

**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

**WRITTEN SUBMISSION OF THE  
UNITED STATES**

**September 19, 2007**

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## I. Introduction

1. 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 submission 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.

2. 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 is nearly four times greater than Antigua’s entire gross domestic product, and at least a 1000 times higher than any figure that could be based on actual economic data. As the United States explains below, Antigua has based its request on an incorrect, unsupported 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United States compliance would entail, and on unsupported and unrealistic figures of gambling revenue found only in an unpublished report prepared by a private consultant working for the gambling industry.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.

3. The United States also shows 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 shows 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”).

## II. Procedural Background

4. The DSB found that three U.S. criminal laws fall within the scope of the exception under Article XIV of the GATS for measures “necessary to protect public morals or to maintain public order.” It also found, however, that the United States had “not shown, in the light of the [Interstate Horseracing Act], that the prohibitions embodied in these measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing.”<sup>1</sup> The last sections of the Appellate Body report frame the issue:

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<sup>1</sup> Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005 (hereinafter “Appellate Body Report”), at para. 372.

“373. For reasons set out in the report, the Appellate Body:

...

“(D) with respect to Article XIV of the GATS, (vi) as regards Article XIV in its entirety, (a) modifies the Panel's conclusion in paragraph 7.2(d) of the Panel Report and finds, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures ‘necessary to protect public morals or maintain public order’, in accordance with paragraph (a) of Article XIV, but that the United States has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, has not established that these measures satisfy the requirements of the chapeau . . . .

“374. The Appellate Body recommends that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the General Agreement on Trade in Services, into conformity with its obligations under that Agreement.”<sup>2</sup>

5. On May 19, 2005, the United States informed the DSB that it intended to implement the DSB's recommendations and rulings in this dispute, and that it would need a reasonable period of time in which to do so. The reasonable period of time, as determined by an arbitrator, was 11 months and 2 weeks from adoption of the Appellate Body report, and expired on April 3, 2006.

6. At the DSB meeting of April 21, 2006, the United States explained that it was in compliance with the recommendations and rulings of the DSB in this dispute. Antigua did not agree, and sought recourse under Article 21.5 of the DSU. In a report issued on March 30, 2007, the Article 21.5 panel concluded that the United States had “failed to comply with the recommendations and rulings of the DSB in this dispute.”<sup>3</sup>

7. On June 21, 2007, Antigua sought recourse under Article 22.2 of the DSU.<sup>4</sup> Antigua sought authorization to suspend concessions and obligations, in an annual amount of US \$3.443 billion, under (i) the following Sections of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS Agreement”): Section 1 (Copyright and related rights), Section 2 (Trademarks), Section 4 (Industrial designs), Section 5 (Patents), Section 7 (Protection

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<sup>2</sup> Appellate Body Report, at paras. 373-374.

<sup>3</sup> Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/AB/RW, adopted 22 May 2007, para. 7.1.

<sup>4</sup> WT/DS285/22 (22 June 2007).

of undisclosed information), as well as (ii) under the GATS with respect to horizontal and/or sectoral concessions and obligations for Communication Services. Antigua’s recourse to Article 22.2 did not place any values on the concessions or obligations it requested to suspend, nor did Antigua explain what steps it would take to ensure that any suspension of concessions did not exceed the level of nullification or impairment alleged by Antigua.

8. In a communication dated July 23, 2007, the United States referred the matter to arbitration, (i) objecting to the level of suspension of concessions and obligations under the TRIPS Agreement and the GATS proposed by Antigua and Barbuda, and (ii) claiming that Antigua and Barbuda’s proposal in document WT/DS285/22 does not follow the principles and procedures set forth in paragraph 3 of Article 22 of the DSU.<sup>5</sup>

### III. The Required Approach under Article 22

9. Pursuant to Article 22.4 of the DSU, the DSB will not authorize the suspension of concessions or other obligations unless “the level” of suspension is “equivalent” to the level of nullification or impairment. Arbitrators in the past have recognized that “equivalence” is an exacting standard:

[T]he ordinary meaning of the word “*equivalence*” is “equal in value, significance or meaning”, “having the same effect”, “having the same relative position or function”, “corresponding to”, “something equal in value or worth”, also “something tantamount or virtually identical.”<sup>6</sup>

10. Antigua offers three different approaches in its modalities paper to how it arrived at its supposed level of nullification or impairment. It is clear on just a superficial examination that none of these approaches bears any resemblance to the issues involved in this dispute and that Antigua’s request vastly exceeds any level of nullification or impairment that Antigua could legitimately claim.

11. 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.” Thus, the starting point in any analysis of a suspension proposal is to determine the extent to which a Member’s failure to bring its WTO-inconsistent measure into conformity with the DSB’s rulings nullifies or impairs benefits accruing to the requesting party.

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<sup>5</sup> WT/DS285/23 (24 July 2007).

<sup>6</sup> Arbitration Award in *EC – Bananas (United States)*, para. 4.1.

