BEFORE THE

WORLD TRADE ORGANIZATION

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

WT/DS285

COMMENTS OF THE UNITED STATES ON THE ANSWERS OF ANTIGUA AND BARBUDA

November 13, 2007

Comments of the United States on Antigua's Answers

Preliminary Comments[1]

1. Antigua's answers and newly-submitted exhibits confirm that Antigua's asserted level of nullification and impairment is wildly unrealistic. Because the United States has comments on several issues that cut across the response to more than a single question, the United States will address those issues in these preliminary comments.

Antigua's Concession on the Level of Nullification and Impairment Relating to Horse Racing

2. In response to Question 10, Antigua concedes "that its operators do very little business in horse race betting." Moreover, Antigua declines to even try to offer an estimate of its level of nullification and impairment tied to on-line horse race gambling.

3. In essence, Antigua is telling the Arbitrator that Antigua is only interested in an outcome to this dispute that results in radical changes to all U.S. anti-gambling laws so as to allow all forms of on-line gambling. And, Antigua seems to be arguing, any arbitration award limited to horse racing would just be too small and would render pointless all of Antigua's efforts to achieve that result in this dispute.

4. In taking such positions, Antigua continues to act as though its desire for particular economic outcomes means that the WTO dispute settlement system should ignore the actual commitments of Members and instead accommodate Antigua's desires. It is clear that Antigua fundamentally misunderstands the benefits it is to receive under the GATS, as well as the purpose of WTO dispute settlement proceedings. The United States (and every other WTO Member) reserves the right to adopt their own policies necessary to address issues of public morality and public order (including through market-restricting measures), so long as those measures are not applied so as to unjustifiably discriminate between service operators in different countries. It is not the role of WTO dispute settlement for one Member to try to change such fundamental legitimate public policies of another Member.

5. In this case, it is undisputed that there are no U.S.-based websites that offer the across-the-board Internet gambling services that Antigua wishes to provide; instead, the reason the U.S. measures failed to qualify for the Article XIV(a) public morals/public order exception was because of discriminatory treatment of Antiguan operators who might wish to offer on-line gambling on horse racing. Antigua is entitled to expect an end to any such discrimination affecting gambling on horse racing; Antigua is not entitled to expect the United States to reverse all of its anti-gambling laws.

---

[1] In preparing these comments, the United States has sought not to repeat positions and arguments presented in prior U.S. written submissions and oral statements. The absence in this document of a U.S. comment on any particular response of Antigua does not in any way indicate the agreement of the United States with that response nor with any position adopted by Antigua in this dispute.

6. Thus, as much as Antigua would like to continue offering harmful gambling services to U.S. citizens despite longstanding U.S. criminal prohibitions, such a result does not follow from the DSB recommendations and rulings. And, contrary to Antigua's assertions, the level of nullification and impairment must be tied to a realistic scenario in which the United States addresses discriminatory treatment of horse race gambling, and not to some scenario in which all U.S. public policies are ignored and all U.S. anti-gambling laws are repealed.

The GBGC Data Cannot be Relied Upon and Fails to Support Antigua's Assertions

7. The cornerstone of Antigua's asserted level of nullification and impairment is the GBGC breakout of Antigua's gambling revenues (supposedly $2.4 billion) in the year 2001. Antigua uses this figure both as an absolute level of Antigua's gambling revenue, and as a basis for the market share Antigua would supposedly maintain under Antigua's compliance scenario.

8. As the United States has explained, and will explain further in these comments, the GBGC data is unreliable and cannot be used as the basis for an arbitration award in this dispute.

9. The GBGC cover letter,[2] although terse, explains volumes about why its data – and especially the Antigua breakout and the data for 2001 and surrounding years – is unreliable. The letter explains that GBGC first started selling gambling data in 2000. During the "early years" (presumably 2000 and following years), "the information available was more limited." Such information must have been "limited" indeed – according to the GBGC letter, even for current figures, the only source of data for non-public operators is "guidance provided by our contacts in the industry" and information from private companies with which GBGC has consultancy arrangements.[3] Thus, for "early years," the best GBGC can assert is that its information for revenues of non-public companies is "more limited" than GBGC's current reliance on "guidance" from unspecified industry "contacts. This is quite a weak assertion – particularly since GBGC is in the business of selling such data, and has every reason to try to make the case that its data is sound.

10. The letter further explains that GBGC only commenced a "more detailed analysis"in 2005, and back dated that information to 2003. And, even that "more detailed analysis" seems to focus on poker gambling sites, while Antigua asserts that its operators tend to engage in non-poker betting, such as betting on sporting events.

11. Furthermore, GBGC concedes that it is constantly revising its models, and that "previous editions" of its estimates have "little relevance." If this is the case, there is no basis to assign any relevance to the GBGC breakout for Antigua in 2000 and following years. Tomorrow, those same figures may be substantially different, as GBGC continues to revise its models and estimates.

---

[2] Ex. AB-14.

[3] GBGC is silent on whether it has consultancy arrangements with any Antiguan operators.

12. Indeed, for example, the GBGC estimate of North American on-line gambling revenues for 2000 fell by nearly 35% in the period between the release of the May eGaming Report and the October eGaming report.[4] Due to the lack of any information provided by GBGC on what data it actually obtained from its industry "contacts," there is no basis to believe that the data prepared in mid-2007 has any connection to reality, or that the October eGaming Report data may not be further revised downward in the next eGaming report.

