

**UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER
SUPPLY OF GAMBLING AND BETTING SERVICES**

**Recourse to Arbitration by the United States
under Article 22.6 of the DSU**

DECISION BY THE ARBITRATOR

The decision by the Arbitrator on *United States – Measures Affecting The Cross-Border Supply Of Gambling And Betting Services* is being circulated to all Members, pursuant to the DSU. The decision is being circulated as an unrestricted document from 21 December 2007 pursuant to the Procedures for the Circulation and Derestriction of WTO documents (WT/L/452).

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
A. INITIAL PROCEEDINGS	1
B. REQUEST FOR ARBITRATION AND PROCEEDINGS	2
II. PRELIMINARY ISSUES.....	2
A. MANDATE OF THE ARBITRATOR.....	2
1. <i>Mandate in relation to the proposed level of suspension</i>	3
2. <i>Mandate in relation to the sector(s) and agreement(s) in which suspension is sought</i>	5
3. <i>Order of analysis</i>	6
B. BURDEN OF PROOF AND PRESENTATION OF EVIDENCE	6
C. REQUEST BY THE UNITED STATES FOR AN OPEN HEARING	8
D. REQUEST BY THE EUROPEAN COMMUNITIES FOR THIRD PARTY STATUS.....	8
E. CONSULTATION OF THE INTERNATIONAL MONETARY FUND (IMF) AND THE EASTERN CARIBBEAN CENTRAL BANK (ECCB)	10
III. ASSESSMENT OF THE PROPOSED LEVEL OF SUSPENSION.....	10
A. MAIN ARGUMENTS OF THE PARTIES.....	11
B. APPROACH OF THE ARBITRATOR	12
C. CHOICE OF COUNTERFACTUAL.....	13
1. <i>Assessment of Antigua's proposed counterfactual</i>	14
2. <i>Alternative counterfactual</i>	20
3. <i>Separate opinion</i>	23
D. CALCULATION OF THE LEVEL OF NULLIFICATION.....	25
1. <i>Review of the approach proposed by Antigua</i>	25
(a) Description of the approach proposed by Antigua	25
(b) Nature of GBGC data, data gathering methodology and data inconsistencies	27
(i) Arguments by the parties.....	27
(ii) Analysis by the Arbitrator	28
(c) Relationship between GBGC remote gambling revenue data and Antigua's exports of remote gambling services to the United States.....	29
(i) Arguments by the parties.....	29
(ii) Analysis by the Arbitrator	30
(d) Relationship between GBGC remote gambling revenue data and Antigua's reported exports and GDP.....	31
(i) Arguments by the parties.....	31
(ii) Analysis by the Arbitrator	34
(e) Absence of direct evidence of revenues of remote gambling operators licensed by Antigua and comparison of GBGC remote gambling revenue data with revenue figures from other sources	35
(i) Arguments by the parties.....	35
(ii) Analysis by the Arbitrator	37
(f) Application of a multiplier to the remote gambling revenue data	38
(i) Arguments by the parties.....	38
(ii) Analysis by the Arbitrator	39
(g) Point in time, when US measures began to affect Antigua's exports of remote gambling services to the United States and loss of market share to competitors	39
(i) Arguments by the parties.....	39
(ii) Analysis by the Arbitrator	42
(h) Comparison of actual and counterfactual exports of Antigua's remote gambling services to the United States	44
(i) Arguments by the parties.....	44
(ii) Analysis by the Arbitrator	44
(i) Concluding remarks	45
2. <i>Review of the approach proposed by the United States</i>	45
(a) Description of the approach proposed by the United States	45
(b) Antigua's exports of remote gambling services on horseracing.....	46
(i) Arguments by the parties.....	46
(ii) Analysis by the Arbitrator	48

(c)	ECCB/IMF/WTO data on Antigua's services exports and alternative revenue estimates.....	48
(i)	Arguments by the parties.....	48
(ii)	Analysis by the Arbitrator.....	50
(d)	Loss of market share to competitors.....	51
(i)	Arguments by the parties.....	51
(ii)	Analysis by the Arbitrator.....	51
3.	<i>Approach of the Arbitrator</i>	51
(a)	Antigua's exports of remote gambling services to the United States.....	52
(i)	GBGC data.....	52
(ii)	Revenues per employee.....	53
(b)	Competing suppliers.....	53
(c)	Gambling on horseracing.....	54
(d)	Growth in US demand.....	54
4.	<i>Conclusion</i>	55
IV.	PRINCIPLES AND PROCEDURES OF ARTICLE 22.3 OF THE DSU	55
A.	MAIN ARGUMENTS OF THE PARTIES.....	55
B.	OVERALL APPROACH BY THE ARBITRATOR.....	57
C.	PRELIMINARY OBSERVATIONS.....	60
D.	REVIEW OF ANTIGUA'S DETERMINATION IN RESPECT OF "SAME-SECTOR" SUSPENSION.....	60
1.	<i>The principles and procedures of Article 22.3(b)</i>	61
2.	<i>Review of Antigua's determination that is not practicable or effective to suspend concessions or other obligations in the "same sector"</i>	63
(a)	Identification of the relevant sector and scope of obligations to be considered.....	63
(b)	Antigua's determination that it is "not practicable or effective" to suspend concessions or other obligations with respect to the same sector.....	64
(i)	Arguments of the parties.....	64
(ii)	Assessment by the Arbitrator.....	65
(c)	Whether Antigua has taken into account the factors identified in subparagraph (d) of Article 22.3.....	67
(d)	Conclusion.....	67
E.	REVIEW OF ANTIGUA'S DETERMINATION IN RESPECT OF "OTHER SECTORS" UNDER THE GATS.....	67
1.	<i>Whether suspension of concessions or other obligations is practicable or effective in "other sectors" under the GATS</i>	68
(a)	Level of suspension and availability of suspension under the GATS.....	69
(b)	Practicability and effectiveness of suspension in other sectors.....	70
(c)	Antigua's consideration of the elements in subparagraph (d).....	73
(d)	Conclusion.....	74
2.	<i>Whether the circumstances are serious enough</i>	74
F.	OVERALL CONCLUSION.....	75
V.	EQUIVALENCE AND IMPLEMENTATION OF SUSPENSION OF OBLIGATIONS UNDER THE TRIPS AGREEMENT	75
A.	ARGUMENTS OF THE PARTIES.....	75
B.	ANALYSIS BY THE ARBITRATOR.....	77
VI.	AWARD	78

LIST OF ANNEXES

	Contents	Page
Annex A	Working procedures	79
Annex B	Letter from the Arbitrator to the ECCB	81
Annex C	Letter from the Arbitrator to the IMF	83
Annex D	Letter from the IMF to the Arbitrator	85
Annex E	Tables on the calculations of the level of nullification or impairment	87

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather</i>	Award of the Arbitrator, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS155/10, 31 August 2001, DSR 2001:XII, 6013
<i>Australia – Salmon</i>	Award of the Arbitrator, <i>Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS18/9, 23 February 1999, DSR 1999:I, 267
<i>Brazil – Aircraft</i> (Article 22.6 – Brazil)	Decision by the Arbitrators, <i>Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS46/ARB, 28 August 2000, DSR 2002:I, 19
<i>Canada – Aircraft Credits and Guarantees</i> (Article 22.6 – Canada)	Decision by the Arbitrator, <i>Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS222/ARB, 17 February 2003, DSR 2003:III, 1187
<i>EC – Bananas III (Ecuador)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>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</i> , WT/DS27/ARB/ECU, 24 March 2000, DSR 2000:V, 2237
<i>EC – Bananas III (US)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>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</i> , WT/DS27/ARB, 9 April 1999, DSR 1999:II, 725
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Hormones (Canada)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS48/ARB, 12 July 1999, DSR 1999:III, 1135
<i>EC – Hormones (US)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>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</i> , WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1105
<i>Korea – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937
<i>US – 1916 Act (EC)</i> (Article 22.6 – US)	Decision by the Arbitrators, <i>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</i> , WT/DS136/ARB, 24 February 2004, DSR 2004:IX, 4269
<i>US – FSC</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS108/ARB, 30 August 2002, DSR 2002:VI, 2517
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R and Corr.1, adopted 20 April 2005, DSR 2005:XII, 5663

Short Title	Full Case Title and Citation
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report, WT/DS285/AB/R, DSR 2005:XII, 5797
<i>US – Gambling (Article 21.5 – Antigua and Barbuda)</i>	Panel Report, <i>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</i> , WT/DS285/RW, adopted 22 May 2007
<i>US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>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</i> , WT/DS217/ARB/BRA, 31 August 2004, DSR 2004:IX, 4341
<i>US – Offset Act (Byrd Amendment) (Canada) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Canada – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS234/ARB/CAN, 31 August 2004, DSR 2004:IX, 4425
<i>US – Offset Act (Byrd Amendment) (Chile) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Chile – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS217/ARB/CHL, 31 August 2004, DSR 2004:IX, 4511
<i>US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS217/ARB/EEC, 31 August 2004, DSR 2004:IX, 4591
<i>US – Offset Act (Byrd Amendment) (India) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by India – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS217/ARB/IND, 31 August 2004, DSR 2004:X, 4691
<i>US – Offset Act (Byrd Amendment) (Japan) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Japan – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS217/ARB/JPN, 31 August 2004, DSR 2004:X, 4771
<i>US – Offset Act (Byrd Amendment) (Korea) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Korea – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS217/ARB/KOR, 31 August 2004, DSR 2004:X,4851
<i>US – Offset Act (Byrd Amendment) (Mexico) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Mexico – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS234/ARB/MEX, 31 August 2004, DSR 2004:X,4931
<i>US – Section 110(5) Copyright Act (Article 25.3)</i>	Award of the Arbitrators, <i>United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU</i> , WT/DS160/ARB25/1, 9 November 2001, DSR 2001:II, 667
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report, WT/DS58/AB/RW, DSR 2001:XIII, 6529

I. INTRODUCTION

A. INITIAL PROCEEDINGS

1.1 On 20 April 2005, the Dispute Settlement Body (DSB) adopted the report of the Panel in this dispute, as modified by the report of the Appellate Body.¹

1.2 The Appellate Body *inter alia* upheld the original panel's finding that the United States' Schedule includes a commitment to grant full market access in gambling and betting services and upheld the Panel's finding that the United States acts inconsistently with Article XVI:1 and subparagraphs (a) and (c) of Article XVI:2 by maintaining certain limitations on market access not specified in its Schedule. The Appellate Body reversed the Panel's finding that the United States had not shown that the three federal statutes are "necessary to protect public morals or to maintain public order", within the meaning of Article XIV(a). The Appellate Body modified the conclusion of the panel with respect to Article XIV as a whole and found, 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".²

1.3 On 19 August 2005, an arbitrator established under Article 21.3(c) of the DSU determined that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute was 11 months and 2 weeks from the date of adoption of the Panel and Appellate Body Reports by the DSB. The United States was consequently awarded until 3 April 2006 to bring its measures into conformity with its obligations under the GATS.³

1.4 On 8 June 2006, Antigua and Barbuda (hereafter "Antigua") requested consultations with the United States under Article 21.5 of the DSU.⁴ On 6 July 2006, Antigua requested the establishment of a panel under Article 21.5 of the DSU.⁵ At its meeting on 19 July 2006, the DSB referred the matter to the original panel, if possible. The report of the Article 21.5 compliance panel was adopted on 25 May 2007. The compliance panel found that the United States had failed to comply with the recommendations and rulings of the DSB in this dispute.

1.5 On 21 June 2007, Antigua requested authorization from the DSB⁶, under Article 22.2 of the DSU, to suspend the application to the United States of concessions and related obligations of Antigua under the *General Agreement on Trade in Services* (the "GATS" and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "TRIPS Agreement") amounting to an annual value of US\$3.443 billion.

¹ Report of the Appellate Body on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/AB/R), (hereafter the "Appellate Body Report") and Report of the Panel on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/R) (hereafter the "Panel Report").

² Report of the Appellate Body, para. 373.

³ WT/DS285/13.

⁴ WT/DS285/17.

⁵ WT/DS285/18.

⁶ WT/DS285/22.

B. REQUEST FOR ARBITRATION AND PROCEEDINGS

1.6 On 23 July 2007, the United States objected to the level of suspension proposed by Antigua and Barbuda pursuant to Article 22.6 of the DSU and claimed that Antigua had not followed the principles and procedures of Article 22.3 of the DSU in its request.⁷ At its meeting of 24 July 2007, the DSB agreed that the matter raised by the United States had been referred to arbitration.