12. It is the WTO-inconsistency of the measure, rather than the measure itself, that forms the basis for a claim of nullification or impairment.<sup>7</sup> In determining the trade that would flow were the measure to be brought into compliance with the WTO ruling, it is necessary to focus on the provisions with which that measure was found to be inconsistent.<sup>8</sup> Furthermore, 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.<sup>9</sup>

13. Thus, an analysis of the level of nullification or impairment must focus on the “benefit” allegedly nullified or impaired “as a result of” the failure of the Member to carry out its obligations – i.e., as a result of the infringement or breach found by the DSB.<sup>10</sup> Arbitrators in past proceedings have uniformly based their determinations on hard evidence and have refused to “accept claims that are ‘too remote’, ‘too speculative’, or ‘not meaningfully quantified.’”<sup>11</sup> As

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<sup>7</sup> For example, in *EC – Bananas*, the arbitrators explained that “[i]t would be the WTO-inconsistency of the revised EC regime that would be the root cause of any nullification or impairment suffered by the United States.” Arbitration Award in *European Communities – Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU (United States)*, WT/DS27/ARB, 9 April 1999 (“Arbitration Award in *EC – Bananas (United States)*”), para. 4.8; see also Arbitration Award in *United States – Section 110(5) of the U.S. Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1, 9 November 2001 (“Arbitration Award in *United States – Section 110(5)*”), para. 3.20 (“Having addressed the nature of the benefits which should accrue to the European Communities under Articles 11bis(1)(iii), the Arbitrators next turn to the issue of the *level* of benefits which the European Communities could expect to accrue to it under those Articles. Put another way, the next issue confronting the Arbitrators relates to the level of royalty income which EC right holders could expect to receive if the United States were to comply with its obligations under Articles 11bis(1)(iii) and 11(1)(ii).”).

<sup>8</sup> For example, the trade effect for a measure found to be inconsistent because it taxed like imported products 0.05 percent more than like domestic products would presumably be different than if the same measure had been found inconsistent because it banned imports from Members who shared a common border with the Member maintaining the measure.

<sup>9</sup> See Arbitration Award in *United States – Section 110(5)*, para. 3.24 (“The Arbitrators consider that the benefits which they should take into account in this case are those which the European Communities could reasonably expect to accrue to it under [the Articles found to be violated].”).

<sup>10</sup> The concept of nullification or impairment derives from the Article XXIII of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”). Article XXIII provides: “If any contracting party should consider that *any benefit* accruing to it directly or indirectly under this Agreement *is being nullified or impaired ... as a result of ... the failure of another contracting party to carry out its obligations* under this Agreement ... the matter may be referred to the CONTRACTING PARTIES.” For example in *US – Section 110(5)*, the arbitrators agreed with the US position that the “nullification-or-impairment analysis must focus on what benefits the EC would receive if the measure at issue – Section 110(5)(B) – were modified in accordance with the DSB recommendation.” See *US – Section 110(5)*, Oral Statement to the Arbitrators (September 5, 2001), para. 22; Arbitration Award in *United States – Section 110(5)*, paras. 3.20-3.35.

<sup>11</sup> Arbitration Award in *United States – Anti-Dumping Act of 1916 (Original Complaint by the European Communities) – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS136/ARB, 24 February 2004 (“Arbitration Award in *United States – 1916 Act*”), para. 6.10; see also paras. 5.54 and 5.69 (“In determining the level of nullification or impairment ... we need to rely, as much as possible, on credible, factual, and verifiable information. We cannot base any such estimates on speculation. ... We are of the view that any claim for a deterrent or ‘chilling effect’ by the European Communities in the present case would be too speculative, and too

the arbitrator found in *Hormones*, “[W]e need to guard against claims of lost opportunities where the causal link with the inconsistent [measure] is less than apparent, i.e. where exports are allegedly foregone not because of the [inconsistent measure] but due to other circumstances.”<sup>12</sup>

14. In previous proceedings, the arbitrator has compared the actual amount of exports that are affected by the WTO-inconsistent measure to the amount of exports in a “counterfactual” (in which the responding party brought the WTO-inconsistent measure into conformity within the reasonable period of time). The difference in the amount of exports to the responding party under these two situations typically represents the “level” of nullification or impairment. Accordingly, the United States agrees with the basic concept – as expressed in Antigua’s Methodology Paper – that the level of nullification and impairment may be calculated based on a “counterfactual,” under which the Member concerned is assumed to have adopted measures in compliance with the DSB recommendations and rulings. Antigua’s counterfactual, however, is based on manifestly incorrect assumptions, which results in an improper inflation of all of Antigua’s calculations by *at least a factor of 1000*.

#### **IV. The Key Starting Point Is What Would Constitute Compliance**

15. The DSB recommendations and rulings call for the United States to ensure that, in the light of the Interstate Horseracing Act, the U.S. prohibitions embodied in those measures are “applied to both foreign and domestic service suppliers of remote betting services for horse racing.” One means to do so would be for the United States to ensure that domestic service suppliers are also prohibited from supplying remote betting services on horseracing. In that event, the level of nullification and impairment for Antigua would be zero. Members are free to determine how to come into compliance with their WTO obligations. Antigua is not entitled to determine for the United States which approach to use to come into compliance.

16. For example, 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 (for example, a 10 percent tax rate on imported goods but a 5 percent tax rate on domestic goods), compliance could take the form of either raising the tax rate on domestic goods to 10 percent, lowering it on imported goods to 5 percent, or setting a new, uniform tax rate. There would be no basis for presuming one approach over another.

17. Accordingly, in this arbitration, any examination needs to take into account the possibility of compliance under different approaches, not just the approach preferred by Antigua.

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remote.”).

<sup>12</sup> Arbitration Award in *European Communities – Measures Concerning Meat and Meat Products (Hormones) (Original Complaint by the United States)– Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999 (“Arbitration Award in *EC – Hormones (United States)*”), para. 41; *see also* para. 77 (Refusing to consider, as “too speculative”, lost exports that would have resulted from foregone marketing campaigns.).

