U.S. GATS Schedule in order to reflect the original U.S. intention of excluding gambling from the U.S. GATS Schedule. Once completed, this process will bring the United States into compliance. In the course of the GATS Article XXI process, the United States is negotiating in good faith with affected Members – including Antigua – on compensatory adjustments in the U.S. Schedule. In fact, the negotiations with some Members are close to fruition, though not yet with Antigua. In short, the United States respects the recommendations and rulings of the DSB and is acting in good faith and in accordance with the established WTO procedures to come into compliance.

9. The United States notes the unusual conduct of the Government of Antigua with respect to the matter of internet gambling. According to Antigua's own assertions, Antigua has affirmatively promoted an off-shore gambling industry that is "tailored to and directed at"[1] U.S. consumers, even though remote gambling has long been prohibited under U.S. criminal laws due to the harm such activities cause to vulnerable groups, and to the ties to money laundering and organized crime. Although Antigua claims to be shocked that remote gambling is unlawful in the United States, this is untenable. The *Cohen* internet gambling prosecution, mentioned in Antigua's submission, began in March 1998, just at the outset of the development of internet gambling. And more broadly, the United States Department of Justice had been prosecuting under the Wire Act phone-based bookmaking operations for decades. In short, according to Antigua's own assertions, Antigua was knowingly promoting operators in Antigua who intended to and did violate U.S. criminal laws.

[1] Written Submission of Antigua and Barbuda, para. 117.

10. In 2003, Antigua for the first time advanced the theory that U.S. gambling laws were inconsistent with the U.S. GATS Schedule. To be sure, Antigua had the right to bring such a dispute. It is regrettable, however, that Antigua chose to begin a dispute about the criminal laws of the United States – laws that reflect policies intended to protect public morality and welfare – only after it had been promoting a remote gambling industry targeted at U.S. consumers for many years.

11. Moreover, throughout this dispute, Antigua has disputed U.S. concerns about money laundering and organized crime by pointing to the allegedly highly regulated nature of the Antiguan gambling industry. From Antigua's latest submission, we now learn that in fact Antigua does not even keep official records of the level of gambling conducted in Antigua. And, Antigua has no information about flows of funds that Antigua claims are greater than Antigua's entire economy. Although not at issue in this proceeding, Antigua's own submission could not be stronger in showing the potential dangers related to money laundering arising from unregulated internet gambling.

12. Under Antigua's own submissions, Antigua paints a picture of gambling operators, licensed by Antigua, that operate in violation of the laws of their most important market, and without any official reporting requirements. Antigua's only data, whether from a private consultant or from Antigua's own sources, is ultimately based on what appear to be phone conversations or at most informal written communications with some of these operators, without any further investigation or verification. The United States fails to see how such information, obtained without verification from enterprises knowingly operating in violation of criminal laws, can be the basis of an award under Article 22.6 of the DSU.

Antigua's Unfounded Claim for Suspension of Benefits Related to All Forms of Remote Gambling

13. As explained in the U.S. first written submission, Antigua's claim for suspension of benefits is based on the wrong counterfactual. In particular, Antigua assumes that the benefits it would receive under the GATS would be complete market access for all types of gambling, regardless of the strong public policies against remote gambling and the longstanding laws in the United States that restrict remote gambling.

14. Antigua has no legal or factual basis for such an assumption. Rather, the only two plausible counterfactuals, in the specific circumstances of this dispute and in light of the DSB findings, is based on the scenario where the United States achieves compliance by either banning domestic remote gambling on horse racing, or adopting measures that allow Antiguan operators (and operators in all other WTO Members) to provide cross-border remote gambling services on horseracing.