13. But even taking GBGC data at face value, the additional information submitted with Antigua's answers show both (i) that the GBGC breakout for Antigua is mere guess work and inconsistent with other GBGC figures, and (ii) that Antigua's theory on lost market share is unsupportable.

14. The key starting point is that the breakout for Antigua is not contained in GBGC's regularly prepared eGaming Reports. Instead, the Antigua breakout is contained only in the report prepared especially for Antigua for the purpose of this arbitration. This fact is evident from the two eGaming reports that Antigua submitted with its comments.[5] Antigua also concedes this in its response to Question 26(f).

15. The fact that the Antigua breakout was not regularly published by GBGC severely undermines Antigua's argument that its calculations were based on publicly available information commonly relied upon by others in the on-line gambling industry. In fact, no one in Antigua – or anywhere else – had seen the Antigua breakout figures until Antigua submitted them in this arbitration.

16. Indeed, Antigua concedes that these breakout figures are far higher than its own, prior estimate of gambling revenues, which Antigua had estimated as equal to 10 percent of its GDP.[6] Antigua attributes this to "the basic ignorance of the government as to the true size of the remote gambling industry."[7] Given Antigua's claims that its gambling industry is highly regulated and that any government would be aware if it had export earnings dwarfing the entire rest of its economy, this is not a very plausible explanation. Rather, the more plausible explanation is that Antigua indeed had a basic sense of the historical "true size" of gambling revenues, and that the GBGC breakout is wildly inaccurate.

17. Furthermore, the GBGC letter indicates that the Antigua-specific breakout is especially unreliable, because of the problem of allocating revenue of operators located in several

---

[4] The May report estimates North American on-line gambling revenues at $2 billion, while the October report estimates the same figure as $1.3 billion. Similarly, between the May and October report, the North American on-line gambling revenue for 2001 fell from $2.8 billion to $2 billion, a fall of 27 percent.

[5] May 2007 and October 2007 eGaming Report, Ex. AB-14.1 and Ex. AB-14.2.

[6] Antigua Answer to Question 37.

[7] *Id.*

jurisdictions. In those cases, GBGC states that it tries to allocate revenue based on the operation of the server, but that "given the complexity of the structures of some of the organizations involved in the online gambling industry *some assumptions have to be made* by GBGC in this regard."[8] There is no explanation of what these assumptions might be, nor any rationales behind them, and there is thus no basis for those assumptions to be accepted in this arbitration.

18. The GBGC data – taken on its face – show that the allocations to Antigua are particularly suspect. In the eGaming reports regularly prepared by GBGC, there is a line for South/Central America and Caribbean Operators, with no breakouts for Antigua or other countries in the region. Thus, GBGC had no need to allocate revenue among the servers located in different countries within that region. A comparison of the South/Central America and Caribbean revenue line with the Antigua breakout line shows that the Antigua breakouts may be completely wrong, and that Antigua's asserted market share trends may be an artifact of unspecified allocation methodologies.

[8] GBGC Letter (25 October 2007), page 3.

Selected Antigua/GBGC data, 1999-2006 (in Billions of Dollars)

	1999	2000	2001	2002	2003	2004	2005	2006
Antigua Operator Revenues from World (Ex. AB-2 - Methodology paper)	0.546	1.716	2.392	2.109	1.416	1.125	1.138	1.086
South/Central America and the Caribbean Operator Revenues from World (Ex. AB-9 - May release - Methodology paper)	0.78	2.32	2.75	2.89	2.65	3.03	3.13	3.36
South/Central America and the Caribbean Operator Revenues from World (Ex. AB-14.1 - Oct release)	0.83	1.78	2.40	2.64	2.68	3.09	3.23	3.15
North America Player Revenues (Ex. AB-2 - May Release - Written Submission)	0.62	2.0	2.83	3.35	3.47	4.84	6.11	6.79
North America Player Revenues (Ex. AB-14.1 - Oct Release)	0.72	1.31	2.06	2.58	2.96	4.43	5.82	6.66
U.S. Player Revenues (Bingo, Casino, Poker, Sports Betting) (Ex. AB-14.2 - May Release - Excel Spreadsheet)	not avail	not avail	not avail	not avail	3.014	4.160	5.231	5.755
U.S. Player Revenues (Bingo, Casino, Poker, Sports Betting) (Ex. AB-14.1 - Oct Release - Excel Spreadsheet)	not avail	not avail	not avail	not avail	2.708	3.998	5.192	5.866
U.S. Player Sports Betting Revenues (Ex. AB-14.2 - May Release - Excel Spreadsheet)	not avail	not avail	not avail	not avail	1.668	1.904	2.119	2.547
U.S. Player Sports Betting Revenues (Ex. AB-14.2 - Oct Release - Excel Spreadsheet)	not avail	not avail	not avail	not avail	1.380	1.646	1.855	2.090

19. As an initial matter, note that the October eGaming Report estimate for all North America revenues in 2001 is $2 billion, while Antigua's asserted revenues for 2001 ($2.4 billion) exceed the figure for all of North America (which includes Canada and Mexico, as well as the United States, and which includes revenues for operators located everywhere in the world) by about 20 percent. Thus, Antigua's estimate is inconsistent with the underlying GBGC data.