As discussed, if the United States were to ensure that domestic service suppliers are also prohibited from supplying remote betting services on horseracing, the level of nullification and impairment for Antigua would be zero.

18. In the following sections, the United States discusses the relevant considerations if the United States were to permit domestic and foreign service suppliers to supply remote betting services on horseracing.

**V. Antigua’s Proposed Counterfactual and Proposed Level of Suspension of Concessions Suffer Numerous Fatal Flaws**

**A. The Inclusion of All Remote Gambling in Antigua’s Counterfactual Is Wrong**

19. Antigua explains its counterfactual as:

“The Counterfactual developed for this methodology is that if the United States had permitted 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, then Antiguan service providers would have had a significantly increased share of the overall global remote gaming market, significantly higher revenues, significantly lower business costs and as a result, higher profits.”<sup>13</sup>

The fundamental flaw with this counterfactual is its assumption that the United States measure that would be in compliance with the DSB recommendations and rulings would be a measure that allowed for all types of cross-border gambling services. Antigua has no legal or factual basis for such an assumption. To the contrary, the DSB recommendations and rulings were addressed to discriminatory treatment of gambling on horseracing. Thus, the real question in the scenario where the United States achieves compliance by allowing market access for foreign suppliers (as opposed to showing that all domestic remote gambling was banned) is as follows: what would be the economic effect if the United States were to adopt measures that allow Antiguan operators (and operators in all other WTO Members) to provide cross-border remote gambling services on horseracing?

20. Antigua’s counterfactual 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.” Antigua’s statement apparently refers to Article XVI (Market Access) of the GATS, and to 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. But Antigua improperly ignores another equally important GATS provision addressed in this dispute,

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<sup>13</sup> Methodology Paper, at 3.



namely the General Exceptions set out in Article XIV of the GATS. That 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. Thus, 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.

21. The specific problem found with the U.S. measures at issue was with respect to the limited issue of the regulation of remote gambling on horseracing. In particular, the finding that the United States measures were inconsistent with its GATS obligation was based on the inability of the United States to meet its burden of showing an absence of discrimination under the chapeau of GATS Article XIV between U.S.-based gambling operators and foreign operators with respect to remote gambling services on horseracing. Compliance with the DSB recommendations and rulings could have been achieved (although it ultimately was not) by resolving this issue regarding the operation of U.S. federal statutes governing remote gambling on horseracing. In short, nothing in the DSB recommendations and rulings required the United States to clarify or change its measures with respect to other forms of remote gambling, such as gambling on poker or professional sports leagues.

22. Indeed, such a result would be fundamentally inconsistent with the purpose of Article XIV. 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.

23. 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 counterfactual that allowed remote gambling on horseracing, but disallowed other types of remote gambling, is entirely plausible. Indeed, such differential treatment of different types of remote gambling is precisely the treatment that Antigua has argued results from the interaction between the federal Interstate Horseracing Act and the federal criminal statutes at issue in this dispute.

24. Antigua’s counterfactual is also wrong as a factual matter. In its statements on compliance, the United States has stated that it intended to address the ambiguity found by the

DSB in U.S. law governing remote gambling on horseracing.<sup>14</sup> The United States has never indicated any intent to take any compliance measures addressed to any other type of remote gambling.

25. The error in Antigua's counterfactual – namely, the inclusion of all types of gambling instead of only gambling on horseracing – profoundly distorts Antigua's economic calculations of its level of nullification and impairment. Given that remote gambling is unlawful in the United States, the United States government does not collect official economic statistics on remote gambling as a whole, or on breakdowns of various types of remote gambling. However, a very conservative estimate of the level of distortion introduced by Antigua's inclusion in the counterfactual of all gambling (as opposed to gambling on horseracing) can be derived by comparing the level of non-remote gambling on horseracing with other types of non-remote gambling. Official U.S. government statistics show that horseracing gambling makes up approximately 7 percent of all gambling in the United States.<sup>15</sup> It is reasonable to assume that remote gambling on horseracing makes up less than 7 percent of other types of remote gambling.<sup>16</sup>

**B. Antigua's Proposed Level of Suspension of Concessions Is Unsupportable and Disconnected from Economic Reality**

26. In 2005 – the last year of available data – Antigua's entire gross domestic product was approximately \$900 million (in U.S. dollars).<sup>17</sup> Antigua's proposed level of suspension of concessions – at \$3.443 billion US dollars – is nearly four times larger than Antigua's entire economy, and thus wildly out of line with any realistic figure.

27. Antigua's Methodology Paper<sup>18</sup> purports to support the \$3.443 billion proposal by presenting three different models of Antigua's trade damages. But each of these methodologies are based on the same underlying data, and – as the United States will explain at some length – that data is fundamentally inconsistent with actual economic data used by governments and international institutions, and should not be relied upon in this proceeding.

28. 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 entitled

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<sup>14</sup> See Status Report by the United States, WT/D285/15, 7 March 2006; Status Report by the United States, Addendum, WT/D285/15/Add.1, 11 April 2006; Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/210, 30 May 2006, paras. 33-35.

<sup>15</sup> See Ex. US-1 (Table of U.S. Gambling Statistics).

<sup>16</sup> Indeed, given the reported apparent popularity of remote gambling on poker, it is likely that this is a very conservative estimate. As noted, however, the United States Government does not collect official economic data on remote gambling (an activity that is subject to criminal penalties).

<sup>17</sup> See WTO Statistics for Antigua and Barbuda (Ex. US-5) (showing Antiguan GDP of \$905 million).