15. Antigua's argument is wrong as a legal matter, because it is not correct – as Antigua writes – that the "United States [must] permit[] Antiguan operators to provide cross-border gambling and betting services to United States consumers without interference, as it is obligated to do under the GATS."[2] Antigua's statement is based on its interpretation of Article XVI of the GATS, and on the findings of the Panel and Appellate Body that the GATS Schedule of the United States included a market access commitment for cross-border gambling services. As an initial matter, the United States notes that it does not agree, and the Appellate Body has never found, that Members have an unconditional obligation to allow access to each and every type of

[2] Antigua's Methodology Paper, at 3.

service covered by the service sectors included in the Member's Schedule of GATS commitments.

16. But, aside from Antigua's interpretation of Article XVI, Antigua improperly ignores another equally important GATS provision addressed in this dispute, namely the General Exceptions set out in Article XIV of the GATS. This article provides that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . . (a) necessary to protect public morals or public order", so long as the Member meets the requirements of the Article XIV chapeau. And in this case, the DSB indeed found that the U.S. measures restricting remote gambling were provisionally justified under the public morals exception set out in Article XIV(a) of the GATS.

17. For these reasons Antigua is wrong in asserting that the United States (or more generally any other Member) has an unconditional obligation to allow access to each and every type of service covered by the service sectors included in the Member's Schedule of GATS commitments.

18. Indeed, such a result would be fundamentally inconsistent with, among other things, the purpose that Article XIV serves within the GATS. The Appellate Body found that the laws of the United States were properly considered measures "necessary to protect public morals or public order" but that the United States did not meet the requirements in the Article XIV chapeau with respect to remote gambling on horseracing. The consequence of such a finding should not be that the WTO Member must neglect to protect its public morals or public order; rather, the WTO Member must be able to protect those values by taking steps to meet the chapeau requirements.

19. Furthermore, nothing in the DSB recommendations and rulings, nor in the chapeau of GATS Article XIV, would require the United States to treat all types of remote gambling identically. Any regulation involves a balance of interests, and a set of measures that allowed remote gambling on horseracing, but disallowed other types of remote gambling, would be consistent with the provisions of the GATS.

20. In its latest submission, Antigua attempts to buttress its arguments regarding a suspension of benefits tied to all types of remote gambling, but those efforts are unsuccessful.

21. First, Antigua argues that the Panel should start and end its analysis with Article XVI market access obligations, and ignore the Article XIV exceptions, because the United States had the burden of establishing an Article XIV defense, and ultimately did not meet that burden. But Antigua does not and cannot explain why evidentiary burdens dictate the counterfactual to be used by the Panel in an Article 22.6 arbitration. The issue here is what level of market access Antigua could expect if the United States complied with its GATS obligations; that question simply does not turn on whether the level of market access is defined by a GATS provision that expresses an obligation, or instead by a provision that establishes an affirmative defense to a breach of an obligation.

22. Second, Antigua argues that the United States did not, but should have, discussed during the original proceeding the GATS-consistency of a hypothetical measure that banned all types of remote gambling other than horse racing. This argument is baseless. The issues in the original panel proceeding, and the current proceeding, are different. One would not expect any issue to arise in the original panel proceeding with respect to what type of compliance measure might be adopted. Indeed, such issues cannot even be framed until there has been a finding that the

measures at issue are not in compliance with WTO obligations. The text of the DSU confirms this point: Article 19.1 provides for panels to issue only a single, standard recommendation, namely that the responding Member bring its measures into conformity with its WTO obligations.

23. Third, Antigua argues that the Appellate Body finding that the U.S. measures were "necessary" under Article XIV was "in essence voided" by the failure of the United States to meet the requirements of the chapeau because of the horse racing ambiguity. This contention is incorrect. With respect to both GATS Article XIV and the comparable context of Article XX of the GATT 1994, the Appellate Body has explicitly found that the applicability of the chapeau and the subparagraphs of the exception are separate and distinct issues, and moreover, that the correct mode of analysis is first to examine the subparagraph of the exception. Furthermore, in at least one prior compliance proceeding involving exceptions – the *US – Shrimp* dispute – the Appellate Body relied on the finding in the original dispute that the measure at issue complied with the requirements of the exceptions subparagraphs, and then proceeded to reexamine the application of the measure under the chapeau. Thus, it is clear that the Appellate Body's findings on the Article XIV(a) necessity of the U.S. measures are anything but void, and that they must play an important role in any further proceedings in this dispute.