1.7 The arbitration was undertaken by the original panelists of the Article 21.5 compliance panel as follows:

Chairperson: Mr Lars Anell

Members: Mr Mathias Francke
Mr Virachai Plasai

1.8 An organizational meeting was held on 7 August 2007 to discuss proposed working procedures and the timetable for the proceedings. At that meeting, both parties requested, *inter alia*, additional time for the preparation of their communications to the Arbitrator. The final timetable and working procedures adopted by the Arbitrator were transmitted to the parties on 22 August 2007 (see the text of the Working Procedures in Annex 1).

1.9 In accordance with the timetable adopted by the Arbitrator, Antigua presented a communication concerning the methodology for calculating the proposed level of suspension ("Methodology Paper") on 31 August 2007, and the United States and Antigua submitted written submissions to the Arbitrator on 19 September and 4 October 2007 respectively. The Arbitrator met with the parties on 18 October 2007. After the meeting, the Arbitrator posed questions to the parties, to which the parties provided written responses on 2 November 2007. Both parties were further provided with an opportunity to comment in writing on the responses of the other party to the questions of the Arbitrator. The decision of the Arbitrator was circulated on 21 December 2007.

II. PRELIMINARY ISSUES

A. MANDATE OF THE ARBITRATOR

2.1 Article 22.7 of the DSU provides that:

"The arbitrator¹ acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3."

¹ The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

2.2 In this proceeding, the United States challenges two distinct aspects of the request by Antigua for the suspension of certain obligations under the covered agreements. First, it challenges the level of suspension that Antigua seeks an authorization for (i.e. the figure of US\$3.443 billion as the level

⁷ WT/DS285/23.

of nullification or impairment of benefits accruing to Antigua). Secondly, the United States also challenges the choice of the sectors and agreement in which Antigua is proposing to carry out the suspension (i.e. certain obligations under the GATS and under the TRIPS Agreement). The Arbitrator therefore has two distinct determinations to make in these proceedings.

1. Mandate in relation to the proposed level of suspension

2.3 Antigua has requested an authorization to suspend the application to the United States of concessions and related obligations of Antigua under the GATS and the TRIPS Agreement, in an amount of an "annual value of US\$3.443 billion", which it considers to "match the level of nullification or impairment of benefits accruing to Antigua and Barbuda". The United States, however, has objected to the level of suspension of concessions and other obligations proposed.

2.4 Article 22.4 of the DSU provides that "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment". Article 22.6 further provides that "if the Member concerned objects to the level of suspension proposed ..., the matter shall be referred to arbitration".

2.5 As noted above, Article 22.7 provides that "[t]he arbitrator acting pursuant to paragraph 6 (...) shall determine whether the level of such suspension is equivalent to the level of nullification or impairment (...)"⁸. The DSU provides no further detail how exactly such equivalence might be established. Some guidance is provided, however, by previous arbitral decisions in which such assessments were carried out further to a recourse to arbitration under Article 22.6 of the DSU.⁹

2.6 As a general matter, as was observed by the arbitrator in *US – 1916 Act (EC) (Article 22.6 – US)*,

the mandate of the arbitrators is to determine whether the level of suspension of concessions or other obligations sought by the complaining party is equivalent to the level of nullification or impairment sustained by the complaining party as a result of the failure of the responding party to bring its WTO-inconsistent measures into compliance.¹⁰

2.7 In approaching this task, we note, as other arbitrators have, that, while the purpose of suspension of concessions or other obligations under the covered agreements as foreseen in Article 22.1 of the DSU is to "induce compliance" by the Member concerned with its obligations under the covered agreements, this does not mean that such suspension may be authorized beyond

⁸ See WT/DS27/ARB, para. 4.1 and WT/DS26/ARB para. 3.

⁹ *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, *EC – Bananas III (US) (Article 22.6 – EC)* (requests by the US and by Ecuador); *EC – Hormones (Canada) (Article 22.6 – EC)* *EC – Hormones (US) (Article 22.6 – EC)* (requests by Canada and the US); *US – 1916 Act (EC) (Article 22.6 – US)* (request by the EC); *US – Offset Act (Byrd Amendment) (Article 22.6 – US)* (requests by Brazil, Canada, Chile, EC, India, Japan, Korea and Mexico). Also relevant as an example of determination of level of nullification or impairment is an arbitration that took place under Article 25 of the DSU in the *US – Section 110(5) Copyright Act (Article 25)*. We note that there have also been several arbitrations under Article 22.6 of the DSU in cases involving export subsidies, for which the SCM Agreement provides a distinct legal standard for the determination of the level of countermeasures. In those cases, the arbitrators were required to determine, under Article 4.11 of the SCM Agreement, "whether the countermeasures [proposed by the complaining Member] are appropriate". Those cases are therefore not directly relevant for the purposes of determining the Arbitrator's mandate in relation to a determination of "equivalence" under Articles 22.6 and 22.7. Nonetheless, we do not exclude that some aspects of those decisions may be relevant to our determinations.

¹⁰ *US – 1916 Act (EC) (Article 22.6 – US)*, Decision by the arbitrators, para. 4.5.

what is "equivalent" to the level of nullification of impairment.¹¹ Rather, in setting out the requirement that suspension be "equivalent" to the level of nullification or impairment, Article 22.4 of the DSU requires a degree of "correspondence or identity"¹² between the level of the suspension to be authorized and the level of the nullification or impairment of benefits.

2.8 This means that it is necessary to determine what this level of nullification or impairment of benefits is, in order to compare it to the requested level of suspension.¹³ Further, past arbitrators have also considered that, if they determined that the proposed level is not equivalent to the level of nullification or impairment as required by the DSU, then it was also their duty to estimate the level of suspension that they considered to be equivalent to the impairment suffered, with a view to contributing to the objective of prompt and positive settlement of disputes embodied in the DSU.¹⁴ This is also what the United States is asking the Arbitrator to do in this dispute.

2.9 In light of these elements, we understand our mandate in relation to Antigua's proposed level of suspension to require us to determine whether the annual amount of US\$3.443 billion proposed by Antigua is equivalent to the level of nullification or impairment of benefits accruing to Antigua under the GATS as a result of the failure of the United States to bring its GATS-inconsistent measures into conformity with its obligations. If we find that it is not, then we will need to determine what the level of such nullification or impairment is.

2.10 We are also mindful that Article 22.7 of the DSU provides that the Arbitrator "shall not examine the nature of the concessions or other obligations to be suspended". Our analysis will, accordingly, be limited to an examination of the level of the proposed suspension, and will not extend to a consideration of the nature of the concessions or other obligations proposed for suspension.

2.11 We note that the United States has also requested us to require Antigua to indicate how it will ensure that any suspension of concessions does not exceed the level of nullification and impairment found by the Arbitrator. In the view of the United States, without this information it would be impossible for the Arbitrator to determine the equivalence of the level of suspension of concessions with the level of nullification and impairment, as is required by DSU Article 22.7¹⁵ and the Arbitrator should thus not find that Antigua is allowed to suspend TRIPS concessions.¹⁶ In Antigua's view, however, the imposition of a requirement for it to specify how it will ensure that the level of suspension of concessions does not exceed the level of nullification determined by the Arbitrators would not be within the terms of reference of the Arbitrators under Article 22.7 of the DSU.

2.12 Without prejudice to our views as to whether our mandate under Article 22.7 of the DSU allows us to impose such a requirement on Antigua, we find it more appropriate to consider this matter once we have made the relevant determinations on the level of suspension and the principles and procedures of Article 22.3 of the DSU, especially in light of the fact that the United States concern appears to relate primarily to the suspension of obligations under the TRIPS Agreement, a matter which will only become pertinent if and when we determine that Antigua may seek suspension of obligations under that Agreement. We therefore leave the discussion of our mandate in relation to this question for a later stage of our award.¹⁷

¹¹ Decision by the arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3.

¹² Decision by the arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.3.

¹³ Decision by the arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.2.

¹⁴ Decision by the arbitrators, *EC – Hormones*, para. 12. See also decision by the arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, (request by Ecuador), paras. 171 – 173 and *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 4.6 – 4.8, which cites the relevant passages of earlier decisions.

¹⁵ US response to question 55.

¹⁶ Para. 28 of US comments on Antigua's answers.

¹⁷ See below section V.B for a complete analysis of this issue.

2. Mandate in relation to the sector(s) and agreement(s) in which suspension is sought

2.13 Antigua's request for authorization to suspend concessions or other obligations refers to both subparagraph (b) and subparagraph (c) of Article 22.3, and it explains that "[b]ecause the withdrawal of concessions solely under the GATS is at present not practicable or effective, and the circumstances are sufficiently serious to justify Antigua and Barbuda exercising its rights under Article 22, Antigua and Barbuda requests authorization to suspend concessions and other obligations under the TRIPS".¹⁸ The United States, in its request for arbitration under Article 22.6, claimed that Antigua's proposal "does not follow the principles and procedures set forth in paragraph 3 of Article 22 of the DSU".¹⁹

2.14 Article 22.3 sets out, in subparagraphs (a) to (c), certain principles and procedures to be followed by a complaining party seeking to suspend concessions or other obligations, as to the sector(s) and/or covered agreement in which the suspension can be sought. Subsequent subparagraphs of Article 22.3 further elaborate on the factors that must be taken into account in applying these principles and procedures as well as the definition of "sectors" for the purposes of this provision and the procedural requirements to be followed in requesting authorization to suspend concessions or other obligations in another sector or under another covered agreement.

2.15 Article 22.7, as noted above, provides that "if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim" and that "[i]n the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3".

2.16 There has only been one dispute to date in which claims relating to the observance of the principles and procedures of Article 22.3 of the DSU have been considered (*EC – Bananas III*).²⁰ In that dispute, in determining the scope of their authority to review the principles and procedures of subparagraphs (b) and/or (c) of Article 22.3, the arbitrators considered that "the fact that the powers of Arbitrators under subparagraphs (b)-(c) are explicitly provided for in Article 22.6 implies *a fortiori* that the authority of Arbitrators includes the power to review whether the principles and procedures set forth in these subparagraphs have been followed by the Member seeking authorization for suspension".²¹

2.17 In this instance, Antigua's request, as noted above, refers both to subparagraph (b) and to subparagraph (c) of Article 22.3. Antigua requested an authorization to suspend obligations both under the GATS and under the TRIPS Agreement. To the extent that it sought to retaliate under the GATS, it sought to do so in a different sector from that in which the violation was found. In addition, Antigua sought an authorization to suspend certain obligations under the TRIPS Agreement. In a subsequent communication, Antigua clarified that it was now seeking an authorization to suspend obligations only under the TRIPS Agreement.²²

2.18 Our mandate with respect to Antigua's request to suspend concessions or other obligations under the TRIPS Agreement is therefore to review whether the principles and procedures set forth in the various subparagraphs of Article 22.3 of the DSU have been followed by Antigua, as the Member seeking authorization for suspension in this dispute.

¹⁸ Recourse by Antigua and Barbuda to Article 22.2 of the DSU, WT/DS285/22, p. 4.

¹⁹ Recourse to Article 22.6 of the DSU by the United States, WT/DS285/23.

²⁰ Decision of the Arbitrators *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, *EC – Bananas III (US) (Article 22.6 – EC)*

²¹ Decision of the Arbitrator *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 50.

²² See Antigua's response to question No. 46 of the Arbitrator.

3. Order of analysis

2.19 As noted above, the DSU provides for specific mandates in respect of the two aspects of the matter before us. To the extent, however, that our determinations in respect of one aspect may have a bearing in our determinations in respect of the other, we consider it appropriate to examine these two aspects in an order that will allow us to fully take into consideration the relevant elements for each determination, and to then make overall conclusions. Specifically, we consider it appropriate, in the circumstances of this dispute, to examine the issues before us in the following order:

- (a) first, the level of nullification or impairment;
- (b) second, the principles and procedures of Article 22.3 of the DSU, taking into account to the extent relevant the level of nullification or impairment as previously determined;
- (c) third, the US request in relation to equivalence, taking in to account our determination, in the preceding section, as to the sectors and/or covered agreements under which Antigua may seek to suspend obligations;
- (d) finally, our conclusions.