<sup>18</sup> Methodology Paper of Antigua and Barbuda, 31 August 2007.

“Quarterly eGaming Statistics Report,” issued by a for-profit consulting group known as “Global Betting and Gaming Consultants” (“GBGC”). It is not clear if this consultant is producing the report at the behest of the Government of Antigua for purposes of this dispute. According to the website of that for-profit enterprise, GBGC is in the business of providing statistics and advice to the gambling industry.<sup>19</sup> The Quarterly eGaming Statistics Report is not specifically mentioned on the website, although something entitled the “Quarterly Data Report” is available for purchase at a price of 1495 British Pounds, or approximately \$3000 in United States dollars. The United States does not have access to either the Quarterly eGaming Statistics Report (cited by Antigua) or the Quarterly Data Report (available for sale), and is thus not able to determine whether the reports are the same, or whether the Quarterly eGaming Statistics Report (cited by Antigua) is a special report prepared at Antigua’s request for the purpose of this proceeding. Moreover, Antigua has not even submitted a copy of that report to the Arbitrator, nor is the United States or the Arbitrator able to evaluate the basis for the data used in that report.<sup>20</sup>

29. The United States is thus not able to determine the methodologies used by GBGC in preparing its reports. 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 assertions of gambling enterprises located within Antigua. The United States submits that unverified, self-serving allegations should not be the basis of arbitration findings under Article 22.6 of the DSU.

30. Furthermore, Antigua’s gambling revenue data is not supported by a single official economic report submitted by the Government of Antigua. And, moreover, the 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. In fact, Antigua’s data appears to be incorrect by a factor of at least 50 to 100.

31. The following table compares Antigua’s allegations of “remote gaming revenue” with economic data prepared by the Eastern Caribbean Central Bank (ECCB). The ECCB is the official bank of the Eastern Caribbean, and issues the Eastern Caribbean Dollar that is used in Antigua and other eastern Caribbean nations. The ECCB data below is taken from the ECCB National Account Statistics, submitted by Antigua itself in Exhibit 7 of its 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.<sup>21</sup>

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<sup>19</sup> See <http://www.gbgc.com>.

<sup>20</sup> The United States notes that Antigua’s Exhibit AB-9, containing two spreadsheets of data without any textual explanation, may be excerpts from a GBGC report. Without any description of the figures in the spreadsheet, and methodologies used to obtain those figures, these spreadsheets are of little, if any, use.

<sup>21</sup> 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.

	1999	2000	2001	2002	2003	2004	2005
Antigua “remote gaming revenue” <sup>22</sup>	\$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

32. Antigua’s data is completely out of line with the official ECCB economic statistics, both in terms of absolute amounts, and in terms of trends. With regard to absolute amounts, Antigua’s claimed “remote gaming revenue” dwarfs Antigua’s officially reported GDP. For example, in 2001, Antigua’s claimed gambling revenue of \$2.392 billion is greater by more than a factor of three than the reported size of Antigua’s economy (less than \$700 million). In other words, Antigua – based only on an unsubstantiated report prepared by a private, for-profit consultancy – is asking the Arbitrator to find that the official economic statistics prepared by Antigua’s central bank are fundamentally wrong.

33. In a footnote, Antigua adverts to and tries to explain this inconsistency, but Antigua’s explanation is unconvincing. Antigua explains that “most importantly” remote gaming operators have a “low response rate to surveys”, and they also fail to report “a key component of GDP – profits.”<sup>23</sup> To be sure, no system of collecting economic data is perfect, but any problem in survey responses could equally affect data collected by the for-profit consultancy. In short, aside from a general claim that official data is not perfect, Antigua provides no basis for the Arbitrator to ignore the official economic data collected by Antigua’s central bank, and no basis for the Arbitrator to instead rely on an unpublished report prepared by a consultant working for the gambling industry.

34. In addition, 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. 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. But Antigua’s official

<sup>22</sup> As alleged by Antigua in Ex. AB-1.

<sup>23</sup> Methodology Paper, at 2, note 5.

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.

35. Moreover, 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 (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. This situation approaches economic impossibility. A dip in just a few percent in GDP over several years (and Antigua’s gambling revenue figures claim a much greater effect) is enough to put a nation into recession or even a depression, with consequent and well known effects on employment and overall economic health. But Antigua has presented no evidence of such recessionary impacts – to the contrary, the ECCB data submitted by Antigua itself show continued economic growth.

36. Antigua’s claims of “remote gambling revenue” are also inconsistent with International Monetary Fund (IMF) statistics collected for balance-of-payment purposes. In particular, the IMF collects and publishes data on goods and services exports and imports. Although the IMF does not have a separate category for gambling services, it does have a category for “other business services” which would appear to cover Antigua’s gambling service revenue. That data, as set out below, is in the same order of magnitude as the ECCB economic data for other services, and (again) Antigua’s claims of “remote gambling revenue” are completely out of line with official economic data.<sup>24</sup>

	1999	2000	2001	2002	2003	2004	2005
Antigua “remote gaming revenue”	\$546 million	\$1716 million	\$2392 million	\$2109 million	\$1416 million	\$1125 million	\$1138 million
IMF - exports of “Other Business Services”	\$44 million	\$33 million	\$35 million	\$30 million	\$28 million	\$30 million	\$32 million

37. Antigua’s claims of “remote gambling revenue” are also inconsistent with services statistics published by the WTO itself. The following table compares Antigua’s claimed level of gambling revenue with WTO statistics on the level of Antigua’s “other commercial services”,