24. Fourth, Antigua cites to Article 3.7 of the DSU for the proposition that the counterfactual must be based on the "withdrawal of the measures." In the first place, Article 3.7 of the DSU is not relevant to the task that DSU Article 22.7 assigns to the Arbitrator. Moreover, Antigua has misunderstood the meaning of the term "withdrawal of the measures" in DSU Article 3.7. As we noted in our written submission, if there were a dispute where the Member concerned was found

to have breached Article III:2 of the GATT 1994 because it imposed higher internal taxes on imported goods than on domestic goods, the Member concerned could choose to raise the tax rate on domestic goods; to lower the rate on imported goods; or to set a new, uniform tax rate. Any of the steps would "withdraw" the measure that had been found inconsistent with GATT Article III:2, as the term "withdraw" is used in the context of Article 3.7. In short, the point of Article 3.7 is that in WTO dispute settlement, compliance is to be preferred over compensation, and compensation is to be preferred over suspension of concessions.

25. Indeed, this same principle is stated in the first sentence of DSU Article 22.1. And in this, more relevant context, the DSU provides that "neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into compliance with the covered agreements." Here, the DSU uses the phrase "full implementation," not "withdrawal." The idea expressed in both Article 3.7 and Article 22.1 is simply that implementation is the preferred option; there is no DSU principle providing that implementation must involve a removal of the measure that was challenged. To the contrary, DSB findings have repeatedly stated that the means of implementation are at the discretion of the implementing Member.[3]

26. Fifth, and finally, Antigua makes the curious argument that the "United States cannot select a hypothetical method of compliance." But, apparently, this is exactly what Antigua believes Antigua is entitled to do. Regardless, neither disputing party has a right to dictate the methodology to be used by the Arbitrator. Rather, the Arbitrator must evaluate the level of the

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[3] Appellate Body Report, *United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, para. 185 (quoting the Appellate Body Report in *United States – Tax Treatment for "Foreign Sales Corporations"*) (internal quotation marks omitted).

nullification and impairment of benefits based on all relevant facts and circumstances. And here the pertinent circumstances must include the U.S. strong policies in opposition to remote gambling, and the fact that the United States failed to meet the chapeau requirements because of the horse racing ambiguity. In these circumstances, compliance through providing market access for horse racing gambling is by far (other than a complete ban on all remote gambling) the most likely scenario.

Antigua's Wildly Unrealistic Proposed Level of Suspension of Concessions

27. In 2005 – the last year of available data – Antigua's entire gross domestic product was approximately $900 million (US dollars). Antigua's proposed level of suspension of concessions – at $3.4 billion US dollars – is nearly four times larger than Antigua's entire economy, and thus wildly out of line with any realistic figure.

28. Antigua's Methodology Paper purports to support the $3.4 billion proposal by presenting three different models of Antigua's trade damages. But each of these methodologies are based on the same underlying data, that data is fundamentally inconsistent with actual economic data used by governments and international institutions, and should not be relied upon in this proceeding.

29. All of Antigua's calculations are based on a single report – provided by a private consultant unassociated with any government or international institution. That report is known as the "Quarterly eGaming Statistics Report," issued by a for-profit consulting group known as "Global Betting and Gaming Consultants" ("GBGC"). In our written submission, we noted that we were not able to determine the methodologies used by GBGC in preparing its reports and, that if the data is collected from surveys of gambling providers, the result would be that

Antigua's entire estimate of damages is based on the self-serving allegations of gambling enterprises located within Antigua.