20. Moreover, the trends in the GBGC data present a very different picture than Antigua's assertions. Note that the South/Central America and Caribbean Operators line (contained in the regularly-produced eGaming reports) shows a basically smooth, rising trend for on-line gambling revenues. Only the Antigua-breakout (prepared for purposes of this arbitration) has the large spike in 2001-2002. As noted, GBGC concedes that its data sources for the "early years" were especially limited. Also, there is no basis for believing that GBGC had any incentive to collect data in those "early years" that supported country-specific allocations (as opposed to data tied to the broad regions used in its eGaming reports). Since the region as a whole has a smooth and basically rising trend for gambling revenues, the rest of the region (that is, excluding Antigua) would have to have increased revenues that essentially match Antigua's asserted fall in revenues. There are four possible scenarios for explaining these trends: (i) the Antigua-specific allocations for 2001-2002 (which are based on unstated assumptions) are wrong, (ii) that gambling operators diversified their operations by moving servers to other locations in the region, (iii) new gambling operators started up in the region; or (iv) as Antigua asserts, the United States caused all these trends. The first three scenarios are plausible, while the fourth one – which is the basis of all of Antigua's calculations – is not.

21. The U.S. measures apply equally to operators from Antigua and from other countries, including operators elsewhere in the South/Central America and Caribbean region. Antigua's only explanation of how U.S. enforcement supposedly harmed Antiguan operators more than other operators is that Antigua focuses on sports betting, as opposed to Internet poker. But the above data indicate otherwise. In particular, as seen in the last two lines of the above table, GBGC estimates that both sports and non-sports betting have been growing in the U.S. market. Because the data show no significant difference in trends between sports gambling and Internet poker, the GBGC data upon which Antigua relies refute any possible attribution of lost Antiguan market share to U.S. enforcement actions.[9] Instead, the data indicate either that Antigua (a) never had as large a market share as Antigua asserts, or (b) (if Antigua did have a high, early market share), that share was lost as Antiguan operators moved servers to other countries in the region, or as a result of new competitors located in other countries in the region.

[9] The United States also notes that the 2002 U.S. enforcement actions relied upon by Antigua for its lost market share theory involved attempts to block credit card and Paypal payments to overseas gambling operators. *See* Ex. AB-13, page 2. There is no basis to believe that attempts to prevent payments to remote gambling operators would have any greater effects on sports gambling than poker gambling, or any greater effects on Antiguan operators than operators in other jurisdictions. Furthermore, if the GBGC data upon which Antigua relies is accepted, then those enforcement efforts were not effective – the data show a continued rise in U.S. Internet gambling.

Antigua Has Actual Data But Refuses to Provide It

22. A possible source of data on actual on-line gambling revenues would be the audited financial statements of on-line gambling companies with operations located in Antigua. In response to the Arbitrator's question 27, Antigua confirms that it has financial statements[10] for Antiguan gambling operators. Remarkably, however, Antigua refuses to provide such statements, or information drawn from such statements, to the Arbitrator in this proceeding. Moreover, Antigua does not even explain whether it has reviewed statements, or whether the data in those statements is in accord with the GBGC estimates.

23. The United States submits that these circumstances further reinforce that the arbitration award cannot be based on the GBGC estimates. Actual data on Antiguan operations apparently exists, but Antigua refuses to provide it.[11] If that data showed higher revenues than the GBGC estimates, Antigua would find a procedure for providing such information to the Arbitrator. Antigua should not be rewarded for failing to disclose relevant information; indeed, the Arbitrator can draw the logical inference that the actual data does not support Antigua's claims to the Arbitrator.[12]

Antigua's Estimate Does Not Comport With Its Employment Figures

24. In response to Question 21, Antigua provides data on the number of Antiguan employees engaged in offering on-line gambling services. Those data – unlike the revenue predictions in the billions of dollars – appear less unrealistic in the context of a country with a population of only 80,000 persons. And the figure is lower by almost a factor of ten from Antigua's previous assertion of 3000 employees.

25. The United States submits that this employment data is more useful than revenue estimates based on unknown sources in assessing the level of nullification and impairment. According to Antigua, in the last five full calendar years (2002-2006), Antigua had an average of about 450 employees working for on-line gambling operators. The number of those persons who work on gambling tied to U.S. citizens, or who work on horse race gambling, is unknown. But regardless of such necessary adjustments, it is implausible that this small number of 450 persons could generate $3.4 billion in revenue for the Antiguan economy.

---

[10] Whether such statements are audited is unclear. Furthermore, Antigua does not clarify whether the statements show which revenues are associated with operations actually located in Antigua, and/or whether the gambling revenue is actually returned to Antigua or instead is funneled to owners in other jurisdictions.

[11] Antigua's purported privacy concerns, and fear of prosecution, are not convincing, and do not explain why Antigua refused to submit data with redactions, or in summary tables.

[12] *Compare Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, Report of the Panel adopted 22 October 2007, paras. 7.10, 7.90-7.106 (drawing adverse inferences because a disputing party declined to provide relevant information to the Panel).

Antigua's Supposed Independent Economic Expert is Not Independent

26. In Exhibit AB-16, Antigua provides the report of its supposedly "independent" economic expert. The report reveals that the economist, Mr. Meister, is no more "independent" than any other person retained to support Antigua's positions in this arbitration. As indicated by his *curriculum vitae*, Mr. Meister is in the business of providing economic testimony for use by parties in gambling disputes. Mr. Meister's report specifies that he performed his calculations under the instructions of Antigua's counsel, and the report relies for its factual basis on Antigua's submissions in this dispute. In short, Antigua's "expert report" is not prepared by some outside independent expert, and is entitled to no more weight than any other arguments submitted by the parties in the arbitration.