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<sup>24</sup> IMF data taken from IMF 2006 Yearbook, Country Table for Antigua and Barbuda, at page 20 (Ex. US-2).

which is all services exports minus travel and transportation services exports. Since this figure encompasses all exports other than travel and transportation, gambling would account for something less than the services exports reflected in the category.<sup>25</sup>

	2001	2002	2003	2004	2005
Antigua’s claimed “remote gaming revenue”	\$2392 million	\$2109 million	\$1416 million	\$1125 million	\$1138 million
WTO export statistics for A&B: Other commercial services (that is, all Commercial services, minus Travel & Transport)	\$47 million	\$39 million	\$34 million	\$44 million	\$45 million

The WTO statistics are comparable with IMF and ECCB statistics, and – again – the estimates of gambling revenue proposed by Antigua in this dispute are larger than internationally accepted statistics by a factor of 50 or more.

38. In sum, Antigua’s proposed figures for gambling revenues are inconsistent with official and internationally accepted economic data. Furthermore, Antigua has cited to not a single official government report about gambling revenue, and certainly one would expect the existence of such reports if gambling were as great a part of Antigua’s economy as Antigua now asserts.

39. Finally, the United States has the following comment on the private consultancy data submitted by Antigua. As noted, the United States submits that where inconsistencies exist, the Arbitrator should rely on official trade and economic statistics, and not on unpublished reports prepared by the gambling industry itself. In any event, the task – if undertaken at all – of explaining the consultancy’s data does not rest with the United States. That said, the United States notes the following possibility regarding the data relied upon by Antigua: namely, it is possible that such data is based, in whole or in part, and perhaps inconsistently for different years and different suppliers, not on gambling revenue (the amount bet minus the payout), but instead only on the gross amount. As Antigua itself acknowledges, for statistical purposes gambling revenue (like other financial services, such as insurance), must be based on the net revenue (in

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<sup>25</sup> WTO statistics from WTO statistical website:  
<http://stat.wto.org/StatisticalProgram/WSDBViewData.aspx?Language=E> .

this case, the amount bet minus payout).<sup>26</sup> But if some gambling companies providing data to GBGC responded incorrectly with the gross amount bet, then the data collected would be wrong and misleading by a substantial amount.

**C. Antigua’s Proposed Level of Nullification and Impairment Is Affected by Other Methodological Flaws**

40. As the United States has explained, the data that underlies Antigua’s methodologies is profoundly inconsistent with official economic statistics, and should not be used as the basis for the determination of the level of Antigua’s nullification and impairment. In addition, the United States notes that Antigua’s methodologies are affected by other crucial flaws.

41. Antigua’s Data Is Based on Worldwide Gambling Revenue, Not U.S. Gambling Revenue. 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.<sup>27</sup> Any correct calculation of Antigua’s level of nullification and impairment would have to be limited to U.S. remote gambling revenue. Given that Antigua’s gambling operators operate Internet sites, Antigua’s gambling services are necessarily accessible to a world-wide audience. Thus, the overstatement resulting from including worldwide services exports may be substantial.

42. Antigua Has No Basis For Attributing Its Loss of Market Share to U.S. Measures. Antigua’s Methodology Paper, and Exhibit 2 in particular, provides data purportedly showing that Antigua’s share of global remote gambling revenue has fallen from 52 percent in 1999 to 7 percent in 2006, with an expected leveling off to 5 percent by 2010. As the United States has explained, it does not accept the validity of Antigua’s underlying data. But even taken at face value, Antigua has presented no basis for arguing that its purported loss of worldwide market share is due to U.S. actions. In particular, Antigua argues that 2002 represented a “major turning point,” because beginning in 2002 the United States increased its enforcement of its laws prohibiting remote gambling.<sup>28</sup> This argument, however, does not in fact explain anything about Antigua’s market share of gambling revenue. In particular, any U.S. enforcement efforts would affect all providers operating in the U.S. market (aside arguably from U.S. sites offering remote gambling on horseraces), and would have no special impact on Antiguan operators. And Antigua admits that one primary reason for the supposed decline in gambling revenue starting in

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<sup>26</sup> Antigua’s Exhibit 9, which is a spreadsheet setting out Antigua’s data on gambling revenue, claims that the figures are based on “Stakes less Prizes or Rake, etc.” As noted above, however, the underlying source of the data, and what the data may or may not actually reflect, is uncertain. For statistical purposes, the revenue for financial services like insurance or gambling must be based on the amount collected minus the amount payed back to the customer. *See, e.g.*, IMF Balance of Payments Manual, at 66-67 (Ex. US-3) (explaining that balance of payment figures for insurance services are based on premiums minus claims payable).

<sup>27</sup> *See, e.g.*, Exhibits AB-1 and AB-2.

<sup>28</sup> Methodology Paper, at 2.

2002 is the enactment by the Antiguan government itself in mid-2001 of stricter remote gaming regulations, diminishing Antigua's appeal as a remote gaming jurisdiction to certain operators.<sup>29</sup> Accordingly, any calculation of nullification and impairment would need to factor out the effects of the Antigua government's own actions.

43. If Antigua's market share of global gambling revenue in fact has fallen from 52 percent in 1999 to 7 percent in 2006, another explanation is far more plausible – namely, that the barriers to entry to Internet gambling are low, and that operators in other locations have increasingly entered the market. Moreover, Antigua has presented no evidence that it has some special attributes – such as a workforce educated in computer programming or a specially developed communications infrastructure – that might place Antiguan operators at an advantage as compared to competitors in other countries. Thus, if – as Antigua asserts – Internet gambling is a growing trend, it is only reasonable to assume that Antigua will continue to lose market share to other nations.