30. In its written response, Antigua provides a letter of explanation from the private, for-profit consultants. The letter explains that for publicly trade companies, the consultant relies on financial results published by the companies. However, as far as the United States is aware, none of the companies upon which Antigua bases its nullification and impairment figures is publicly traded. And for such non-publicly-traded companies, the GBGC letter is vague on its methodologies. It states only that its clients (which may or may not be Antiguan operators) sometimes share information, and that GBGC periodically "puts questions to companies and receives guidance." The only other source of data mentioned for non-publicly-traded companies is some modeling of poker sites, but there appears to be no modeling of other types of internet gambling. Thus, based on the new information Antigua has provided, the main source of data relating to Antiguan operators indeed is unverified claims of revenues provided by those companies themselves. The United States submits that such unverified, self-serving allegations should not be the basis of arbitration findings under Article 22.6 of the DSU, particularly when they are at odds with official economic data.

31. Furthermore, as the United States has noted, Antigua's gambling revenue data is not supported by a single official economic report submitted by the Government of Antigua. In its latest submission, Antigua submits a letter (AB-10) from an Antiguan official confirming that Antigua does not have any official, enforceable, and/or verifiable means to collect data from its licensed operators. The letter otherwise has no probative value in this dispute, as it is simply

another assertion by Antigua prepared for the purpose of this proceeding, and it is again based on unverified data provided by unnamed gambling operators.

32. Moreover, Antigua's data is fundamentally inconsistent with official economic statistics prepared by international institutions such as the Eastern Caribbean Central Bank, the International Monetary Fund, and the WTO itself. The data is even inconsistent with Antigua's own assertions contained in its request under Article 22.2 for authority to suspend concessions. In fact, Antigua's data appears to be incorrect by a factor of at least 50 to 100.

33. As the United States explained in its written submission, Antigua's claims of "remote gambling revenue" are inconsistent with International Monetary Fund (IMF) statistics collected for balance-of-payment purposes and with services statistics published by the WTO itself. To the extent that the data may not fully reflect all gambling revenue, this appears to be the result of a conscious decision by Antigua to protect its licensed operators from any disclosure requirements. Although Antigua tries to downplay the official, internationally-accepted statistics, these in fact are the available figures for Antigua's economy, are entirely appropriate for use in an international arbitration, and are the best data available to the Arbitrator. The United States submits that this data, as opposed to unsupported and unverifiable assertions of Antiguan operators, must be the basis of any economic calculations in this arbitration.

34. The following table compares Antigua's allegations of "remote gaming revenue" with economic data prepared by the Eastern Carribean Central Bank (ECCB) on the GDP of Antigua. The ECCB is the official bank of the Eastern Carribean, and issues the Eastern Caribbean Dollar that is used in Antigua and other eastern Carribean nations. The ECCB data below is taken from the ECCB National Account Statistics, submitted by Antigua itself in Exhibit 7 of its first submission. The first ECCB line below is for "other services," which is the only place that gambling services would fit in the ECCB table breaking down the GDP components of Antigua's economy. The second ECCB line is for Antigua's total GDP.[4]

	1999	2000	2001	2002	2003	2004	2005
Antigua "remote gaming revenue"[5]	$546 million	$1716 million	$2392 million	$2109 million	$1416 million	$1125 million	$1138 million
ECCB "other services"	$41 million	$44 million	$44 million	$46 million	$47 million	$49 million	$51 million
ECCB "Total GDP"	$652 million	$665 million	$697 million	$714 million	$754 million	$818 million	$870 million

35. Antigua is claiming that its 2002 exports of gambling services alone exceeded GDP by a factor of nearly 4, and exceeded its value-added for the "other services" sector of its economy of which gambling is a part by a factor of 46, stretching credibility beyond the breaking point. If

[4] Taken From ECCB data in Ex. AB-6, Table 3.1, with conversion of Eastern Caribbean dollars to U.S. dollars at the 2.7 exchange rate.

[5] As alleged by Antigua in Ex. AB-1.

this were the case, Antigua should explain how the basis for this incredible situation would exist. In fact, Antigua has not provided even the most basic breakdown of the economic structure of its gambling exports.