Antigua's Failure to Specify its Means for Measuring the Level of Its Requested Suspension of TRIPS Concessions and Other Obligations

27. As the United States has explained, Antigua has failed to follow the principles and procedures under DSU Article 22.3, and thus should not be authorized to suspend concessions or other obligations under any agreement except the GATS. Antigua's response to Question 56 reinforces that Antigua should not, as it has requested, be authorized to suspend TRIPS concessions.

28. In particular, Antigua has refused to explain to the Arbitrator how Antigua would calculate and track the level of suspension of TRIPS concessions. Without such information, the Arbitrator cannot determine, as required by DSU Article 22.7, that the level of suspension is equivalent to any level of nullification and impairment found by the Arbitrator. As such, there is no basis for ensuring an equivalence between nullification and impairment and the level of suspension, and the Arbitrator should thus not find that Antigua is allowed to suspend TRIPS concessions.

29. In this connection, the United States notes its severe concerns with the possibility of suspension of TRIPS concessions in the context of Antigua's on-line gambling industry. The United States recalls that the Antiguan gambling industry has been targeting U.S. consumers in knowing violation of U.S. criminal laws. Also recall that according to Antigua's own answers, Antigua had no idea about the level of supposed Antiguan gambling revenues until it paid for a report from a private gambling consultant. Also, Antigua apparently allows these same companies to operate outside Antiguan law. In particular, in response to Question 31, Antigua explains that although it adopted a corporate income tax in the period 2001-2003, the gambling companies never payed it. Finally recall that even where Antigua has information from the gambling companies that is relevant to the outcome of the arbitration, Antigua refuses to provide such information in order to shield those companies from prosecution under the criminal laws of another WTO Member.

30. In these circumstances, the United States is concerned that any suspension of TRIPS concessions could lead to or encourage the piracy of intellectual property rights by internet operators in Antigua. Without strict supervision by the Government of Antigua, there would be no basis to calculate the level of suspension, or to determine whether the operators were abusing the authorization to suspend TRIPS concessions by offering pirated intellectual property in jurisdictions outside Antigua. And, Antigua explains that it has not even begun to address such issues. In short, an authorization to suspend TRIPS concessions could encourage rampant and uncontrolled IPR piracy. Such an outcome would serve no legitimate interests of any WTO Member.

Antigua Has Not Refuted the IMF and WTO Data on Antigua's Service Exports

31. In its response to Question 40, Antigua asserts that "it is beyond dispute" that IMF and WTO data do not reflect any gambling service exports by Antiguan operators. To the contrary, the IMF and WTO data – which include 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 established that the "other services" categories contained in IMF and WTO data exclude gambling services in Antigua. Indeed, the Arbitrator's questions note that, with respect to WTO services data, the Arbitrator is seeking clarification from the WTO Secretariat.

32. Accordingly, the official economic data collected by the IMF and WTO remain the best available source of data on the level of Antigua's services exports. As the United States has explained in its prior submissions, those data show that Antigua's level of nullification and impairment is approximately $500,000 per year.

33. This concludes the U.S. preliminary comments. Below are comments on Antigua's responses to specific questions.

* * * * *

Q2. To Antigua: Please elaborate on why you have assumed, for the purposes of your counterfactual, that the US would allow Antiguan operators to provide unrestricted access to cross-border remote gambling and betting services to US consumers.
2bis Could any other scenarios also constitute "a situation that is consistent with the recommendations by the Appellate Body and the findings of the compliance panel"?
2ter Please clarify whether the two following scenarios might constitute such situations:
(i) total prohibition of remote gambling services?
(ii) removal of discrimination against foreign remote services providers in areas, such as horse racing, where domestic remote provision is accepted or tolerated?

34. Antigua's answer fails to rebut that the only reasonable compliance scenarios in this dispute are (a) a complete ban on remote gambling, or (b) a measure that maintains the ban except with respect to remote gambling on horseracing. As the United States has explained, only these counterfactuals reflect the actual proceedings in this case, and the fact that the United States bans remote gambling for reasons of public morality and public order.

35. Antigua, in fact, does not even attempt to present any reasonably possible scenario under which the United States would allow unfettered internet gambling within its borders. Instead, Antigua in essence argues that, for several reasons, the Arbitrator must adopt a counterfactual entirely detached from reality. None of the reasons presented by Antigua is valid.

36. First, Antigua argues that the Article XVI market access commitment of the United States applies to all forms of remote gambling, and thus the compliance scenario must involve access to all forms of remote gambling. As the United States has explained, this argument is fundamentally wrong because it ignores Article XIV of the GATT, and the fact that the United States has established that gambling restrictions are necessary for reasons of public morality and public order. The obligation of the United States is to comply with its GATS obligations as a whole, and those obligations are established by no single article standing alone.