44. Finally, the United States notes one other significant point about market share for Internet gambling services. Currently, Antiguan and other non-U.S. Internet gambling operators 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. Indeed, throughout this proceeding, Antigua has never introduced evidence of any U.S.-based Internet site that provides non-horseracing Internet gambling (such as gambling on poker or professional team sports). 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.

45. Antigua Has No Basis for Its “Small Island Economy Multiplier”. In its Methodology Paper, Antigua argues that any direct nullification or impairment of Antigua's benefits under the GATS must be multiplied by 1.4, to reflect that losses in one industry have effects on other industries. There is no basis under the WTO Agreement for applying such a “multiplier.” First, as illustrated in prior Article 22.6 arbitrations, the figure calculated relates to the nullification and impairment of benefits under the covered agreement, not some broader, subjective measure of the overall economic impact of non-compliance.<sup>30</sup> Second, the specific DSU requirement is

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<sup>29</sup> Methodology Paper, at 3.

<sup>30</sup> See, e.g., Arbitration Award in *European Communities – Measures Concerning Meat and Meat Products (Hormones) (Original Complaint by the United States)– Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999 (“Arbitration Award in *EC – Hormones (United States)*”), para. 41; *see also* para. 77 (Refusing to consider, as “too speculative”, lost exports that would have resulted from foregone marketing campaigns.); Arbitration Award in *United States – Anti-Dumping Act of 1916 (Original Complaint by the European Communities) – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS136/ARB, 24 February 2004 (“Arbitration Award in *United States – 1916 Act*”), para. 6.10; *see also* paras. 5.54 and 5.69 (“In determining the level of nullification or impairment ... we need to rely, as much as possible, on credible, factual, and verifiable information. We cannot base any such estimates on speculation.”).



that the “level of suspension of concessions . . . shall be equivalent to the level of nullification and impairment.”<sup>31</sup> If, as Antigua asserts, the level of nullification must be increased by a multiplier, then to maintain equivalence, the proposed level of suspended benefits would likewise have to be increased by a multiplier before comparison to the level of nullification. Otherwise, the arbitration would not be an apples-to-apples determination of equivalency, as required under the DSU. Third, the context of the DSU indicates that considerations such as alleged effects on other areas of a Member’s economy would be considered under the DSU Article 22.3 principles, not in the calculation of the level of nullification and impairment. In particular, DSU Article 22.3(d)(ii) states that a Member may consider the “broader economic elements” related to the nullification and impairment. The fact that such broader elements, such as might be reflected in Antigua’s purported “multiplier”, is listed in Article 22.3 indicates that the term “nullification and impairment” itself does not include such elements. In short, applying the “multiplier” requested by Antigua would be unprecedented, and there is no basis for doing so under the DSU.

**VI. Official Economic Statistics and Antigua’s Own Reasoning Show that the Level of Antigua’s Nullification and Impairment Should Be Roughly \$0.5 Million, and in No Case Greater than \$3 Million per Year**

46. 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.

47. The starting point is one issue 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.

48. Antigua in particular argues that the years 2001-2002 were the high point of Antigua’s export of gambling services to the United States, and that those exports then began to decline as a result of enhanced U.S. enforcement of criminal laws and enhanced Antiguan regulation of its own industry.<sup>32</sup> For this reason, Antigua bases all of its estimates, at least in part, on gambling exports for the years 2001-2002. The United States cannot verify what has motivated Antiguan gambling operators or any U.S. users of those services, and (as noted) believes that any decline from 2001 levels would also be due to increasing competition from other foreign gambling

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<sup>31</sup> DSU, Article 22.4.

<sup>32</sup> Methodology Paper, at 2-3.

operators. But in any event, 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.

49. As explained in Part III above, Antigua’s data on exports of remote gambling services is based on an unpublished report of a for-profit private company that consults for the gambling industry, is wildly inconsistent with official trade statistics, and thus should not be used as the basis for the determination of the level of nullification or impairment in this arbitration. Instead, the United States submits that the Arbitrator should start with the WTO’s own published figures for Antigua’s services exports. As noted, under the WTO figures, Antigua’s “other service exports” – which is services exports minus travel and transportation exports – was \$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.

50. 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). Specifically, Antigua’s recourse to Article 22.2 states that:

“Prior 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 percent of the gross domestic product of Antigua and Barbuda and was the fastest growing segment of the economy.”<sup>33</sup>

As noted, Antigua’s Methodology Paper specifies that the “actions taken by the United States” purportedly began in 2002, so that the year referred to in the above statement is 2001. Based on official ECCB data submitted by Antigua itself, Antigua’s GDP in 2001 was EC\$1882 million (Eastern Caribbean dollars), or US\$697 million (at the 2.7 exchange rate). Thus, using Antigua’s own allegations in its recourse to Article 22.2, its gambling services exports to the entire world in 2001 were \$68 million (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.

51. 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. As noted above, a very conservative estimate of the U.S. market –

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<sup>33</sup> Recourse by Antigua and Barbuda to Article 22.2 of the DSU, WT/DS285/22 (22 June 2007), at 3.

based on non-remote gambling – is that horserace gambling accounts for 7 percent of total gambling. (And in fact, it probably is far less.) 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 \$3.3 million per year.