36. Antigua notes that a significant portion of the monies arising from gambling operations are kept in foreign banks, and also that the profits of the industry may not return to Antigua. In the view of the United States, these are important concessions on the behalf of Antigua, and raise serious questions about what Antigua means by nullification or impairment. As the United States understands it, the export of a good or service involves a payment by the purchaser, and a return of the payment (along with a currency exchange) to the exporting country. But here, according to Antigua's own statements, it seems that this may not be occurring. Instead, although the operator may have an Antiguan license, the operator may in fact be a resident in some other jurisdiction, and only paying small amounts (in the form of service fees or expenses) to entities actually located in Antigua. In such a scenario, the actual value to Antigua of its services export, and the figures upon which nullification and impairment would be calculated, would be only a small fraction of the net revenue involved in the transactions claimed by Antigua.

37. Antigua submits a letter from the ECCB, in response to a query from Antigua's counsel. The letter acknowledges that it is the role of the ECCB to collect the official statistics of Antigua, and notes that its primary purposes include regulation of money and credit, monetary stability, sound financial structures, and economic development. Thus, the letter in essence confirms that the ECCB needs and wants information on major trade and monetary flows, and makes efforts to obtain such data. The letter then explains, however, that licensed gambling

operators are not reflected in ECCB calculations, because Antigua itself has exempted those operators from Antigua's "Statistics Act." In other words, the letter from the ECCB indicates that Antigua has written laws to exempt those companies from reporting requirements. Yet, Antigua asks this Arbitrator to accept data that is not collected officially under force of law, but that is provided informally, and without any means of verification, to a private consultant.

38. In addition, the United States note that in the ongoing trade policy review – including in the paper just released on October 1, 2007 (WT/TPR/S/190/ATG), the WTO Secretariat indicates that gambling operators in Antigua are subject to a 3 percent income tax, and that these companies paid only US$2.5 million in revenue for this tax in 2006. If indeed Antigua does collect income taxes on gambling operators, such data would be highly relevant to this proceeding. The United States respectfully requests that Antigua clarify this matter.

39. In any event, even if gambling revenue were less than fully reported in official economic statistics, gambling revenue that dwarfed the rest of Antigua's economy would surely exhibit themselves in other components of Antigua's GDP, as some of that revenue would be used to purchase other goods and services. (Unless, as just noted, that revenue was never returned to Antigua, and instead was a benefit accruing to some jurisdiction other than Antigua.) Indeed, Antigua's own Methodology Paper claims a "multiplier" of 1.4 related to gambling revenue. But under Antigua's own reasoning, its gambling revenue data are completely inconsistent with its official economic statistics. For example, in 2000, Antigua claims that gambling revenue tripled, with an increase of nearly $1.2 billion. Under Antigua's 1.4 "multiplier" theory, an additional 40 percent of this $1.2 billion, or $480 million, would be injected into other areas of Antigua's economy, and would ultimately be reflected in GDP as purchases of final goods and services.

But Antigua's official economic statistics show only a 2% rise ($13 million) in GDP for 2000, nothing like the nearly 75% percent ($480 million) increase in GDP predicted by Antigua's multiplier theory.

40. Moreover, again leaving aside how gambling revenue is directly reported in official statistics, the overall trends of Antigua's official economic data are inconsistent with Antigua's claims (based on the consultancy report) of gambling revenue. For example, Antigua claims that in the period 2002-2005, Antigua's gambling revenue fell by nearly $1 billion (by nearly 50%), a figure substantially greater than the size of Antigua's economy. Yet, during this same period, Antigua's official economic statistics show continued growth (ranging from 2 to 7 percent) of its economy, as reflected in the GDP figures.

Other Methodological Flaws in Antigua's Calculations

41. In addition to the fundamental problem with Antigua's source of economic data, Antigua's methodologies that make use of this data are affected by other crucial flaws. Antigua's responses to these points in its written submission are entirely unconvincing.