37. Second, Antigua argues that the purpose of suspension of concessions is to induce compliance, and that the authorized level of suspension will be too low to induce compliance if the counterfactual only addresses gambling on horseracing.[13] This argument is circular, and thus completely without merit. Although inducing compliance is one purpose of suspending concessions, the DSU is clear that the level can be no greater than the level of nullification or impairment of Antigua's benefits under the GATS. And this is true even if the complaining Member is unsatisfied with the authorized level of suspension. In short, the level of nullification and impairment must be based on a realistic scenario, taking account of both the strong U.S. policy rationales for restricting remote gambling and the right of all WTO Members under GATS Article XIV to protect its citizens. Antigua is not entitled to ignore these points

[13] The United States notes that inducing compliance is not the only purpose of a suspension of concessions. Another purpose of countermeasures can be found in Article 3.3 of the DSU, which refers to the need for "the maintenance of a proper balance between the rights and obligations of Members." This language suggests that one of the purposes of countermeasures is to restore the overall balance of rights and obligations between the Members concerned that would exist if the non-conforming measure were withdrawn. This is the conclusion reached by the arbitrator in *EC – Hormones*, which found that "[t]o allow the effect of suspension of concessions to exceed that of bringing the measure into conformity with WTO rules would not be justifiable in view of DSU objectives." *See European Communities – Measures Concerning Meat and Meat Products (Hormones) (Complaint by the United States); Recourse to Arbitration by the European Communities*, WT/DS26/ARB, Award of the Arbitrator issued 12 July 1999, para. 39; *see also* Patricio Grané, *Remedies Under WTO Law*, 4 J. INT'L ECON. L. 755, 759 (2001) (discussing how under Article XXIII of GATT 1947, '[t]he withdrawal of concessions, as a remedy of last resort, was a counterbalancing action, its objective being to offset the reduction in benefits resulting from the non-conforming measure'). Antigua's request to base the level of nullification and impairment on an entirely unrealistic level of trade effects would be inconsistent with the object and purpose of maintaining the balance of rights and obligations between Members.

simply because it is unhappy with the authorized level of suspension that would result. Furthermore, Antigua is not entitled to try to "induce compliance" in the form of inducing unrestricted internet gambling of all types, when in fact the United States has the right under GATS Article XIV to adopt restrictions on remote gambling in order to protect public morality and public order so long as they are not applied in a manner that results in arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

38. Third, Antigua argues that the failure of the United States to clarify the operation of its laws regarding remote gambling on horseracing shows that the United States does not actually believe it is necessary to restrict remote gambling in order to protect its citizens. This appears to be both an argument about the application of GATS Article XIV, and about the operation of governments. Both of these arguments lack any validity. With respect to GATS Article XIV, the chapeau prohibits arbitrary or unjustifiable discrimination between operators in different countries where like conditions prevail; nothing in the chapeau requires that measures adopted to protect public morality and order must comprehensively address each and every harm to a Member's citizens. With respect to the operation of governments, it is not the case that measures necessarily must (and always do) address in the exact same way each and every type of harm within the same general category of harms.

39. Fourth, Antigua argues that as a legal matter, the counterfactual must involve the complete removal of the measure found to be inconsistent with obligations under the covered agreement. As the United States has explained, this is not true. The obligation of the Member concerned is to bring its measure into compliance with the covered agreement; there is no obligation to "remove" the measure. Also, it is not the case, as Antigua asserts, that in past arbitrations the counterfactual always involved removal of the measure. To the contrary, in the *EC-Bananas (U.S.)* arbitration, the arbitrator examined four different possible WTO-consistent measures,[14] and chose what it believed to be the most "reasonable" counterfactual, based on the facts and circumstances of the dispute. 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.

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?

40. In its response, Antigua argues that the counterfactual must be chosen so as to "induce compliance." As the United States explains above in its comment on Antigua's answer to Question 2, this argument is circular. The United States is obligated to comply with its GATS obligations, but the United States has reserved the right under GATS Article XIV to adopt

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

measures that include non-discriminatory restrictions. Antigua has no basis for arguing that it is entitled to "induce compliance" in a manner that ignores both the strong policy rationales of the United States for restricting remote gambling, and the fact that the United States has established in this dispute that its restrictions are provisionally justified under the GATS Article XIV(a) exception for measures necessary to protect public morals or maintain public order.

Q6. To Antigua: Please comment on the US assertion that "only benefits that can reasonably be expected to accrue to the requesting party under the provision breached may serve as a basis for authorization to suspend concessions" (US written submission, para. 12) (emphasis added).

41. As noted in the U.S. comments on Antigua's answer to Question 2, Antigua's approach to selecting the counterfactual is to ignore reality, and to argue for the counterfactual that gives Antigua the largest level of suspension because that will better "induce compliance." Antigua's response to question 6 mostly repeats such flawed arguments.

42. Antigua also cites *EC – Computer Equipment* and *EC – Sugar* for the proposition that in interpreting the WTO Agreement, a Member's subjective expectations are not controlling, and that the relevant expectations are set out in the text of the agreement. The United States is in agreement with these principles, and in fact cited to them during the hearing. It is Antigua (not the United States) that wishes for the Arbitrator to base an award on subjective expectations. Namely, Antigua wants the Arbitrator to adopt a reward based on an unrealistic counterfactual (the complete U.S. removal of U.S. restrictions on internet gambling), simply because that is the result Antigua seeks in this dispute. However, the text of the GATS is plain in reserving Members' rights to adopt restrictions in order to protect public morals and public order, and thus Antigua has no basis in the text of the GATS for its expectation of a complete removal of all U.S. restrictions.

Q7. To Antigua: You indicated in your oral statement that your "key starting point" is "just the point used in every Article 22 arbitration in the past" (oral statement para. 21). Could you please elaborate on this statement ? In doing so, please comment on the developments in paragraphs 7.4 to 7.7 of the EC - Bananas (US) decision by the arbitrators under Article 22.6 with respect to their choice of a counterfactual.