52. 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 (reflecting exports of horseracing gambling services in 2001) would need to be reduced by the ratio of 7 percent (Antigua’s claimed market share in 2001) over 50 percent (Antigua’s claimed current market share), or to approximately \$500,000 per year in lost exports to the world of horserace gambling services.<sup>34</sup>

53. The United States notes that Antigua also provides estimates of predicted growth of the U.S. remote gambling market. The United States does not accept these estimates. First, the estimates are again based on the unsupported figures from the private consultant, and are not based on any internationally accepted economic data. Second, Antigua’s figures are for remote gambling as a whole, and the United States believes that trends in, for example, on-line poker gambling are not indicative of trends in on-line horseracing gambling. To the contrary, horseracing is not a growth industry, and there is no basis to believe that Internet gambling on horse-racing will grow over time. Furthermore, the United States submits that any possible growth in remote horseracing gambling would be more than offset by Antigua’s admitted expectation of continued losses of worldwide market share in gambling services, and by the fact that Antigua has made no adjustment for the fact that its figures reflect exports to the whole world, not just the United States. Accordingly, the United States believes that the appropriate level of nullification and impairment would be roughly \$500,000 per year, and that certainly the \$3.3 million per year figure (which is based directly on published statistics) should serve as an absolute cap on Antigua’s nullification and impairment in this dispute.<sup>35</sup>

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<sup>34</sup> In other words, the \$3.3 million figure based on 2001 data would need to be adjusted by the fall in market share:  $\$3.3 \text{ million} * (7\% \text{ current market share} / 50\% \text{ 2001 market share}) = \$462,000$ .

<sup>35</sup> The United States also notes that depending on the scenario of the measure taken to comply, the calculation should require a further reduction in Antigua’s level of nullification and impairment. In particular, if Antiguan operators received the exact same treatment as U.S. operators under the Interstate Horseracing Act, their right to engage in off-track betting would require that the Antiguan operators (like U.S. operators) enter into revenue sharing agreements with the horse tracks. This requirement for revenue-sharing agreements would further reduce any Antiguan gambling revenue. As of this time, the United States has not located government data that would allow for the quantification of such a reduction in revenue.

**VII. Antigua’s Proposal for the Suspension of Concessions Does Not Follow the Principles and Procedures Set Forth in Paragraph 3 of Article 22 of the DSU, and Should Be Limited to the Suspension of GATS Concessions**

54. As set out in the United States communication referring this matter to arbitration, the United States claims that Antigua’s proposal in document WT/DS285/22 does not follow the principles and procedures set forth in paragraph 3 of Article 22 of the DSU. In particular, the United States submits that Antigua has not presented a valid basis for not following the general principle of seeking to suspend concessions in the same sector or same agreement with respect to which the panel or Appellate Body has found a violation or other nullification and impairment.

55. Paragraph 3 of Article 22, in relevant parts, provides as follows:

“In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

...

(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;

(g) for purposes of this paragraph, "agreement" means:

...

(ii) with respect to services, the GATS. . . .”

56. As applied to this case, the Article 22.3 principles mean that Antigua must first seek to suspend concessions in the same sector as the sector covered by gambling services, and that Antigua may only suspend concessions outside this sector if it is not practicable or effective to suspend concessions within the sector. Under the GATS classification scheme, gambling services are covered in “10. Recreational, Cultural and Sporting Services.”<sup>36</sup> Thus, Antigua must first seek to suspend concessions in this sector.

57. If not practicable or effective to do so, Antigua must then seek to suspend concessions under the same agreement, which with respect to services means the GATS. Only if it is not practicable or effective to suspend concessions under the GATS, and only if the circumstances are “serious enough,” may Antigua seek to suspend concessions under other agreements, such as (as Antigua has requested) the TRIPS Agreement.

58. Although Antigua in its Article 22.2 request purports to explain its rationale for requesting to suspend TRIPS Agreement concessions, its explanation is unconvincing and does not follow the Article 22.2 principles.

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<sup>36</sup> MTN.GS/W/120, as referred to in footnote 14 to DSU Article 22.3.

59. First, Antigua misreads the GATS in arguing that Antigua cannot seek to suspend concessions under the same sector. In particular, Antigua argues that it made no commitment in GATS Sector 10.D, and therefore that Antigua cannot suspend concessions in the same sector. This reasoning, however, is incorrect. The GATS is clear in providing that in this context, “sector means one of the 11 categories set out in MTN.GNS/W/120.” Thus, the issue is not whether Antigua has made any commitments in subsector 10.D, but rather whether Antigua has made any commitments in all of sector 10, covering Recreational, Cultural and Sporting Services. And, in fact, Antigua has made both market access commitments and national treatment commitments under 10.A, covering Entertainment Services.<sup>37</sup> Even though required under DSU Article 22.3, Antigua has provided no explanation of why it is not seeking to suspend concessions for Entertainment Services.

60. Second, Antigua has not provided an adequate explanation of why it cannot seek to suspend concessions under the GATS, as opposed to the GATS and also the TRIPS Agreement. Antigua’s request includes conclusory statements along the lines that Antigua is a developing country and that it generally needs to import goods and services, but Antigua provides no specific explanation of why it would not be practicable or effective to suspend concessions on specific services. And in fact, WTO statistics indicate that Antigua’s “other service imports” (that is, all services other than travel and transport) are in fact larger than its “other services exports,” and are thus an obvious candidate for a request for suspension of concessions. The following table is from the WTO statistical website:<sup>38</sup>

**Subject:** Trade in commercial services    **Unit:** US dollar at current prices (Millions)

Reporter	Flow	Indicator	Partner	2001	2002	2003	2004	2005
Antigua	Exports	Other Commercial Services <sup>39</sup>	World	47	39	34	44	45
Antigua	Imports	Other Commercial Services	World	71	74	78	78	84

<sup>37</sup> Antigua and Barbuda Schedule of Specific Commitments, GATS/SC/2 (15 April 1994) (Ex. US-4).