42. First, any calculation of Antigua's nullification and impairment must reflect loss of access to the U.S. market, and not worldwide gambling markets. Yet, without explanation, all of Antigua's calculations are based on worldwide gambling revenue. Antigua's written response makes clear that Antigua has no sound basis for using worldwide gambling revenue. Instead, Antigua concedes that the United States accounts for significantly less than 100% of its purported revenue. Antigua explains that it nonetheless attributed all of its alleged lost revenue to the United States because some unnamed consultant hired by Antigua for the purpose of this

arbitration "believes" it to be true. Clearly, such unsupported beliefs do not form the sound basis for an arbitration award.

43. Second, Antigua has presented no basis for arguing that its purported loss of worldwide market share is due to U.S. actions. In its written submission, Antigua does not even attempt to argue that U.S. actions were in any way targeted at or discriminatory toward Antigua, as compared to operators from other foreign jurisdictions. Instead, Antigua simply postulates that Antigua had some special position in the U.S. market, and thus that U.S. restrictions adversely affected Antigua's worldwide market share as compared to operators from other jurisdictions who were less reliant on the U.S. market. As an initial matter, the United States notes its concern with this idea that Antigua's claimed level of nullification and impairment is, according to Antigua itself, directly based on Antiguan operators who intended to and did break U.S. criminal laws, and that such flagrant disregard for the laws of another WTO Member should form the basis for an increased level of nullification and impairment. Furthermore, Antigua's contention is inconsistent with its own data. According to the GBGC data submitted by Antigua, while Antigua's revenues went down by $1.3 billion between 2001 and 2006, rest of world revenues from the North American market went up $5.3 billion. While the United States does not find any of the GBGC data to be credible, Antigua relies on it, and that data shows that Antigua lost market share not just around the world, but also in the United States. Thus, Antigua's own data show a loss of worldwide and North American market share that cannot be attributed to U.S. actions.

44. Third, Antigua simply has no response to the fact that Antiguan and other non-U.S. internet gambling operators currently face a major advantage as compared to any such operators

located in the United States. Namely, the U.S. criminal laws banning remote gambling are difficult to apply directly to foreign operators, which is not the case for any internet gambling operators located in the United States. If, as Antigua asserts in its counterfactual, the United States were to clearly and affirmatively legalize internet gambling, any Antiguan operators would lose their advantage (as compared to U.S. operators) of being located outside the direct reach of U.S. criminal laws. The result would necessarily be an even greater loss in Antigua's future market share of gambling revenue.

The U.S. Estimate of the Level of Antigua's Nullification and Impairment

45. Based on official economic statistics, and Antigua's own reasoning regarding the operation of the U.S. gambling market, the level of Antigua's nullification and impairment should be roughly $0.5 million, and certainly no greater than approximately $3 million per year in lost exports of gambling services.

46. The starting point is one area of agreement that the United States has with Antigua at this stage of the arbitration: namely, that historical levels of internet gambling services (to the extent that the data is accurate and reliable) is indicative of the level of nullification and impairment in this dispute. Although remote gambling has at all relevant times been unlawful under U.S. Federal criminal statutes, enforcement of those federal statutes against foreign operators offering services over the internet has been difficult. Thus, historical levels of gambling services exports are instructive as to the levels that might exist if remote gambling had never been outlawed in the United States.

47. Antigua in particular argues that the years 2001-2002 were the high point of Antigua's export of gambling services to the United States. Although the United States has no basis for

knowing how 2001-2002 compared to other years, the United States can accept that exports in 2001-2002 are somewhat instructive regarding the (unlawful) market in the United States for remote gambling services.

48. Under WTO figures, Antigua's "other service exports" – which is services exports minus travel and transportation exports – were $47 million in 2001. Since this category is a catchall provision, it surely includes more than just gambling services. As a result, the $47 million figure for 2001 is a hard cap on the absolute highest figure of Antigua's gambling service exports in 2001. The $47 million figure also encompasses exports to the entire world, not just the United States, and thus the United States would not account for all Antiguan services exports under this category.