43. The *Bananas* arbitration award refutes Antigua's assertion that in every past arbitration, the starting point was the withdrawal of the measure. 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.

44. Antigua tries to distinguish the *Bananas* arbitration by citing the following language from the arbitration report: "In the view of the arbitrators 'what the EC is required to ensure is to terminate discriminatory patterns of licence allocation' in conformity with the applicable provisions of the covered agreements.'"[15] This language, however, does not distinguish *Bananas*. In this dispute, as in *Bananas*, the compliance scenario depends on the termination of unjustifiable discrimination, and in each dispute there is more than one scenario for how the termination of such discrimination could be achieved.

45. Finally, Antigua reverts to its argument that the realistic compliance scenarios – those involving horse racing – must be ignored because the evaluation of the WTO-consistency of the measures involved in those scenarios involve a different GATS article (Article XIV) than the GATS article (Article XVI) with respect to which the breach was found. As the United States has explained, however, this argument has no basis in logic or the text of the DSU. Under DSU Article 19, the recommendation of the panel and/or Appellate Body shall be to bring the measure under dispute "into conformity with [the covered] agreement." That is also the recommendation of the DSB. The recommendations of the panel, Appellate Body, and DSB are not limited to any particular article of the covered agreement. Moreover, in this particular dispute, the recommendations and rulings do in fact contain explicit findings on the application of Article XIV to the measures at issue. Thus, Antigua's argument that the Arbitrator must only consider a single GATS article is at odds both with the text of the DSU, and with the particular recommendations and rulings in this dispute.

Q10. To Antigua: Assuming the counterfactual scenario proposed by the United States, i.e. a situation where the United States would allow foreign suppliers access to the remote gambling market in respect of horseracing, could you please calculate the level of nullification or impairment suffered by Antigua as a result of the US measures found to be inconsistent with US WTO obligations in the underlying proceedings.

46. As noted in the preliminary U.S. comments, Antigua concedes that its operators "do very little business in horse race betting."

47. Among other arguments, Antigua seems to imply that the Arbitrator cannot use the horse racing counterfactual because data are difficult to obtain. Such an argument is unpersuasive. If (as Antigua requests) the official statistics of international economic organizations are ignored, all other data on gambling services to the U.S. market are difficult to obtain. However, if Antigua had been interested in this information, Antigua could have consulted its own operators, as it has done for other purposes in this arbitration, and presented audited or other objective evidence of their operations. Absent such sources, an allocation based on non-remote gambling provides the best basis for an estimate. And finally, the selection of the counterfactual must be based on a realistic compliance scenario, taking account the prior proceedings in this dispute.

[15] Antigua's Answers, page 14.

Problems of estimation cannot be used to justify the selection of a counterfactual that is divorced from reality.

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.

48. In its response, Antigua refers to a report published by "International Gaming & Wagering Business." Antigua does not cite an exhibit number for this report, and the United States does not have a copy of this report. As such, the United States is not in a position to comment on the contents of that report and, since it has not been introduced in this proceeding, there is no basis to rely on it in this proceeding.

Q21. To Antigua: In section II.A of your methodology paper, you mention that in 1999, there were 119 licensed remote gaming operators in Antigua employing an estimated 3,000 persons. In our meeting of 18 October 2007, you stated that currently there are around 30 operators left. Would it be possible that you provide the Arbitrator with an annual/quarterly time series of employment in the Antiguan remote gambling sector covering the years 1995/1999 to 2006.

49. In Question 21, Antigua now provides numbers relating to employees directly employed by license holders that are substantially lower than the 3000 employees previously claimed by Antigua in its submissions.

50. The United States notes that the numbers of employees increased between 2002 and 2005 by 91 percent (from 328 to 628), while during this same period the GBGC breakout for Antigua gambling revenue shows a 46% decline from $2.1 billion to $1.1 billion. Not many industries increase employment as revenues significantly decline. This further calls into question the accuracy of the GBGC figures relied upon by Antigua.

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.

51. Antigua has reported information on revenues per employee for various companies. Neither the United States nor the Arbitrator is able to review the sources for this data (which were not included with Antigua's answers), and thus there is no basis to give any weight to the alleged information presented.

52. For "leading remote gaming companies," Antigua reported revenues per employee in a huge range, from between $82,895 in 2001 for YouBet to $918,453 in 2006 for PartyGaming.[16] Antigua also reported revenues per employee for "successful online" companies such as Google, Amazon, Yahoo!, and eBay ranging between $295,472 for Yahoo in 2003 and $1.4 million for Amazon in 2006. Presumably other "less successful" online companies and gaming companies would have revenues per employee at much lower values. Given the ranges presented, it is difficult to see how such data can be used to provide an estimate of Antigua's gambling revenue.

53. Moreover, mere revenue is not enough to estimate Antigua's actual gambling exports. As the United States has explained, only revenue actually returned to Antigua can be considered an export for nullification and impairment purposes. If revenue is retained in other jurisdictions, the multi-jurisdiction transaction must be considered an export of services by the jurisdiction that actually receives the payment, with any smaller payments to Antigua considered as a separate, lower value services transaction.