B. BURDEN OF PROOF AND PRESENTATION OF EVIDENCE

2.20 Antigua has argued that the burden of proof in Article 22.6 arbitrations is well settled, and that it is not for the complaining party to demonstrate that its request for suspension of concessions or other obligations conforms to the requirements of Article 22, rather that it is for the responding party to establish a prima facie case that the complaining party has not done so. If the responding party is able to establish a prima facie case that the complaining party has not conformed to the requirements of Article 22, then, Antigua argues, the burden shifts to the complaining party to rebut that presumption.²³

2.21 In response to a question by the Arbitrator, the United States indicated that it agreed that the party referring the matter to arbitration has the initial burden of showing that the proposed level of suspension is not equivalent to the level of nullification or impairment.²⁴ At the same time, the United States considers that this burden does not mean that the allegations and factual assertions of Antigua enjoy any presumption of correctness or any special weight simply because Antigua has put them forward.²⁵

2.22 We note that, although the DSU provides no specific guidance on the allocation of burden of proof in arbitral proceedings under Article 22.6 (or indeed, in other proceedings), previous arbitrators acting pursuant to Article 22.6 of the DSU have addressed this matter and have consistently determined that, as noted by both parties, the burden of proving that the requirements of the DSU have not been met rests on the party challenging the proposed level of suspension.²⁶ This was first expressed as follows by the arbitrators in *EC – Hormones*:

²³ Written submission of Antigua, paras. 13 and 14.

²⁴ US response to question No. 1 of the Arbitrator, para. 1.

²⁵ US response to question No. 1 of the Arbitrator, para. 2.

²⁶ Decision of the Arbitrators *US – 1916 Act (EC) (Article 22.6 – US)*, decision of the Arbitrators para. 3.3; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras. 2.5-8; decision of the Arbitrators *US – FSC (Article 22.6 – US)*, paras. 2.8-11; decision of the Arbitrators *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.8; *EC – Bananas III (ECU) (Article 22.6 – EC)*, paras. 37-41; decision of the arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC)*, *EC – Hormones (US) (Article 22.6 – EC)*, para. 9.

"WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency. The act at issue here is the Canadian proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that the level of suspension be equivalent to the level of nullification and impairment. The EC challenges the conformity of the Canadian proposal with the said WTO rule. It is thus for the EC to prove that the Canadian proposal is inconsistent with Article 22.4. Following well-established WTO jurisprudence, this means that it is for the EC to submit arguments and evidence sufficient to establish a *prima facie* case or presumption that the level of suspension proposed by Canada is *not* equivalent to the level of nullification and impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the Canada to submit arguments and evidence sufficient to rebut that presumption. Should all arguments and evidence remain in equipoise, the EC, as the party bearing the original burden of proof, would lose."²⁷

2.23 This means that it is for the United States, in this dispute, to demonstrate in the first instance that the amount in which Antigua seeks to suspend concessions or other obligations is not equivalent to the level of nullification or impairment of benefits accruing to it.

2.24 At the same time, however, we note that the rules on allocation of burden of proof do not relieve the parties from their duty to provide information to the Arbitrator in these proceedings. It has been generally acknowledged in panel proceedings that it is for each party to bring forward the elements to sustain the factual assertions it makes, and that each party has a duty to collaborate in the establishment of the facts. These principles have been applied *mutatis mutandis* in arbitral proceedings under Article 22.6. In particular, it has been acknowledged that information relating to the calculation of the proposed level of suspension is in the hands of the party that has presented the proposal.²⁸

2.25 We agree with these observations and consider, accordingly, that both parties, including Antigua, have a duty to collaborate in the establishment of the relevant facts. It is in consideration of these elements that we requested Antigua to provide a Methodology Paper explaining how it arrived at its proposed level of suspension at the beginning of these proceedings.

2.26 With respect to the US claims that Antigua has not followed the principles and procedures of Article 22.3 of the DSU, as noted above, only one relevant precedent exists (*EC – Bananas III*). In that dispute, the arbitrator found that the same rules applied for the allocation of burden of proof, namely that it was for the Member challenging the proposal to demonstrate that the principles and procedures of Article 22.3 had not been followed. Specifically, the Arbitrator in that dispute

²⁷ *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 9.

²⁸ Decision of the Arbitrators *EC – Hormones (Canada) (Article 22.6 – EC)*, *EC – Hormones (US) (Article 22.6 – EC)*, para. 11:

"The duty that rests on *all* parties to produce evidence and to collaborate in presenting evidence to the arbitrators – an issue to be distinguished from the question of who bears the burden of proof -- is crucial in Article 22 arbitration proceedings. The EC is required to submit evidence showing that the proposal is *not* equivalent. However, at the same time and as soon as it can, Canada is required to come forward with evidence explaining how it arrived at its proposal and showing why its proposal *is* equivalent to the trade impairment it has suffered. Some of the evidence - such as data on trade with third countries, export capabilities and affected exporters - may, indeed, be in the sole possession of Canada, being the party that suffered the trade impairment. This explains why we requested Canada to submit a so-called methodology paper." (original footnote omitted).

considered that it was "for the European Communities to challenge Ecuador's considerations of the principles and procedures set forth in Articles 22.3 (b)-(d)" and that "[o]nce the European Communities has shown prima facie that these principles and procedures have not been followed, and that the factors listed in subparagraph (d) were not taken into account, however, it [was] for Ecuador to rebut such a presumption".²⁹

2.27 We agree with this approach and thus find that it is for the United States to demonstrate in the first instance that Antigua has not followed the principles of Article 22.3 of the DSU and not taken due account of the factors in subparagraph (d). At the same time, here again, by the very nature of the situation, it is likely that some of the key information relating to the factors to be taken into account and how Antigua has considered these factors, is primarily in the hands of Antigua itself. Indeed, as the Member requesting suspension under another sector or agreement than that in which a violation was found, it was for Antigua to "state the reasons therefore" under Article 22.3 subparagraph (e).³⁰

2.28 We also note that the Working Procedures adopted by the Arbitrator in these proceedings provide that "each party shall submit all factual evidence to the Arbitrator no later than in its written submission to the Arbitrator, except with respect to evidence necessary for the purposes of rebuttal or for answers to questions".

C. REQUEST BY THE UNITED STATES FOR AN OPEN HEARING

2.29 At the organizational meeting, the United States requested the Arbitrator to open to the public its meeting with the parties. The Arbitrator sought and received the views of Antigua on this request. In a written communication addressed to the parties on 21 August 2007, the Arbitrator addressed this request as follows:

"The Arbitrator has considered the US request to open its meeting with the parties to the public. The Arbitrator first notes the absence of a specific provision in the DSU addressing this issue in relation to arbitral proceedings under Article 22.6. The Arbitrator considers that it has a margin of discretion to deal, in accordance with due process, with specific situations, such as this one, that may arise in a particular case and that are not expressly regulated in the DSU. At the same time, it considers that it should, in exercising this discretion, take due account of the views of the parties. In this instance, Antigua opposes the opening of the meeting to the public. In light of this, and bearing in mind the object of the proceedings, the Arbitrator has decided not to allow for the opening of its meeting to the public."

D. REQUEST BY THE EUROPEAN COMMUNITIES FOR THIRD PARTY STATUS

2.30 On 3 August 2007, the Arbitrator received a communication by the European Communities, requesting to be accorded third-party status in these proceedings. The Arbitrator sought the views of both parties on this request, and received these views in writing on 9 August 2007.

2.31 On 23 August, the Arbitrator addressed the following communication to the European Communities:

²⁹ Decision of the Arbitrators *EC – Bananas III (Ecuador)*, (Article 22.6 – EC) para. 59.

³⁰ The arbitrators in *EC – Bananas III (Ecuador)*, (Article 22.6 – EC) also recognized this and considered that Ecuador :

"[H]ad to come forward and submit information giving reasons and plausible explanations for its initial consideration of the principles and procedures set forth in Article 22.3 that caused it to request authorization under another sector and Agreement than those where violations were found" (decision of the arbitrators, para. 60).

"The Arbitrator has taken note of the EC's letter of 3 August requesting to be accorded third party status in this arbitration proceeding. The Arbitrator has sought the views of the parties on the EC request and received these views in writing on 9 August 2007. After careful consideration of the EC request and the parties' views on such request, the Arbitrator has decided to decline the EC request for third-party status.

The Arbitrator first notes the absence of a specific provision in the DSU on third-party rights in Article 22.6 arbitral proceedings. Like panels, arbitrators acting under Article 22.6 have, under the DSU, 'a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not expressly regulated'.³¹ At the same time, the Arbitrator considers that, in such situations, it should pay particular attention to the views of the parties. In this instance, there is no agreement among the parties as to whether the EC request should be accepted, and this consideration should be given appropriate weight.

The Arbitrator also notes that in arbitral proceedings under Article 22.6 of the DSU to date, third party rights have only been granted once.³² This involved very specific circumstances, where the two Members being granted third-party status were both complainants and parties to arbitral proceedings under Article 22.6 in disputes concerning the same matter, and where the Arbitrator found, in the circumstances of that case, that the determination in one arbitral proceeding may be decisive for the determination in the other.³³

In this case, the EC has argued that its substantial interest in these proceedings derives from the fact that this arbitration may, in its view, affect its WTO rights in the context of ongoing procedures under Article XXI:1(b) of the GATS relating to the modification of US commitments on 'Other recreational Services'.

However, the Arbitrator's mandate in these proceedings is defined in Article 22.7 of the DSU and is limited to matters arising from Antigua and Barbuda's request for suspension of concessions and other obligations and the US challenge to this request, in accordance with Articles 22.6 and 22.7 of the DSU. Specifically, the mandate of the Arbitrator includes a determination of whether the level of suspension of concessions and other WTO obligations proposed by Antigua and Barbuda is 'equivalent' to the level of nullification or impairment arising from lack of compliance by the US with certain DSB recommendations and rulings. By contrast, proceedings under Article XXI:1(b) of GATS, which arise from an intent to modify or withdraw a scheduled commitment under GATS, involve, in the first instance at least, a negotiation process among Members concerned, 'with a view to reaching agreement on any necessary compensatory adjustment'.

The Arbitrator sees no basis for assuming that its determination under Article 22.7 of the DSU in respect of Antigua and Barbuda's request to suspend concessions and

³¹ Appellate Body Report on *EC – Hormones*, footnote 138, in relation to panel proceedings: "The DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not expressly regulated".

³² In *EC – Hormones (Canada) (Article 22.6 – EC)*, *EC – Hormones (US) (Article 22.6 – EC)* Third-party rights were also requested, but not granted, in two other instances: *Brazil – Aircraft*, Award of the Arbitrator, paras. 2.4 -2.6; and *EC – Bananas III (US) (Article 22.6 – EC)*, Award of the Arbitrator, para. 2.8

³³ See the arbitral awards in *EC – Hormones (Canada) (Article 22.6 – EC)*, *EC – Hormones (US) (Article 22.6 – EC)*, para. 7.

other obligations would be such as to adversely affect the EC's rights in the context of the separate proceeding it is engaged in with other Members concerned under Article XXI:1(b) of the GATS for the modification of US concessions, which has both a distinct legal basis and a distinct object.

For all the above reasons, the Arbitrator declines the EC request to be accorded third-party status in these proceedings."

E. CONSULTATION OF THE INTERNATIONAL MONETARY FUND (IMF) AND THE EASTERN CARIBBEAN CENTRAL BANK (ECCB)

2.32 On 19 November 2007, the Arbitrator informed the parties that, in the light of the parties' responses to its questions and because of the need for further clarification of certain factual issues, it considered that it would be useful for it to seek technical information from the IMF and the ECCB concerning the exact source and contents of the data collected by them, which had been referred to in these proceedings. The Arbitrator therefore proposed to address a request for information to both organizations and requested the parties to comment on the text of draft communications to be sent to these two organizations.

2.33 The United States provided some specific drafting suggestions. Antigua, for its part, admitted to "a degree of ambivalence regarding the proposed enquiries".³⁴ On the one hand, Antigua was certain that whatever responses the Arbitrators would get as a result of these enquiries, they would support the evidence and claims made by Antigua during the course of this arbitration, but on the other hand, in the view of Antigua, the enquiries could also be viewed as reflecting adversely upon the veracity or accuracy of fundamentally uncontested evidence submitted by Antigua in this arbitration, and as an effort by the Arbitrators to engage in fact finding on behalf of a litigant that has essentially failed to do so itself, despite having many opportunities.

2.34 The Arbitrator considered Antigua's arguments, in particular its concern that the Arbitrator may be engaging in fact finding "on behalf of" the United States. While the Arbitrator agreed that the purpose of an expert consultation should not be to substitute for a party's failure to make its case, the Arbitrator considers that this is not what it was proposing to do in seeking information from the IMF and the ECCB. Rather, the aim of the Arbitrator was to seek additional clarification of some of the factual elements that had been put before it by the parties, to make its determination on the basis of the best possible information.

2.35 In light of these considerations, the Arbitrator decided to proceed with the consultation. Accordingly, it revised the text of the draft communications in light of the comments of the parties, and addressed requests for information to both the IMF and the ECCB on 22 November 2007 (see text reproduced in Annexes C and B). A response was received from the IMF on 14 December 2007 (see text reproduced in Annex D). No response had been received from the ECCB by the time the Arbitrator finalized its work.