<sup>38</sup> The website is located at <http://stat.wto.org/StatisticalProgram/WSDBViewData.aspx?Language=E>.

<sup>39</sup> “Other Commercial Services” is defined as all services except travel and transport, and thus would include gambling, telecommunications and any other imported or exported services except travel and transport services. The statistical website provides Antigua services trade only for “world,” and not data specifically for the United States. However, Antigua itself notes that about half of its goods and services imports come from the United States.

In each of the last five years for which data is available, Antigua’s “other services” imports exceed its “other services” exports, thus indicating that Antigua would have the option of suspending concessions with respect to services imports. Moreover, Antigua has even higher levels of services imports for travel and transport services (not included in the above table).<sup>40</sup> Although Antigua’s economy does depend to a substantial extent on tourism, it does not necessarily follow that suspension of concessions in the areas of travel or transport would adversely affect Antigua’s tourism industry.<sup>41</sup> In short, Antigua’s explanation of why it cannot suspend services concessions is entirely lacking, and thus does not comply with the principles and procedures set out in Article 22.3.

61. Third, Antigua argues that the very level of its requested suspension of concessions is greater than all of its trade with the United States, and thus that Antigua must suspend concessions under other agreements.<sup>42</sup> This argument is flawed because, as set out above, Antigua’s request for suspension of concessions is out of line with any economic reality, and is too large by at least a factor of 1000. Once Antigua’s level of nullification and impairment is calculated based on actual economic statistics, the level is well in line with Antigua’s services imports, and suspension of services concessions is possible and indeed required under the general principles of Article 22.3.

62. Finally, Antigua makes the general point that no suspension of concessions in the area of goods or services could impact the United States, because the United States economy is much larger than Antigua’s economy. This argument cannot justify a departure from the general principle of seeking to suspend concessions first in the same sector, and then under the same agreement (that is, the GATS). In fact, Antigua’s reasoning about the supposed ineffectiveness of suspending concessions against a Member with a much larger economy applies just as well to its request to suspend concessions under the TRIPS Agreement or any other WTO agreement. Differences in sizes of economies cannot provide a *carte blanche* permission to deviate from the general principles set out in Article 22.3.

### **VIII. The Arbitrator Should Require Antigua to Specify How Antigua Will Ensure the Equivalency of the Suspension of Concessions with the Level of Nullification and Impairment**

63. 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

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<sup>40</sup> In 2005, for example, Antigua’s services imports for travel services were \$141 million, and for transportation services were \$35 million. See WTO Statistical Profile of Antigua and Barbuda, Ex. US-5 (applying the 72% figure for travel and the 18% figure for transportation to the total services imports of \$197 million).

<sup>41</sup> For example, Antigua has concessions under Sector 11 for maritime freight transport services, which would not appear to have any relation to the tourism industry.

<sup>42</sup> Antigua’s request makes this assertion with regard to “all trade,” but it is not clear whether Antigua is referring only to trade in goods, or to trade in goods and services combined.

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. For this reason, an authorization to suspend concessions on, for example, telecommunications services, could well lead to an excess suspension of concessions in the absence of any mechanism adopted by Antigua to track the level of suspension. Accordingly, 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.<sup>43</sup>

## **IX. Conclusion**

64. For the reasons set forth above, the United States requests that the Arbitrator find that the level of suspension of concessions requested by Antigua is in excess of the level of nullification or impairment, that the level of nullification or impairment is approximately \$500,000 per year (and certainly no greater than \$3.3 million per year figure based directly on published statistics), and that Antigua has not complied with the principles and procedures set out in DSU Article 22.3. In addition, the Arbitrator should require Antigua to specify how it will ensure that any suspension of concessions does not exceed the level of nullification and impairment found by the Arbitrator.

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<sup>43</sup> Such actions on the part of the Arbitrator would be consistent with those taken by Arbitrators in other disputes. *See, e.g.,* Arbitration Award in *United States – Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by Brazil) – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS217/ARB/BRA, 31 August 2004, at paras. 5.1-5.5 (specifying the steps that Brazil must take every year to ensure that the level of suspension of benefits does not exceed the level of nullification and impairment).



## **List of Exhibits**

- US-1            Table of U.S. Gambling Statistics
  
- US-2            International Monetary Fund, Balance of Payment Statistics, Yearbook 2006, Country Table for Antigua and Barbuda (pages 19-23 of Country Tables).
  
- US-3            International Monetary Fund, Balance of Payments Manual (excerpt) [Complete copy may be found at <http://www.imf.org/external/np/sta/bop/BOPman.pdf>].
  
- US-4            Antigua and Barbuda Schedule of Specific Commitments, GATS/SC/2 (15 April 1994) and Antigua and Barbuda Schedule of Specific Commitments, Supplement 1, GATS/SC/2/Suppl.1 (11 April 1997)
  
- US-5            Printout from WTO Statistical Website, Profile for Antigua and Barbuda (April 2007) [Source is:  
<http://stat.wto.org/CountryProfile/WSDBCcountryPFView.aspx?Language=E&Country=AG> ]