54. Nonetheless, even taking Antigua's per-employee data at face value, those data show that Antigua's suggested level of nullification and impairment is far too high. The following table combines (1) Antigua's answer to Question 21, and (2) the GBGC data on Antigua's total revenues from Antigua's Methodology paper. As shown below, according to the GBGC data, Antigua's net revenues per employee would be far higher than for any of the gaming companies listed by Antigua, or even for the most famous and successful online companies listed by Antigua. Antigua's estimated revenues per employee would range up to more than $6.4 million (in 2002), more than 350 percent greater than Amazon's highest revenue per employee. Yet again, the GBGC data does not comport with the existing economic landscape.

[16] Exh. AB-17, Gaming Industry Data Summary

Estimated Revenues Per Employee for Antigua, 2000-2007

Year	Internet Gambling Employees (from Q. 21)	Net Revenues for Antigua, in $Millions (from Exh. AB-2 Methodology Paper)	Net Revenues per Employee
2000	1,900	1,716	903,158
2001	1,014	2,392	2,358,974
2002	328	2,109	6,429,878
2003	431	1,416	3,285,382
2004	492	1,125	2,286,585
2005	628	1,138	1,812,102
2006	442	1,086	2,457,014
2007	333	948	2,846,847

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.

55. Antigua reports "CCA" data on the U.S. gambling market. The United States does not have copies of the cited CCA documents, and Antigua has not provided them. Thus there is no basis to give them any weight in this proceeding. The CCA website has certain estimates, but those figures do not match Antigua's description of CCA figures.

56. The CCA estimates cited by Antigua differ from the GBGC figures. For example, for 2006 U.S. Internet gambling revenues, CCA (according to Antigua) reported $5.8 billion, while GBGC reported $6.4 billion. This is hardly surprising – there is no apparent way to match CCA data (as there is no way to match GBGC data) to official economic statistics. Thus, CCA, like GBGC, must base its estimates for all operators (other than public companies) on private, unverifiable sources.

Q37. To Antigua: In your recourse to Article 22.2, you indicate that "[p]rior to the actions taken by the United States to prevent the provision of gambling and betting services from Antigua and Barbuda to consumers in the United States, it is estimated that the gambling and betting services sector accounted for more than ten per cent of the gross domestic product of Antigua and Barbuda". Which year does this refer to? Please explain how the Antiguan gaming revenues (as quoted in your methodology paper) are related to the contribution of the gambling industry to the Antiguan economy, i.e. its ten per cent share in GDP.

57. The United States submits that points (ii) and (iii) of Antigua explanation of its prior use of a 10 percent of GDP estimate are some of the most plausible, and relevant, statements made by Antigua regarding its level of nullification and impairment. In particular, Antigua states that the estimate was based on "(ii) estimates on the direct impact of the industry on the country in the nature of salaries paid, domestic rents and purchases and similar direct expenditures; and (iii) correlations made between estimated employment and the size of the overall domestic workforce."[17] As the United States has explained, any government would notice economic inflows that dwarfed the rest of its economy by a factor of three (as Antigua now claims), because the spill over effects on consumption and employment would be the main factors in overall economic growth or decline. Apparently, Antigua never noticed any such drastic effects. And the reason for this seems clear – the revenue figures now proposed by Antigua – based only on GBGC estimations – are completely unrealistic.

58. The United States has pointed out a number of problems with the GBGC estimates, but in this context would highlight the following point: *whatever the level of revenue that may be associated with a particular operation, if that revenue is not returned to Antigua it cannot be a lost benefit for the purpose of calculating nullification and impairment*. The fact that the Government of Antigua never took note of the huge revenues that Antigua now claims indicates either that (i) the revenue estimates are fundamentally wrong, or (ii) that a major proportion of those revenues were never returned to the economy of Antigua.[18]

Q38. To Antigua: Could you elaborate on the points mentioned in para. 106 of your written submission, and address the question of how the inflows of export revenue from remote gambling are counterbalanced so as not to affect GDP in the same order of magnitude. Would it be possible that you provide the Arbitrator with a breakdown of

---

[17] Antigua Answers, page 31.

[18] Indeed, in contrast to the counterfactual set out in Antigua's Methodology Paper, Antigua's Written Submission argues that many Internet gambling revenues are held in overseas accounts and never returned to Antigua. See Antigua Written Submission, para. 106 ("many of the banking services for the industry are performed outside of Antigua so that a significant amount of the money retained by the industry is not reflected in the Antiguan financial services sector; [and] a significant portion of the profits of the industry may be invested or expatriated to shareholders, holding companies or affiliates located elsewhere").

Antigua's remote gambling revenues in terms of domestic profits, expatriated profits, labour costs, costs for equipment (domestic and imported), imported services etc.
Q39. To Antigua: In your methodology paper (footnote 5) you indicate that "the remote gaming industry is not fully or properly reflected in Antigua's GDP" [emphasis added] given "a low response rate by remote gaming operators to GDP-related survey" and that "the few remote gaming operators that have responded to the GDP-related survey, have not often reported a key component of GDP - profits". The letter of the ECCB in Exhibit AB-12 to your written submission indicates that "the Statistics Act of Antigua and Barbuda cannot enforce an obligation on these entities to provide data for compilation of the GDP as they are outside the jurisdiction of the Act". [emphasis added] Please provide additional information on the legal basis for and the procedures of GDP-related surveys of remote gaming operators referred to in your methodology paper, the response rate, and what kind of erroneous data may have been provided in some cases. Also please clarify the statement by the ECCB as to whether a reporting obligation under the Statistics Act does not cover gaming operators or whether such reporting obligation under the Act does cover them but cannot be enforced on them.
Q40. To Antigua: In your methodology paper (footnote 5), you note that GDP is underestimated, because it excludes, inter alia, unreported transactions. In para. 106 of your written submission, you appear to suggest that remote gaming revenues may not be reported for national accounts purposes, and hence, not be reflected in GDP. Would, therefore, GDP be higher if remote gaming revenues were reported? If so, by how much would GDP be higher on an annual basis?