III. ASSESSMENT OF THE PROPOSED LEVEL OF SUSPENSION

3.1 As noted above in paragraph 1.5, Antigua has requested an authorization to suspend the application to the United States of "concessions and related obligations" of Antigua under the GATS and the TRIPS Agreement, in an amount of an "annual value of US\$3.443 billion", which it considers to "match the level of nullification or impairment of benefits accruing to Antigua and Barbuda". The United States, however, has objected to this proposed level of suspension, pursuant to Article 22.6 of the DSU.

³⁴ Letter to the Arbitrator from Antigua and Barbuda, 21 November 2007.

A. MAIN ARGUMENTS OF THE PARTIES

3.2 In its Methodology Paper, Antigua presented three calculations in support of its proposed level of suspension of concessions or other obligations, and explained that its calculations were based on a counterfactual that assumed that to comply with the recommendations and rulings of the DSB, the United States would allow Antiguan operators to provide unrestricted access to cross-border remote gambling and betting services to United States consumers.³⁵ Specifically, Antigua indicated that it made the following assumptions in relation to the counterfactual:

1. The United States adheres to its GATS commitments for remote gambling and betting services as established in the dispute;
2. The United States recognizes that Antiguan law governs Antiguan-based remote gaming operators serving customers located in the United States;
3. The United States does not interfere with the electronic transfer of funds between customers and Antiguan remote gaming operators;
4. The United States does not interfere with advertising by Antiguan remote gaming operators;
5. Antiguan remote gaming operators are not compelled to invest significant resources to counteract United States measures to restrict gaming operators from providing remote wagering services to United States consumers.³⁶

3.3 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".³⁷

3.4 The United States, however, disputes Antigua's choice of counterfactual. Specifically, it disputes the assumption that the compliant US measure would be a measure that allowed for "all types of cross-border gambling services", for which it considers that Antigua has no legal or factual basis.³⁸ In the view of the United States, the Arbitrator needs to take into account "the possibility of compliance under different approaches, not just the approach preferred by Antigua".³⁹ The United States submits that the DSB recommendations and rulings are addressed to discriminatory treatment of gambling on horseracing, so that the real question in the scenario where the United States achieves compliance by allowing market access for foreign suppliers is as follows: "what would be the economic effect if the United States were to adopt measures that allow Antiguan operators (and operators of all other WTO Members) to provide cross-border remote gambling services on horseracing?"

3.5 The United States thus considers that a measure that would open, without discrimination, access to remote gambling services in respect of horseracing only would constitute compliance with the rulings. The United States identifies this as the pertinent scenario, if the assumption is to be that

³⁵ Antigua's Methodology Paper, para. 3.

³⁶ Antigua's Methodology Paper, p. 8.

³⁷ US written submission, para. 14.

³⁸ US written submission, para. 19.

³⁹ US written submission, para. 17.

it would allow some access to remote gambling. In the United States view, this is the "most likely" scenario.

3.6 The United States also identifies, as a scenario that would in its view be consistent with the DSB rulings and recommendations, a situation in which it would ensure that domestic service suppliers are also prohibited from supplying remote betting services on horseracing.⁴⁰ However, it does not suggest that this be the scenario retained for the purposes of the counterfactual in these proceedings.

3.7 Antigua considers that the United States misses the key starting point when it "takes the fundamental position in its submission that the nullification and impairment to Antigua only extends to hypothetical trade in betting on horse racing that might be available to Antiguan operators from customers in the United States".⁴¹ Antigua analyses the rulings, in particular the role of the affirmative defence under Article XIV of GATS and its relationship to market access commitments under Article XVI, to conclude that the United States should be barred from presenting a completely new argument (distinguishing between horseracing and other forms of remote gambling) in the hopes of minimizing its exposure to Antigua for having failed to come into compliance with the DSB rulings".⁴²

3.8 Antigua also recalls that the United States bears the burden of proof "to overturn the presumptions established by Antigua's Request and the Methodology Paper".⁴³ Antigua further considers it "unconscionable" for the United States to have done nothing to come into compliance in the time that it should have, and now ask the arbitrators to determine what may have constituted compliance.⁴⁴ It considers that, in the circumstances of this dispute, where there has been no attempt to comply, the only assumption that may be used by the Arbitrator in assessing the level of nullification and impairment is "withdrawal of the measure" as set out in Article 3.7 of the DSU.⁴⁵

3.9 The United States also takes issue with other aspects of Antigua's methodology, in particular the underlying data, which it considers to be "inherently unreliable" and as providing "no useful information in this arbitration".⁴⁶

B. APPROACH OF THE ARBITRATOR

3.10 As noted above, Article 22.7 provides that "[t]he arbitrator acting pursuant to paragraph 6 (...) shall determine whether the level of such suspension is equivalent to the level of nullification or impairment (..)".⁴⁷

3.11 In this instance, we are therefore required to determine whether the amount of US\$3.443 billion proposed by Antigua is equivalent to the level of nullification or impairment of benefits accruing to Antigua. As has been noted by previous arbitrators, for that purpose, we must first determine what the level of nullification or impairment of benefits accruing to Antigua is.⁴⁸

⁴⁰ US written submission, para. 15.

⁴¹ Antigua's written submission, para. 72.

⁴² Antigua's written submission, para. 89.

⁴³ Antigua's written submission, para. 71.

⁴⁴ Antigua's written submission, para. 92.

⁴⁵ Antigua's written submission, para. 94.

⁴⁶ US response to question 1 by the arbitrator, para. 4. See below section III.D for a detailed analysis of data and methodology issues.

⁴⁷ See WT/DS27/ARB, para. 4.1 and WT/DS26/ARB para. 3.

⁴⁸ See for example *EC – Hormones (Canada)*, Decision by the arbitrators, para. 35.

3.12 Antigua's proposed level of suspension is based on an assessment of the annual amount of trade that it considers that it has lost, as a result of the maintenance of the inconsistent US measures beyond the end of the reasonable period of time for implementation. To calculate the level of such lost trade, Antigua relies on a counterfactual scenario intended to reflect what the situation would have been, if the United States had complied with the DSB recommendations and rulings.

3.13 The United States does not disagree with the basic approach adopted by Antigua in determining its level of nullification or impairment of benefits. Specifically, the United States agrees 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".⁴⁹

3.14 We note that this approach has been applied in prior proceedings under Article 22.6 of the DSU.⁵⁰ We agree that the use of a counterfactual to assess the level of exports that would have accrued to Antigua, had the United States complied with the rulings, constitutes an appropriate basis for assessing the level of nullification or impairment of benefits accruing to Antigua in this dispute and, in light of the parties' common view in this respect, we accept it as the basis for our determination.

3.15 Although the parties are in agreement on the suitability of this general approach, the United States disagrees both with the counterfactual upon which Antigua has based its calculations and with the data used by Antigua to then estimate the level of its lost exports under that counterfactual. The threshold issue of the choice of counterfactual has a crucial bearing on subsequent steps in the determination of the level of nullification or impairment of benefits, as it effectively determines the basis on which subsequent calculations are to be made. We will therefore consider this issue first, before turning to the actual calculation of the level of nullification.

C. CHOICE OF COUNTERFACTUAL

3.16 As described above, Antigua has based its calculation of the level of nullification or impairment it has suffered on a counterfactual under which the United States would open to Antiguan operators the United States market for remote gambling without restriction. Antigua considers that, based on the "full" nature of the commitment made by the United States in its GATS schedule, as well as the findings by the original panel and the Appellate Body that this commitment requires the United States to provide market access to all services within the applicable sector, Antigua has a legitimate right to expect that the United States will comply with that commitment. Antigua further considers that it is completely reasonable for it to assume that the United States will observe its obligations under the "express language of the GATS that requires it to provide Antiguan service providers with full market access to consumers in the United States".⁵¹

3.17 The United States disagrees with the key assumption underlying Antigua's counterfactual, namely that the United States would be assumed to have complied with its obligations by allowing Antiguan operators to provide unrestricted access to cross-border remote gambling and betting services to United States consumers.⁵² The United States considers that this scenario is "extraordinarily unrealistic and thus does not form the basis for a useful counterfactual in this arbitration".⁵³ The United States considers this assumption to have no factual or legal basis and

⁴⁹ US written submission, para. 14.

⁵⁰ See in particular *EC – Hormones (Canada)*, Decision by the Arbitrators, para. 37 and *EC – Bananas III (United States)*, para. 7.1.

⁵¹ Antigua's response to question No. 2 by the Arbitrator.

⁵² Antigua's Methodology Paper, para. 3.

⁵³ US response to questions Nos.3 and 3bis of the Arbitrator.

argues that Antigua's proposed scenario entirely ignores the context of this dispute, including the fact that the United States severely restricts, rather than promotes, internet gambling.⁵⁴

3.18 The United States considers that the single most important consideration in the Arbitrator's determination with respect to the choice of counterfactual must be the factual context of the dispute, as reflected in the prior proceedings and the DSB recommendations and rulings. The United States notes that in this dispute, it has established its strong public policy and morality rationales for restricting remote gambling, and the Appellate Body indeed agreed that the United States had met its burden of showing that the US measures were provisionally justified under GATS Article XIV. The United States considers that in these circumstances, the only reasonable scenarios for compliance are either a complete ban on remote gambling, or the adoption of measures that allow foreign and domestic operators to engage in remote gambling on horseracing.⁵⁵ Specifically, the United States considers that the appropriate counterfactual for the Arbitrator's consideration in these proceedings would be to assume a measure that would open, without discrimination, access to remote gambling services in respect of horseracing only.

3.19 We therefore now first examine whether, as the United States asserts, the counterfactual upon which Antigua's determination of the level of nullification or impairment of its benefits is based cannot form the basis for such determination. If we find that the counterfactual proposed by Antigua is not appropriate, we will then need to determine what an appropriate alternative counterfactual could be.

1. Assessment of Antigua's proposed counterfactual

3.20 The US challenge to Antigua's counterfactual arises from the fact that it assumes a means of achieving compliance with the DSB rulings that is, in the view of the United States, "extraordinarily unrealistic" in this dispute. In the view of the United States, there is no factual or legal basis for Antigua to assume that the United States would comply with the DSB's recommendations and rulings in this dispute by providing unrestricted access to its remote gambling sector to Antiguan operators.

3.21 Antigua's counterfactual is based on an assumption that the United States, by virtue of its specific commitments under the GATS, is required to provide unrestricted access to its remote gambling market to Antiguan operators. Antigua has explained that it is entitled to assume that the United States would comply with its obligations by allowing such access to the United States remote gambling market for Antiguan operators. Antigua finds support for this assumption in particular in the nature of the rulings (a violation of a market access commitment under Article XVI of GATS), as well as in the terms of Article 3.7 of the DSU, which provide that the first objective of the dispute settlement system is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

3.22 The United States acknowledges that the scenario proposed by Antigua would constitute a means of compliance with the recommendations and rulings of the DSB.⁵⁶ However, it argues that this scenario is "extremely unrealistic". The United States considers that only benefits that can reasonably be expected to accrue to the complaining party can form the basis for the calculation of nullification or impairment of benefits. The United States further considers that the Arbitrator's enquiry "is simply what counterfactual – based on the specific facts or circumstances in the dispute and the specific DSB recommendations and rulings – would be the most likely form of compliance".⁵⁷

⁵⁴ US response to question No. 5 by the Arbitrator, para. 13.

⁵⁵ US response to question No. 5 of the Arbitrator, para. 12.

⁵⁶ US response to questions 3 and 3*bis* of the Arbitrator.

⁵⁷ US answer to question 3*quater* of the Arbitrator, para. 10.

3.23 In considering this issue, we first recall that the burden rests upon the United States to demonstrate that the level of suspension proposed by Antigua is not equivalent to the level of nullification or impairment of benefits it has suffered as a result of the continued application of the inconsistent US measures. For that purpose, it would not be sufficient, in our view, for the United States to simply identify the existence of alternative possible means of compliance, other than that envisaged by Antigua in its counterfactual. Rather, for the United States to succeed in its challenge, it must persuade us that the particular scenario identified by Antigua as the basis for its counterfactual is not such as to accurately reflect the level of nullification or impairment of benefits accruing to Antigua under the GATS as a result of the continued application by the United States of inconsistent measures.