49. The United States also notes that the $47 million cap on total gambling service exports for 2001 is in the same range as an estimate set out in Antigua's recourse to Article 22.2 of the DSU (despite the much higher figures set out in Antigua's Methodology paper). Based on its allegations in its recourse to Article 22.2, Antigua's gambling services exports to the entire world in 2001 were $68 million (which is within the range of the cap indicated by WTO data), and a much more realistic allegation than the *$2.4 billion* amount claimed for 2001 gambling exports in Antigua's subsequent methodology paper.

50. The 2001 cap on other services exports must then be limited to reflect the correct counterfactual – a hypothetical U.S. legalization of remote gambling on horseracing, as opposed to Antigua's hypothetical legalization of all remote gambling, including gambling on poker and professional team sports. Limiting the $47 million cap to the horseracing proportion, Antigua's

highest possible level of gambling services that would be affected by U.S. compliance is U.S. $3.3 million per year.

51. The United States believes that this $3.3 million figure would overstate current levels of nullification and impairment, because (1) it is based on services exports to the world (not just to the United States), and (2) Antigua itself asserts that since 2001 its level of market share has fallen drastically from 50 percent worldwide, is currently only 7 percent, and will level off at only a 5 percent market share. If Antigua's own claims of loss in market share are taken into account, then the $3.3 million per year figure would need to be reduced to the amount of approximately $500,000 per year in lost exports to the world of horserace gambling services.

The Limitation of the Award to GATS Concessions Under Article 22.3 Principles

52. The United States has little to add at this point to the Article 22.3 issues, because the United States and Antigua have such differing views on the level of Antigua's nullification and impairment. The United States would only note here the following two points. First, Antigua does not dispute that Antigua does indeed have a market access concession in the same sector as gambling, and that under Article 22.3 principles, Antigua must first seek to suspend concessions in that sector. Second, Antigua does not dispute that, if the level of nullification and impairment is the level shown in the United States written submission, that it indeed would be practicable and effective for Antigua to suspend concessions in other GATS sectors, and thus that there would be no basis for a suspension of TRIPS concessions.

Equivalency of the Suspension of Concessions with the Level of Nullification and Impairment

53. As the United States noted in its written submission, Antigua's request alleges a level of nullification and impairment, and requests permission to suspend certain GATS and TRIPS concessions, but the request places no value on the GATS and TRIPS concessions and does not explain what mechanism Antigua intends to use to ensure that the level of suspension does not exceed the level of nullification and impairment. The United States accordingly requested that regardless of the level of nullification and impairment found by the Arbitrator, and regardless of the sectors or agreements under which Antigua is permitted to suspend concessions, the Arbitrator should require Antigua to specify how it will ensure that the level of suspension of concessions does not exceed the level of nullification and impairment found by the Arbitrator.

54. The United States understands this to be a routine procedure in Article 22.6 arbitrations, and was surprised by Antigua's strong objection to the U.S. request. To respond to Antigua's comments, the reason to obtain further information on Antigua's requested suspension of concessions is set out in Article 22.7 of the DSU. In particular, pursuant to Article 22.7 of the DSU, the arbitrator "shall determine whether the level of ... suspension is equivalent to the level of nullification or impairment." The arbitrator cannot make this determination unless there is some information regarding the methodology that will be used by the Member to determine that the level of suspension will remain below the level of nullification and impairment determined by the arbitrator. In this case, for example, Antigua is requesting the authority to suspend TRIPS obligations, but Antigua has provided no information on how this authority will be restrained so as not to exceed the level of nullification and impairment. The United States notes that in the

EC-Bananas (Ecuador) arbitration – an arbitration to which Antigua has repeatedly referred – the report of the arbitrator contains a full discussion of this matter and of the methodologies to be adopted by Ecuador. The United States respectfully refers the Arbitrator and Antigua to paragraphs 161 to 164 of that decision by the arbitrators.

55. This concludes our opening remarks. We would be pleased to respond to any questions by the Arbitrator.