59. Antigua's response to questions 38, 39, and 40 provides no new useful information. Antigua's discussion of an "infant industry" and the "assault by the United States government" has nothing to do with the issue of the actual size of Antigua's economy. Antigua cannot even posit any imports that would possibly offset the claimed huge surges in gambling export revenue. Thus, most of Antigua's claimed gambling export revenue would be additive to GDP, and Antigua has no answer to the fact that – solely for the purpose of this arbitration – Antigua is now claiming that its GDP is greater by a factor of three or more than any internationally accepted figure.[19] To the knowledge of the United States, Antigua has never made such claims in IMF consultations, in discussions with its official bank (ECCB), or in the WTO Trade Policy Review.

60. The GBGC data in the eGaming reports – at most – show gambling revenue collected from persons in North America by operators located and/or licensed somewhere in the Western Hemisphere. The data do not purport to show what revenues actually flowed back to any jurisdiction.

61. According to footnote 46 to Antigua's answer to question 39, the data considered by ECCB in its Balance of Payments reporting include "financial statements and foreign exchange

[19] *See* U.S. Response to Question 34.

records reported by the commercial banks to the ECCB, and ECCB's financial statement." If the gambling revenues now asserted by Antigua were for actual Antiguan export transactions and were thus returned to Antigua, the currency flows should be reflected in the balance of payment accounting based on bank transactions. Yet nothing in the ECCB balance of payment statistics submitted by Antigua[20] contain any hint of the billions of dollars of monetary inflows that would result from the gambling services exports claimed by Antigua.

62. Thus, it is not a sufficient answer – as Antigua repeatedly asserts – that the gambling operators systematically withhold information on the level of their gambling revenues. As the United States has noted, export transaction that dwarf the rest of the economy would be evident in other officially collected statistics, including through secondary effects on domestic consumption or imports, and through balance of payments accounting on monetary flows.

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?

63. As the United States has explained, Antigua's theory of 2001 as the "last good year" for Antigua, and the claim that U.S. enforcement efforts caused a subsequent fall in Antigua's market share, are unsupportable. The GBGC Antigua revenue breakout – as GBGC itself has indicated – is based only on the roughest estimations of allocations among Western Hemisphere suppliers. Moreover, there is no basis for claiming that any enforcement efforts affected Antiguan operators but not operators in other jurisdictions.

64. Antigua tries to buttress its theories on this point by citing to the report of Antigua's hired economist. But as the economist's report makes clear, it adds nothing new: the economist just cites the same figures and arguments as provided by Antigua's counsel in Antigua's submissions.[21]

Q46. To Antigua: In your methodology paper, you estimate that gaming revenue has a "multiplier effect" of 1.4 on the Antiguan economy, which you suggest that the Arbitrator should include in its calculations starting from the year 2006.
(a) Please clarify why the difference between actual and counterfactual revenues in your models are augmented by a multiplier, although this has not been done in previous arbitrations?

---

[20] *See* ECCB Statistics (Ex. AB- 6 of Antigua's Methodology Paper); IMF Statistics (Ex. AB-11), Table 9 (Consolidated Accounts of Commercial Banks).

[21] *See* Ex. AB-16, pages 6-7.

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

65. As the United States has explained, there is no basis under the DSU for "multiplying" actual trade effects by a factor to reflect other economic effects. In its answer to Question 46, Antigua tries to buttress its arguments by relying on the report of its economic expert. That report, however, is merely a restatement of Antigua's arguments already presented to the arbitrator. Moreover, the report makes clear that Antigua's proposed multiplier is to reflect effects on internal transactions *within* the Antigua economy – such as effects on the purchase of Antiguan goods or services by Antiguan gambling operators.[22] As such, the transactions which would serve as the basis for Antigua's suggested multiplier are not lost Antiguan exports, and thus are not properly included in a measurement of Antigua's nullification and impairment of GATS benefits.[23]

66. With respect to subquestion (b), the United States notes that Antigua cannot reconcile (1) its argument that gambling revenue has a 40 percent carryover effect on the Antiguan economy, (2) its argument that gambling revenue dwarfs the rest of its economy, and (3) the fact that Antigua's official economic statistics (leaving aside the reporting or non-reporting of direct gambling revenue) show no significant "multiplier" effect from the allegedly massive influx of gambling revenue. Antigua's only answer is that all official economic figures on the Antiguan economy are drastically wrong. Antigua has no basis (other than the desire to square its inconsistent arguments) for this assertion. Even if direct gambling revenue were under-reported, there is no basis for believing that all other economic figures on the Antiguan economy are not simply wrong, but are wrong in the exact way necessary to mask the effects of the allegedly massive increases and decreases of gambling revenue over the 1998 to 2006 period.

---

[22] See Ex. AB-16, page 13.

[23] *See European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB, Award of the Arbitrator issued 9 April 1999, para. 6.12 (finding that the nullification and impairment of benefits must be based on lost trade flows between the parties to the arbitration); *id*. para 6.18 (on this basis, declining to include in the level of nullification and impairment lost sales of inputs used in banana production).