3.24 We do not disagree with the United States that a WTO Member generally has the discretion to determine the means through which it will comply with adverse DSB rulings, provided that such means are consistent with the WTO covered agreements.⁵⁸ However, this does not, in our view, imply that the Member concerned has the freedom to decide, for the purposes of a determination under Article 22.7 of the DSU, among a range of potential measures that it might have taken in order to comply with such rulings, which one should form the basis of the arbitrator's assessment. Our mandate under Article 22.7 of the DSU is to determine whether the level of suspension proposed by Antigua is "equivalent" to the level of nullification or impairment of its benefits. Our starting point, in this determination, must be Antigua's proposed level of suspension. In determining whether this proposed level is "equivalent", we must take care to ensure that the level of suspension is neither reduced to a level lower than the level of nullification or impairment of benefits accruing to the complaining party, such as to adversely affect that party's rights, nor exceeds the level of nullification or impairment of benefits, such that it would become punitive. This is the key consideration that must, in our view, guide our assessment of the US challenge to Antigua's choice of counterfactual.

3.25 Specifically, under the methodology proposed here by both parties for the estimation of "lost exports", the counterfactual (and the assumptions that it entails as to what would have constituted compliance) forms the basis for the calculation of the benefits accruing to the complaining party that have been nullified or impaired. It is thus important for the counterfactual to reflect the nature and scope of such benefits accurately, so that the trade flows that will be assumed to occur under the counterfactual can, in turn, provide a reliable basis for an estimation of the level of nullification or impairment of such benefits.

3.26 We do not consider that the proposed counterfactual must necessarily reflect the "most likely" scenario of compliance by the Member concerned. By nature, a counterfactual represents a hypothetical scenario and thus there may be, in any given case, a degree of uncertainty as to what exact form compliance might have taken, had it occurred. The Member concerned may have had a range of WTO-consistent options at its disposal to choose from to ensure compliance. It is not for us to speculate on what might have been the "most likely" such scenario.

3.27 Nonetheless, the counterfactual should, in our view, reflect at least a plausible or "reasonable" compliance scenario. A counterfactual that would assume a compliance scenario that leads to an implausibly high level of nullification or impairment of benefits would lead to a suspension in excess of the level of nullification or impairment actually suffered. Conversely, a counterfactual that would underestimate the level of benefits accruing to the complaining party would risk leading to an

⁵⁸ This issue has been addressed in arbitrations under Article 21.3(c) for the determination of the RPT. See for example *Australia – Salmon*, Article 21.3(c) arbitration, para. 30. See also *Korea – Alcoholic Beverages*, Recourse to Article 21.3(c), Decision of the arbitrator, para. 45: "Choosing the means of implementation is, and should be, the prerogative of the implementing Member, as long as the means chosen are consistent with the recommendations and rulings of the DSB and the provisions of the covered agreements".

unwarranted reduction of the level of suspension below the level that that complaining party is entitled to seek, namely "equivalence".

3.28 We find support for our position in past determinations. We thus note that the arbitrator in *US – Bananas III* case selected what it determined to be a "reasonable counterfactual" for the purposes of its calculation, taking into account the circumstances of the case. We also note that in the *US – Section 110(5) Copyright Act (Article 25)* dispute⁵⁹, the arbitrator based its determination of the level of nullification or impairment on historical figures on royalty income prior to the introduction of the TRIPS-incompatible limitation to copyright, rather than on a counterfactual that would have assumed no limitations in respect of the right in question.⁶⁰ We further note the finding that "the level of royalty income which the European Communities could reasonably expect EC right holders to receive is, in the view of the Arbitrators, limited to licensing revenue from the numbers of users that *would* be licensed"⁶¹ (rather than the entirety of fees that could by law have been collected). We further note the Arbitrator's observation in that dispute that:

It should be recalled, in this context, that the inquiry into the level of benefits which the European Communities could expect to accrue to it if Section 110(5)(B) were brought into conformity with the TRIPS Agreement is hypothetical in nature. The Arbitrators consider that, in such a situation, it is necessary to proceed with caution, such that only those benefits which the European Communities could, in good faith and taking into account all relevant circumstances, expect to derive from Articles 11bis(1)(iii) and 11(1)(ii) are found to be nullified or impaired".⁶²

3.29 In response to a question by the Arbitrator, Antigua commented that, in that case, the parties were not in disagreement over the nature of the benefits that should accrue to the European Communities, but rather over the level of nullification or impairment, and that the "reasonable expectations" at issue did not refer to what was expected of the United States government but to what the European Communities could reasonably expect of non-governmental third-party participants in extracting the full value out of the impaired rights.⁶³

3.30 We agree with Antigua that the circumstances of *US - Section 110(5) Copyright Act* and *EC – Bananas III* differ somewhat from those of the present dispute. Nonetheless, we find that the determinations of the arbitrators in those disputes provide useful guidance as to the nature of our task in these proceedings. Specifically, these determinations confirm us in our view that, to the extent that the estimation of the level of nullification or impairment requires certain assumptions to be made as to what benefits would have accrued, in a situation where compliance would have taken place, such assumptions should be reasonable, taking into account the circumstances of the dispute, in order for the proposed level of suspension to accurately reflect the benefits accruing to the complaining party that have actually been nullified or impaired.

⁵⁹ We are aware that the determination of the arbitrator in that case was made pursuant to Article 25 of the DSU, rather than pursuant to Article 22.6 of the DSU. Nonetheless, the nature of the determination entrusted by the parties to the arbitrator in that case was comparable to the determination that we are conducting now, namely a determination of the level of nullification or impairment of benefits accruing to a complaining party as a result of measures that had been found to be inconsistent with a covered agreement (in that case, the TRIPS Agreement).

⁶⁰ *US – Section 110(5) Copyright Act (Article 25)*, Award of the Arbitrators (Article 25 arbitration), paras. 4.7-4.14.

⁶¹ *US – Section 110(5) Copyright Act (Article 25)*, Award of the Arbitrators (Article 25 arbitration), para. 3.33.

⁶² *US – Section 110(5) Copyright Act (Article 25)*, Award of the Arbitrators, (Article 25 arbitration), para. 3.24, footnote 43.

⁶³ Antigua's response to question No. 6bis of the Arbitrator, p. 12.

3.31 With these considerations in mind, we now turn to an examination of whether the specific counterfactual upon which Antigua bases its calculations accurately reflects the benefits accruing to it in this dispute. As noted above, it is for the United States to demonstrate to us that it does not.

3.32 Antigua considers that the nature of the benefits accruing to Antigua is reflected in Article XVI of the GATS and in the US schedule, and that for the purposes of this arbitration, it means that the United States is under an obligation to provide unrestricted market access for Antiguan providers of all cross-border remote gambling and betting services to consumers in the United States. In Antigua's view, whether it should "reasonably" expect such benefit is not an issue, since it has a legal right to enjoy it.⁶⁴ Antigua also considers that it is "entitled to ignore the failed Article XIV defences of the United States in making Antigua's assumptions in this proceeding".⁶⁵ The United States, however, notes that, in this dispute, the DSB found that the US measures restricting remote gambling were provisionally justified under the public morals exception set out in Article XIV(a) of the GATS, so that Antigua is wrong in asserting that the United States 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.⁶⁶ In the US view, the specific problem found with the US measures at issue was with respect to the limited issue of the regulation of remote gambling on horseracing.⁶⁷

3.33 As we understand it, the question before us therefore essentially turns around whether and how we should take into account, in assessing the proposed counterfactual, the fact that the Appellate Body found that the US measures at issue were "necessary to protect public morals or maintain public order" in accordance with paragraph (a) of Article XIV, even though it ultimately found these measures not to be justified under Article XIV.

3.34 Both parties have presented extensive arguments relating to the rulings in the underlying dispute to explain their proposed counterfactuals and justify opposing views on this question. We find it useful, in these circumstances, to consider first the terms of the Appellate Body's rulings in this dispute.

3.35 The Appellate Body made, *inter alia*, the following findings:

- first, with respect to Article XVI of the GATS, the Appellate Body upheld the Panel's finding that:

"by maintaining the Wire Act, the Travel Act, and the Illegal Gambling Business Act, the United States acts inconsistently with its obligations under Article XVI:1 and subparagraphs (a) and (c) of Article XVI:2";⁶⁸

- further, with respect to Article XIV of the GATS, the Appellate Body found 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

⁶⁴ Antigua's response to question No. 6 by the Arbitrator, p. 9.

⁶⁵ Antigua's response to question No. 2 of the Arbitrator, p. 4.

⁶⁶ US written submission, para. 20.

⁶⁷ US written submission, para. 21.

⁶⁸ Appellate Body Report, para. 373(C)(ii).

service suppliers of remote betting services for horse racing and, therefore, has not established that these measures satisfy the requirements of the chapeau."⁶⁹

3.36 We note that the findings of the Appellate Body contain an initial finding that the measures at issue (three federal laws) are inconsistent with Article XVI of the GATS, followed by findings that these same measures are "necessary to protect public morals or maintain public order" within the meaning of paragraph (a) of Article XIV, but that the United States ultimately "has not established that these measures satisfy the requirements of the chapeau" of that provision.

3.37 We make no determination in these proceedings as to what exactly the United States might have been required to do to implement these specific rulings. Indeed, it would not be within the terms of our mandate to conduct such an assessment. Rather, we assume that the United States may have had various WTO-consistent means at its disposal in order to come into compliance with its obligations in this dispute. Indeed, the parties have presented to us a range of scenarios with vastly divergent impacts on the calculation of the level of nullification or impairment of benefits.⁷⁰ We limit our consideration of these rulings to the extent relevant to our assessment of whether Antigua's counterfactual accurately reflects the benefits accruing to it in this dispute. In other words, as observed above, we consider this matter only to the extent required in order to determine whether Antigua's assumption that the United States would allow unrestricted access to Antiguan remote gambling and betting operators on the US market was reasonable, in the circumstances of the case.

3.38 The Appellate Body's finding of a violation of Article XVI of the GATS in the underlying proceedings was based on a finding that the United States had a commitment, under sub-sector 10.D of the GATS, to provide unrestricted access to the cross-border supply of remote gambling and betting services. In light of this, we agree that the nature of the benefits accruing to Antigua in this dispute is reflected in Article XVI of the GATS and in the US Schedule, and that these benefits relate to Antigua's access to the supply of cross-border gambling and betting services in the United States.

3.39 The question we must consider, however, is whether Antigua's assumption that such access would come in the form of unrestricted access to the US market with respect to all forms of remote gambling and betting services was reasonable, in the circumstances of this dispute.

3.40 Antigua's proposed counterfactual assumes that, as of 3 April 2006 (the end of the reasonable period of time for implementation), the United States would have granted it unrestricted access to its remote gambling market. As Antigua itself notes, it is based on an assumption, by Antigua, that it was entitled to "ignore" the United States invocation of Article XIV of the GATS in the underlying proceedings. The United States objects that this is an "extraordinarily unrealistic" scenario, in view in particular of the fact that the United States bans remote gambling for strong policy reasons of protecting public morality and public order, and that it is entitled under the GATS to maintain such a ban as long as it is not applied in a manner that arbitrarily or unjustifiably discriminates between operators in different jurisdictions⁷¹. The United States also argues that the specific problem found

⁶⁹ Appellate Body Report, para. 373(D)(vi)(a). In its overall conclusion on Article XIV, the Appellate Body, when noting that the United States had not shown that, in the light of the Interstate Horseracing Act, the prohibitions were applied to both foreign and domestic service suppliers of remote betting services for horse racing, emphasized that "[f]or this reason alone" it found that the United States had not established that these measures satisfied the requirements of the chapeau of Article XIV. See Appellate Body Report, para. 372.

⁷⁰ We note, in this respect, that the scenarios identified by the parties in these proceedings as possible means of compliance range from a complete opening to a complete closing of the US remote gambling and betting services market. We also note that, while the parties are in disagreement as to the potential consistency of a scenario of partial opening of the market, they both appear to acknowledge that scenarios involving either a complete opening or a complete closing of the market could constitute a form of compliance with the recommendations and rulings in this case.

⁷¹ US response to question No. 3*bis* by the Arbitrator, para. 5.

with the US measures at issue was the "limited issue of the regulation of remote gambling on horse racing".⁷²

3.41 In considering this question, we find it appropriate to take account of the specific circumstances of this case. We note in this respect that the United States has consistently asserted a public morals and public order policy both in the original proceedings and again in the compliance proceedings as a basis for maintaining restrictions on access to the United States remote gambling market. The United States has thus asserted this policy objective before and beyond the end of the reasonable period of time, which is the date at which the counterfactual situation is assumed to start.

3.42 We further note that the Appellate Body found that US measures restricting access to the remote gambling market were "necessary" within the meaning of Article XIV of the GATS for the protection of public morals and public order, and found that the United States had 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, had not established that these measures satisfy the requirements of the chapeau".⁷³

3.43 In light of these elements, we consider that Antigua's assumption that it could simply "ignore" the failed US defence under Article XIV of the GATS, and that the United States would comply with the rulings by providing unrestricted access to all sectors of its remote gambling market for Antiguan operators, was not reasonable, taking into account the particular circumstances of this dispute.

3.44 In making this determination, we have considered carefully Antigua's arguments that it was entitled by right to expect unrestricted market access, because the United States was obligated to provide such treatment in accordance with Article XVI of the GATS and its specific commitments, and that Antigua was also entitled to expect "withdrawal" of the inconsistent measure (i.e. in this dispute, in Antigua's view, the withdrawal of the US restrictions on access to the remote gambling market), in accordance with Article 3.7 of the DSU.

3.45 We agree with Antigua that the United States has an obligation, under Article XVI of the GATS and the US schedule, to provide market access on the cross-border supply of remote gambling services. At the same time, however, the GATS also recognizes the right of Member to regulate in order to meet their national policy objectives⁷⁴ and Article XIV specifically recognizes the possibility of adopting measures necessary to protect public order and public morals. In this dispute, such legitimate policy objectives were consistently invoked by the United States in order to restrict access to its remote gambling market despite the existence of a specific commitment, and the Appellate Body has found that the three federal laws at issue in the proceedings were "measures ... necessary to protect public morals or to maintain public order".⁷⁵ In these circumstances, a reasonable counterfactual must take into account these US policy objectives.

3.46 We also note that while Article 3.7 of the DSU does provide that the objective of dispute settlement proceedings is *usually* the withdrawal of the inconsistent measures, we do not read this provision to mean that this is in all cases the only possible outcome in disputes where a violation of one of the covered agreements has been found. The recommendations of the DSB to the United States in this dispute require it to bring its measures into compliance with the GATS. This did not necessarily require it to "withdraw" the measures by removing entirely the restrictions it maintained on remote gambling and betting services. We note in this respect that the "concept of compliance or implementation prescribed in the DSU" has been described by arbitrators mandated under

⁷² US written submission, para. 20.

⁷³ Appellate Body Report, para. 373 (emphasis added).

⁷⁴ Preamble of the GATS, fourth paragraph.

⁷⁵ Para. 373(D)(iii)(c)

Article 21.3(c) of the DSU to determine the reasonable period of time for implementation as "the withdrawal *or modification* of a measure, the establishment or application of which by a Member of the WTO constituted the violation of a provision of a covered agreement" (emphasis added).⁷⁶ Indeed, we note that Antigua itself appears to agree that a total prohibition on remote gambling and betting services (that is, no market access at all) would in fact also constitute a form of compliance by the United States in this dispute.⁷⁷

3.47 In this respect, we note the observations of the compliance panel in this dispute:

"The possible form of measures taken to comply with a recommendation under Article 19.1 of the DSU will depend on the rulings of the DSB in a particular dispute. For example, if a measure has been found inconsistent with a covered agreement, or unjustified under an otherwise available exception, due to the way in which the measure is *applied*, compliance with the recommendation could presumably be achieved by a change in the application of the measure, without necessarily a change to the text of the measure itself or that of any written implementing measures. The present dispute illustrates this point."⁷⁸

3.48 We also note the observation made by the arbitrator appointed under Article 21.3(c) to determine the reasonable period of time for implementation in this dispute that "I am ... conscious of the fact that any legislation adopted by the United States will inevitably, as the Appellate Body Report demonstrates, bear on questions of public moral and public order".⁷⁹

3.49 In sum, our conclusion that Antigua's counterfactual is not reasonable, taking into account the circumstances of this dispute, is not modified by our consideration of Antigua's arguments in respect of the nature of its rights under Article XVI of the GATS and of Article 3.7 of the DSU. Rather, our analysis of these elements confirms to us that, as a matter of law, the United States may have had a range of WTO-consistent means at its disposal in order to implement the recommendations and rulings in this dispute, not limited to a complete opening of its remote gambling and betting services market.

2. Alternative counterfactual

3.50 Having determined that the counterfactual used by Antigua to estimate the benefits accruing to it in this dispute did not accurately reflect such benefits, we must now determine what would constitute a reasonable counterfactual, in the circumstances of this dispute.

3.51 We first recall our determination above that a reasonable counterfactual for the purposes of this dispute would have to take into account the US public policy objective of protecting public morals and public order.

3.52 The United States identified, as a potential means of implementation of the DSB's recommendations and rulings in this dispute, a complete prohibition on the provision of remote gambling services in the United States.⁸⁰ Antigua appears to agree that this could constitute a form of

⁷⁶ *Argentina – Hides and leather*, Article 21.3(c), Award of the arbitrator, para. 41.

⁷⁷ Antigua's response to Question 2ter of the Arbitrator, p. 6 ("Although the total prohibition by the United States of all remote gambling and betting services would not be *expressly* compliant with the DSB rulings, Antigua believes that it may well constitute *de facto* compliance, consistent with the approach of the compliance panel in the *US – Shrimp* dispute.")

⁷⁸ *US – Gambling*, compliance panel report, para. 6.21.

⁷⁹ Award of the Arbitrator under Article 21.3(c), paras. 46-47.

⁸⁰ US written submission, para. 15.

compliance.⁸¹ However, neither party has suggested that this scenario should form the basis of the calculation of the level of nullification or impairment of Antigua's benefits for the purposes of these proceedings. We therefore do not consider it further.

3.53 The other alternative scenario that has been presented to us is that identified by the United States, which assumes that the United States would provide unrestricted market access for remote gambling and betting services only in respect of horseracing gambling and betting.

3.54 The United States describes this scenario as the "most likely", and explains that the specific problem found with the US measure at issue was with respect to the limited issue of the regulation of remote gambling on horseracing, and in particular on the United States inability to demonstrate an absence of discrimination under the chapeau of GATS Article XIV with respect to remote gambling services on horseracing. In the view of the United States, nothing in the DSB recommendations required it to clarify or change its measures with respect to other forms of remote gambling.⁸² Moreover, according to the United States, nothing in the DSB recommendations and rulings, nor in the chapeau of GATS Article XIV, would require it to treat all types of remote gambling identically, and a counterfactual that allowed remote gambling on horseracing, but disallowed other types of remote gambling, is entirely plausible.⁸³

3.55 Antigua, however, considers that such a scenario would not bring the United States into compliance. Antigua argues in particular that in the underlying proceedings, the United States alleged that it was entitled to maintain the offending measures by application of Article XIV of the GATS and that it prohibited all remote gambling because, by its very nature, remote gambling presented risks and other pernicious features that were not subject to amelioration through regulation or any other means.⁸⁴ In Antigua's view, the United States can therefore not now assert that it is "necessary" to prohibit all remote gambling to protect its citizens if it expressly allows remote gambling in *any* context. Antigua also notes that the United States never argued that remote gambling on horseracing was somehow "safer" than other types of remote gambling, or that Antiguan service providers should be allowed to do only what domestic providers can lawfully do.⁸⁵ Antigua further considers that it is not for the Arbitrator in this proceeding to assess whether such hypothetical measures can bring the United States in compliance with its obligations under the GATS.

3.56 In approaching this part of our determination, we are mindful that our mandate in these proceedings is not to determine the consistency with the WTO covered agreements of hypothetical compliance measures. We also note that, as we have stated above, whether the scenario at issue is the "most likely", as described by the United States, is not pertinent as such in our determination. Rather, as determined above, we must assess whether the proposed scenario could constitute a "plausible" or "reasonable" compliance scenario, in the circumstances of the dispute, for the purposes of calculating the level of nullification or impairment of benefits accruing to Antigua in the dispute.

3.57 We first observe, in this respect, that, as the United States noted, the specific aspect of the United States' measures that was found to lead to an arbitrary discrimination within the meaning of the chapeau of Article XIV of the GATS was the treatment of remote gambling and betting in respect of horseracing. This was the sole basis upon which the Appellate Body determined that the US measures were not justified under Article XIV of the GATS. Specifically, the Appellate Body found that:

⁸¹ See footnote 77.

⁸² US written submission, para. 21.

⁸³ US written submission, para. 23.

⁸⁴ Antigua's response to question No. 2ter of the Arbitrator, p. 6.

⁸⁵ Antigua's response to question No. 2ter of the Arbitrator, p. 6.

"We *find*, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the IGBA fall within the scope of paragraph (a) of Article XIV, but that it has not shown, in the light of the IHA, that the prohibitions embodied in these measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing. For this reason alone, we *find* that the United States has not established that these measures satisfy the requirements of the chapeau."⁸⁶ (underlined emphasis added)

3.58 In these circumstances, in particular in light of the nature of the findings in the underlying proceedings, we do not find it unreasonable to assume that compliance might have been achieved through the removal of this specific source of discrimination identified by the Appellate Body, that ultimately led the measures to be found not to be justified under Article XIV of the GATS. We also do not find it unreasonable to assume, in the circumstances of the dispute, that it may have been possible for the United States to remove such discrimination by opening access to remote gambling on horseracing for foreign providers. We also note that this is the only segment of the market that is currently already open to domestic providers, so that an extension of this access to foreign providers would seem to require only limited adjustments to the current situation.

3.59 In making this determination, we do not make any specific finding or determination as to the exact circumstances under which such opening might take place and what specific conditions might be required for the United States to justify, under the terms of Article XIV of the GATS, such a distinction between the treatment of remote gambling on horseracing and other forms of remote gambling. Rather, we are assuming that a range of implementation options might exist for the United States, not necessarily limited to total prohibition or total opening of its market to remote gambling services.

3.60 We also note that the arbitrator appointed under Article 21.3(c) to determine the reasonable period of time for implementation in this dispute made comparable assumptions:

"I am ... conscious of the fact that any legislation adopted by the United States will inevitably, as the Appellate Body Report demonstrates, bear on questions of public moral and public order. It seems to me that, within the field of public morals and public order, only prohibitions are simple. In other words, to the extent that the United States may consider authorizing any form of internet gambling or wagering, this will increase the complexity of any legislative solution. The more such activities are authorized, the greater lengths the legislator will have to go to in order to ensure that sufficient safeguards are in place to make the system consistent with, and acceptable under, prevailing standards of public morals and public order. (...) However, the United States has not, in this proceeding, explained in any precise manner how it intends to implement the recommendations and rulings of the DSB. The few indications that it has given suggest that it is leaning more in the direction of 'confirming' or 'clarifying' the prohibitions on the remote supply of gambling and betting services, rather than in the direction of authorizing, even in part, the supply of such services."⁸⁷(emphases added)

3.61 Having determined that the alternative counterfactual proposed by the United States reflects a reasonable assumption as to a situation in which the United States would have complied with the recommendations and rulings of the DSB in the circumstances of this dispute, and thus can be considered to accurately reflect the benefits accruing to Antigua that have been nullified or impaired,

⁸⁶ Report of the Appellate Body, para. 372.

⁸⁷ Award of the Arbitrator under Article 21.3(c), paras. 46-47.

we now proceed with the calculation of the level of nullification or impairment of benefits accruing to Antigua under this counterfactual.

3. Separate opinion

3.62 One of the arbitrators is unable to agree with the analysis and conclusions reflected in paragraphs 3.41 to 3.61 above. In the view of this arbitrator, it was not unreasonable for Antigua to assume, in the circumstances of this case, a counterfactual scenario under which the United States would provide unrestricted access to its remote gambling and betting market.

3.63 In the view of this arbitrator, it is appropriate to refer, as a starting point, to the findings and conclusions of the panel and the Appellate Body in this case. Specifically, the Appellate Body has determined that, although the three federal laws at issue are measures "necessary to protect public morals or public order", the United States had not demonstrated that they were applied in accordance with the requirements of the chapeau of Article XIV of the GATS.

3.64 The Appellate Body made this determination "in light of" only one specific discrimination that it identified in the application of the measures. However, this does not necessarily imply, as the United States suggests, that the specific problem found with the US measure at issue was restricted to the "limited issue of the regulation of remote gambling on horse racing"⁸⁸. Rather, the overall conclusion of the Appellate Body was that *the measures at issue* (rather than simply the discriminatory treatment provided in respect of horseracing) were, as a result, not justified under Article XIV of the GATS. As the compliance panel in this case noted:

"It is true that the Appellate Body found that the United States had demonstrated that the measures at issue were 'justified' under paragraph (a) of Article XIV of the GATS. However, this was *not* a finding on Article XIV in its entirety. The Appellate Body expressly confirmed that Article XIV contemplates a 'two-tier analysis' – first, under one of the paragraphs of Article XIV, and then under the chapeau. There was no finding that the measures were consistent with the chapeau or with Article XIV in its entirety nor, hence, with the United States' obligations under the GATS, and there is no concept recognized under the DSU of provisional or transitional consistency with a recommendation of the DSB."⁸⁹

3.65 Article XIV of the GATS allows Members to maintain certain trade-restrictive measures that would otherwise be inconsistent with their obligations under this Agreement, in order to fulfil certain legitimate objectives. However, these measures are required to be applied in such a manner that they do not result in unjustifiable discrimination or disguised restrictions to trade. In other words, the protection afforded by the exceptions under the various paragraphs of Article XIV of GATS is conditional upon an application of the measures at issue that does not turn them into instruments of undue discrimination or protection. In this case, the United States was not able to justify that it applied the measures consistently with these requirements. Furthermore, the compliance panel report also identified further aspects in the application of the measures that could reflect a discriminatory application of the measures at issue, although it made no findings in respect of such aspects.⁹⁰

3.66 This arbitrator agrees with the determination in paragraph 3.41 above that it is appropriate to take into account the specific circumstances of the case in order to assess whether the counterfactual proposed by Antigua accurately reflects the benefits accruing to Antigua under the GATS that have been nullified or impaired in this case. However, this arbitrator considers that, in the circumstances of

⁸⁸ US written submission, para. 20.

⁸⁹ *US – Gambling*, compliance panel report, para. 6.29 (original footnotes omitted).

⁹⁰ See the developments on intrastate commerce, Compliance Panel Report, at paras. 6.118 to 6.123.

this case, it was not unreasonable for Antigua to base its counterfactual on an assumption that the United States would open its market to the cross-border provision of remote gambling services. Such an assumption is fully compatible with the nature of the Appellate Body's findings in this case, as analysed above. In fact, as noted above, the United States itself acknowledges that this scenario would constitute compliance with the DSB recommendations and rulings in this case.

3.67 By contrast, it is not clear that the alternative counterfactual scenario envisaged by the United States, which involves a partial opening of a limited segment of the market, constitutes a more reasonable assumption in the circumstances of the case. In particular, assuming, for the sake of argument, that such a scenario would constitute compliance with the recommendations and rulings of the DSB in this case (something that is not within our mandate to determine), it is not clear how the United States proposes to reconcile the protection of public morals or public order with the opening of one segment of the market (horseracing).

3.68 In light of the above, this arbitrator is not persuaded that the United States has demonstrated that Antigua's proposed counterfactual was unreasonable in the circumstances of the case.

3.69 This does not imply, however, that this scenario would constitute the only way in which the United States could have complied with these recommendations and rulings. As noted above, Members are free to choose the WTO-consistent means by which they will comply with DSB rulings, and there may be a number of ways in which the United States could have complied, and still could comply, with the rulings in this case. Nor does this determination imply that US policy objectives should not be taken into account. On the contrary, this arbitrator agrees with the determination of the majority that a reasonable counterfactual must take into account the US policy objectives, as stated in para. 3.45 above. In that sense, nothing would require the US to abandon its objective of protecting public morals or public order, under Article XIV(a) of the GATS, in implementing, in the future, the recommendations and rulings of the DSB. Indeed, it is quite conceivable that the United States could have found ways in which to address these concerns while protecting such interests. Other WTO Members have chosen to open their market to remote gambling, and it would not be reasonable to assume that such Members do not also have similar policy objectives.

3.70 This arbitrator also notes Antigua's argument that the objective of inducing compliance with the rulings of the DSB is to be taken into account in the Arbitrator's assessment of Antigua's counterfactual. In the view of this arbitrator, the objective of inducing compliance cannot lead to suspension being authorized in excess of equivalence with the level of nullification or impairment of benefits, as foreseen in Article 22.6 of the DSU, and this must remain the benchmark against which the proposed level of suspension is assessed. At the same time, however, in a situation where different means of compliance might form the basis of a counterfactual in order to determine the level of nullification or impairment of benefits, the complaining party would not be prevented from selecting a counterfactual that may lead to a higher level of nullification or impairment than others, provided that such counterfactual is reasonable.

3.71 It should be borne in mind, in this respect, that the Member concerned has had the opportunity to comply with the rulings at issue, and that the very reason for the existence of countermeasures under the DSU is to induce compliance with the covered agreement that has not taken place within the period foreseen in the DSU. In these circumstances, the complainant is by necessity obliged to make certain assumptions as to how compliance might have taken place. This has no implications, however, as to the means through which the Member concerned might actually choose to comply in the future, possibly including, in this case, through the adoption of measures that involve a restriction to trade fully consistent with the provisions of Article XIV of GATS.

3.72 Finally, although this arbitrator disagrees with the conclusions reached by the majority of the Arbitrator in respect of the choice of counterfactual, it nonetheless sees no added value in pursuing the

calculations on the basis of Antigua's counterfactual, which the majority of the Arbitrator does not consider to be reasonable. Accordingly, the assessments and calculations in the following section reflect the common view of the Arbitrator as to the calculation of the level of nullification or impairment, on the basis of the counterfactual proposed by the United States.

3.73 This arbitrator also wishes to highlight that, even if calculations had been pursued on the basis of Antigua's proposed counterfactual, a number of parameters would have had to be taken into account. In particular, due account would have had to be taken of the fact that, in a scenario under which the United States would open the entirety of its remote gambling market, Antigua would face competition not only from other foreign operators but also from domestic US operators that currently also have no access to the market.

D. CALCULATION OF THE LEVEL OF NULLIFICATION

3.74 In light of our determinations above, we now proceed with an assessment of the exports "lost" by Antigua on the basis of a counterfactual under which the United States would have provided unrestricted market access to Antiguan operators only in respect of horseracing gambling and betting.

3.75 For this purpose, we first review the approach of Antigua in respect of the calculations and methodologies, and then, as necessary, the approach of the United States, before turning to the approach that we have adopted, taking into account our review of the parties' approaches.

1. Review of the approach proposed by Antigua

(a) Description of the approach proposed by Antigua

3.76 In its calculations, Antigua assumes complete access for all of its remote gambling services to the United States market as the appropriate counterfactual.⁹¹ The core data used by Antigua comes from the Quarterly eGaming Statistics Report of the private gambling consulting group "Global Betting and Gaming Consultants" (GBGC) and from its underlying database. In the absence of bilateral data, Antigua uses data from the GBGC database on global remote gaming revenues for Antigua for the years 1999-2006 and projections for Antigua for the years 2007-2012 as a starting point.⁹² Antigua considers its global remote gambling revenues to be a good proxy of its revenues from the US, claiming that at least 80 per cent of the revenue of Antiguan remote gaming operators has been from customers in the United States.⁹³ The second set of key data in Antigua's approach are historical data on global remote gaming revenues of the whole industry (not only the Antiguan industry) for the years 1999-2006 and projections for the years 2007-2012 gathered from the GBGC's Quarterly eGaming Statistics Report. The two data set together allow Antigua to calculate its global market share.⁹⁴

3.77 Antigua is of the view that its remote gaming industry drove the growth of the remote global gaming markets until 2002. Antigua assumes that both the historical data and the projections by GBGC reflect the adverse impact on Antigua of the US measures as of a certain date and that the difference between actual revenues at that date and actual revenues after that date is principally due to the US measures.⁹⁵ Hence, Antigua seeks to determine how its remote gaming revenues would have developed in the absence of the US measures, in order to compare those counterfactual revenues to its

⁹¹ Antigua's Methodology Paper, pages 3-6; Antigua's written submission, paras. 33-36 and 72-94.

⁹² Antigua Methodology Paper, Exhibit AB-1.

⁹³ Antigua's written submission, para. 112.

⁹⁴ Antigua Methodology Paper, Exhibit AB-1.

⁹⁵ Antigua's Methodology Paper, page 3; and Antigua's written submission, para. 112.

actual revenues beginning 4 April 2006, i.e. after the expiry of the reasonable period of time for the United States to come into compliance.

3.78 Antigua presents three "models" to calculate the counterfactual Antiguan remote gaming revenues per annum starting from the historical time series and following the same basic framework. For its Constant Market Share model, Antigua takes its global market share in 2003 (21 per cent) as a basis for constructing the counterfactual. It assumes that absent the US measures, it would have retained that market share. Hence, it multiplies the global remote gaming revenues of the whole industry for each year 2004-2012 with the 21 per cent share in order to arrive at annual counterfactual Antiguan remote gaming revenues. For the years 2006-2012, it then subtracts the actual/projected global remote gaming revenues for Antigua from the counterfactual numbers to obtain the Antiguan annual global remote gaming revenues lost beginning 4 April 2006 (in order to take into account that the time period after the reasonable period of time is less than a year it reduces the calculated annual 2006 amount by about one quarter). It then multiplies the average annual losses by an assumed output multiplier ("small island economy multiplier"). In the absence of better estimates, it proposes to use a multiplier of 1.41, established for the tourism industry in Barbados.⁹⁶ Finally, it discounts the "trade loss" so obtained for each year 2006-2012 to the year 2007, utilizing a 9.38 per cent discount rate. This rate is the median weighted average cost of capital for SIC Code 7999, which includes the gaming industry, according to the Ibbotson Cost of Capital 2006 Yearbook. Antigua, finally, takes the simple average over those 6¾ years yielding an average annual global remote gaming revenue loss over the 2006-2012 period of US\$3.45 billion.⁹⁷

3.79 The other two models proposed by Antigua only differ in the way in which the annual counterfactual Antiguan remote gaming revenues are calculated. Rather than assuming a constant share of the global market, Antigua proposes, in the Constant Growth Rate Model, to take its actual global remote gaming revenues of 2001 (US\$2.392 billion as per GBGC) and proceed in two steps to determine the counterfactual amounts for each following year. For the years 2002-2006, Antigua assumes that this amount would have been unchanged. For the years, 2007-2012 it assumes that it would grow at an annual rate of 8.7 per cent. The latter growth rate constitutes the compound annual growth rate of global remote gaming revenues for the whole industry excluding Antigua. Antigua then proceeds in the same manner subtracting the actual/projected global remote gaming revenues for Antigua from the counterfactual numbers to obtain the Antiguan annual global remote gaming revenues lost beginning 4 April 2006. After applying the multiplier, discounting and averaging, it obtains an average annual global remote gaming revenue loss of US\$2.403 billion.⁹⁸

3.80 Finally, under the fixed revenue model Antigua simply presumes that it would have retained its actual global remote gaming revenues of 2001 (US\$ 2.392 billion as per GBGC) in each following year until 2012. Again, these counterfactual amounts are reduced by the actual/projected global remote gaming revenues for Antigua to obtain the Antiguan annual global remote gaming revenues lost beginning 4 April 2006. After applying the multiplier, discounting and averaging, it obtains an average annual global remote gaming revenue loss of US\$1.614 billion.⁹⁹

3.81 Apart from the counterfactual, the United States takes issue with other aspects of Antigua's methodology, in particular its underlying data, which it considers as "inherently unreliable" and as providing "no useful information in this arbitration".¹⁰⁰ In the following, we will review the arguments by the parties on each of the major concerns raised in relation to Antigua's proposed approach, followed by an assessment by the Arbitrator.

⁹⁶ Antigua's Methodology Paper, pages 8-9.

⁹⁷ Antigua's Methodology Paper, pages 6-9, Exhibit AB-3.

⁹⁸ Antigua's Methodology Paper, pages 9-10, Exhibit AB-4.

⁹⁹ Antigua's Methodology Paper, pages 10-11, Exhibit AB-5.

¹⁰⁰ US response to question 1 by the Arbitrator, para. 4.

(b) Nature of GBGC data, data gathering methodology and data inconsistencies

(i) *Arguments by the parties*

3.82 The United States notes that only insufficient explanations of GBGC's data gathering and processing methodology have been given and that the data contains internal inconsistencies and has been substantially revised from one quarterly report to the next. To begin with, the United States states that it has been unable to evaluate the basis for the data and the methodologies used by GBGC. The United States notes that the "Quarterly eGaming Statistics Report" by GBGC was not submitted by Antigua to the Arbitrator with its methodology paper. The United States was only able to identify a report entitled "Quarterly Data Report", which was on sale on the GBGC website.¹⁰¹ The United States claims that it is not clear if GBGC produced this report at the behest of Antigua for the purposes of the dispute and, hence, whether it may contain self-serving allegations.¹⁰²

3.83 The United States continues to consider the GBGC data unreliable on methodological grounds even after submission by Antigua of first an extract from the May 2007 release of the GBGC Quarterly eGaming Statistics Report along with an explanation by GBGC of some of its contents¹⁰³ and, thereafter, of the full May and October 2007 releases of the Report as well as a letter by GBGC explaining its methodology in gathering the data.¹⁰⁴ The United States observes that GBGC in its cover letter admits that during the "early years" (presumably 2000, when it started selling gambling data, and following years) "the information available was more limited." The United States holds that such information must have been very "limited", since, even for current figures, the only source of data GBGC uses for non-public operators is guidance provided by unspecified contacts in the industry and information from private companies with which GBGC has consultancy arrangements.¹⁰⁵ In that regard, the United States believes further explanation is required on how the information is requested, whether sampling is used, and if so, how.¹⁰⁶

3.84 The United States also sees the extent of data revisions by GBGC as a sign of methodological problems. It points to GBGC's statement that it constantly revises its numbers and its admission that "previous editions" of its estimates have "little relevance." According to the United States, this suggests that the figures, notably the ones for Antigua in the early years (i.e. around the year 2000), could be substantially different in any future revision of the data, and that the relevance of the available GBGC in that regard is therefore questionable. As an indication of the severity of such revisions, the United States notes the 35 per cent downward revision of North American online gambling revenues from the May 2007 to October 2007 releases of GBGC's eGaming Report.¹⁰⁷

3.85 The United States also points to what it perceives to be data inconsistencies. It notes that Antigua's asserted revenues for 2001 (based on the May 2007 release of GBGC's eGaming Report) exceeds the figure for all revenues from players in North America for the same year (according to the October 2007 release of the eGaming Report).¹⁰⁸ It also notes the inconsistency between regional statistics in the May 2007 release of the GBGC database and the revenue figures of Antigua, Curaçao and Cost Rica, which taken together surpass the total for the entire Central American and Caribbean region in certain years.¹⁰⁹

¹⁰¹ US written submission, paras. 28-29.

¹⁰² US written submission, paras. 28-29.

¹⁰³ Antigua's written submission, paras. 45-46 and Exhibits AB-1 and AB-2.

¹⁰⁴ Antigua responses to questions by the Arbitrators, Exhibits AB-14, AB-14(1) and AB-14(2).

¹⁰⁵ US comments on Antigua responses to questions by the Arbitrator, para. 9.

¹⁰⁶ US response to question 36 by the Arbitrator, para. 45.

¹⁰⁷ US comments on Antigua responses to questions by the Arbitrator, paras. 11-12.

¹⁰⁸ US comments on Antigua responses to questions by the Arbitrator, para. 19.

¹⁰⁹ US response to question 36 by the Arbitrator, para. 48.

3.86 The United States notes that the breakout for Antigua is not contained in GBGC's regular eGaming Statistics Reports. Since it appears to have been prepared especially for Antigua for the purposes of the arbitration, the United States concludes that the Antiguan data could not have been commonly relied upon by others in the online gambling industry¹¹⁰ (and, hence indirectly be confirmed in the market place). The United States also observes that the more detailed analysis GBGC purports to have undertaken as of 2005 (reviewing the information base from 2003 onwards) seems to focus on poker gambling sites rather than sportsbetting, as the main gambling activity by Antiguan operators.¹¹¹

3.87 Antigua replies that the GBGC data is publicly available in the sense that any one who is willing to pay for the information may have access to it.¹¹² It recalls that GBGC and its data existed before Antigua's use of its data in the estimation of the level of nullification or impairment. It also explains that the Antiguan data has not been established for Antigua, but provided by GBGC to Antigua upon its request from the underlying database, but that it is not a standing feature of GBGC's Quarterly eGaming Statistics Report, unlike some of the other regional and global statistics.¹¹³

3.88 Antigua is of the opinion that, in addition to the letter from GBGC explaining GBGC's data gathering methodology¹¹⁴, the best proof of the reliability of the GBGC data is its widespread use in the global marketplace. Antigua notes that as an independent company GBGC relies upon industry participants and other parties for its revenues. It has every reason to be as accurate as it can possibly be in order for its data to be considered reliable and useful by its customers. Antigua doubts that GBGC would be long in business otherwise.¹¹⁵ Antigua provides a list of institutions that have used GBGC data in support of its good credentials. It makes specific reference to GBGC data used in a report commissioned by the European Commission.¹¹⁶

3.89 Concerning data revisions and inconsistencies, Antigua notes that GBGC refines its data on an ongoing basis (including the allocation of revenues to particular jurisdictions).¹¹⁷ It observes that adjustments for the changing value of the United States currency can lead to relatively minor inconsistencies among data sets, particularly those compiled at different points in time.¹¹⁸

(ii) *Analysis by the Arbitrator*

3.90 At the outset, we note that questions of data availability and reliability present themselves as a particular challenge in this proceeding. In considering data quality, we have to make an evaluation in both absolute and relative terms. In other words, in analysing the strengths and weaknesses of the GBGC data, we have to keep in mind the question whether alternative sources of data put forward by parties really constitute an improvement, given that these may suffer from certain deficiencies themselves.

3.91 We agree with the United States that the information concerning data gathering and processing methodology provided to Antigua by GBGC leaves much to be desired. At the same time,

¹¹⁰ US comments on Antigua responses to questions by the Arbitrator, paras. 14-15.

¹¹¹ US comments on Antigua responses to questions by the Arbitrator, para. 10.

¹¹² Antigua response to question 26(b) by the Arbitrator, page 26.

¹¹³ Antigua response to question 26(f) by the Arbitrator, page 26. The fact that country information existed in a database maintained by GBGC from where specific data was extracted upon request was clarified by Antigua in the oral hearing of 18 October 2007.

¹¹⁴ Antigua response to question 26(e) by the Arbitrator, pages 25-26 and Exhibit AB-14.

¹¹⁵ Antigua comments on answers by the US, page 24-25.

¹¹⁶ Antigua response to question 26(a) by the Arbitrator, page 25 and Exhibit AB-14(4); and Antigua comments on answers by the US, pages 5-7 and 23.

¹¹⁷ Antigua response to question 26(d) by the Arbitrator, page 25.

¹¹⁸ Antigua comments on responses by the US to questions 35 and 36 by the Arbitrator: pages 25-27.

we think that, in the absence of more detailed background information from GBGC, the wide use of its data in the market place can be seen as giving some indirect support to its figures, since it implies a certain degree of acceptance amongst observers familiar with the industry. It may also show that alternative data sources are somewhat hard to come by. We are also not convinced why GBGC would have an interest in providing wrong numbers to its clients who may base some of their business decisions on that data and would quickly discard GBGC as a reliable provider in case of persistent flaws.

3.92 We acknowledge that some of the aggregate figures that are standing features of GBGC's Quarterly eGaming Statistics Reports are perhaps more reliable than the country data and can certainly be useful to our analysis. The former may be assumed to be periodically subjected to the judgement of a broader range of users, to rely to a larger extent on publicly reported information and to obviate the need to allocate revenue on the basis of additional assumptions. We take it that the revenue data for Antigua may be affected by such problems, especially in the early years. We note in this regard, that the revisions for Antigua undertaken by GBGC between the May and October 2007 releases of the Quarterly eGaming Statistics Report are quite substantial for the years 2000-2002 (downward corrections of between one third and one fourth), less so for 2003, while the years 1999 and 2004-2006 remain virtually unchanged. We also note that the data inconsistencies identified by the United States between regional aggregates and country data, including on Antigua, in the May 2007 release of the Quarterly eGaming Statistics Report appear to have been removed in the October release.¹¹⁹ While these revisions are severe, they are perhaps not enough to discredit the GBGC data, especially since the changes of the Antiguan data for more recent years have been less dramatic. However, if the GBGC data were to be used, we would take some comfort in obtaining additional confirmation of the order of magnitude of Antigua's revenues from remote gambling over those years.

(c) Relationship between GBGC remote gambling revenue data and Antigua's exports of remote gambling services to the United States

(i) *Arguments by the parties*

3.93 The United States questions to what extent Antigua's remote gambling revenues according to GBGC constitute exports of remote gambling services from Antigua to the United States.¹²⁰ The United States notes that the GBGC data at most shows 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 flow back to any jurisdiction.¹²¹

3.94 Three issues appear to be involved: Firstly, the GBGC data does not provide for Antigua's gambling revenues from the United States, but only for its supposed remote gambling revenues from the world or for the world's remote gambling revenues from North America.¹²² Secondly, the United States considers the GBGC methodology not to be sufficiently clear in relation to how revenue estimates were calculated and how country shares of supply and demand or specific gambling products were determined. As a result, it would be unclear whether revenues were allocated on the basis of where licensing existed, operations were located or company headquarters were located.¹²³

¹¹⁹ We also do not consider it appropriate to speak of a data inconsistency if the sum of country data in one release of the GBGC Report exceeds the corresponding regional aggregate in another release, but not in the same release.

¹²⁰ US response to question No. 36 by the Arbitrator: para. 43.

¹²¹ US comment on Antigua response to questions Nos. 38, 39 and 40 by the Arbitrator, para. 60.

¹²² US written submission, para. 41; and US response to question No. 36 by the Arbitrator, para. 44. In other words, the data may include revenues from exports of remote gambling services to destinations other than the US and, possibly domestic revenues.

¹²³ US response to question No. 36 by the Arbitrator, para. 45.

The United States holds that the fact that a website is licensed by Antigua does not necessarily indicate where the website's operations are located.¹²⁴ Websites may obtain licenses from multiple jurisdictions for marketing or other purposes, while operating out of a different jurisdiction altogether.¹²⁵ Consequently, the United States considers it is unclear how revenues from companies with licenses in several jurisdiction are allocated to a specific country. The United States notes that GBGC allocates revenue based on the operation of the server, but that no explanation is given of underlying assumptions in relation to GBGC's statement 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."¹²⁶ Thirdly, the United States submits that for gambling revenue actually to be considered an export of Antigua, that revenue must be generated from internet operations actually located in Antigua and must be returned to those same operations in Antigua. Otherwise, such revenue would not be associated with an Antiguan service export, and any reduction in that level of revenue cannot be considered nullification and impairment suffered by Antigua.¹²⁷ It notes that Antigua has conceded that many of the gambling revenues associated with websites licensed by Antigua are held in foreign banks by foreign nationals and are never returned to Antigua.¹²⁸ The United States goes on to explain that Antigua may act as a point of sale for business owners in third countries. Its exports would be measured by the stream of payments it receives from foreign firms for its selling services, which would be a modest fraction of the claimed revenues.¹²⁹

3.95 On the first issue, Antigua provides a letter from GBGC stating that it estimates the historical share of Antigua's remote gambling revenues from the United States to amount to between 80 and 90 per cent of its total revenues. Antigua also notes that certain Antiguan operators in conversations have estimated their US revenues to lie between 90 and 95 per cent and that Antigua's Directorate of Gaming of Antigua uses an 80 per cent figure. Antigua also refers to some publicly listed companies reporting estimates in a similar range.¹³⁰ On the second aspect, Antigua notes that remote gambling revenues are allocated among countries by the location of the server that processes the wagers, a methodology used not only by GBGC¹³¹, but also in the 2006 Report commissioned by the European Commission. As far as the third point is concerned, Antigua holds that the United States is wrong in arguing that revenues generated by an Antiguan operation do not count as Antigua's exports if they accrue to "foreign nationals" or if the revenues are held in "foreign banks". It notes that for the purposes of measuring GDP (as the more relevant concept in measuring revenues generated in a particular jurisdiction compared to GNP), it does not matter who owns Antiguan companies or where the profits go, as long as the remote gaming revenues are earned through the operation of computer services in Antigua.¹³² Antigua also notes that all remote gambling revenues should be considered exports, as there is no domestic market for these services.¹³³

(ii) *Analysis by the Arbitrator*

3.96 Concerning the question to what extent Antigua's global revenues from remote gambling constitute exports by Antigua to the United States of such services, we, first of all, regret that the GBGC revenue data for Antigua is only given at the global level and not by destination, specifically in regard to revenues from the United States. We observe, in that context, that the services trade

¹²⁴ US response to question No. 11 by the Arbitrator, para. 18.

¹²⁵ US response to question No. 35 by the Arbitrator, para. 38.

¹²⁶ US comments on Antigua responses to questions by the Arbitrator, para. 17.

¹²⁷ US response to question 11 by the Arbitrator, para. 18.

¹²⁸ Antigua's written submission: para. 106, as paraphrased by the US in US response to question No. 11 by the Arbitrator, para. 18.

¹²⁹ US response to question No. 36 by the Arbitrator: para. 43.

¹³⁰ Antigua response to question 14 by the Arbitrator, page 17, Exhibit AB-14 and Exhibit AB-17.

¹³¹ Antigua response to question 26(e) by the Arbitrator, pages 25-26 and Exhibit AB-14.

¹³² Antigua comments on answers by the US, pages 13-14.

¹³³ Antigua comments on US response to question 36 by the Arbitrator, page 25.

statistics referred to by the United States are not available on a bilateral basis either. The anecdotal evidence provided by Antigua, while unsatisfying, provides at least some indication of the United States share in Antigua's remote gambling revenues.

3.97 As far as multiple licences in several jurisdictions are concerned, it seems reasonable to us that revenues be allocated across countries on the basis of where the service is produced (i.e. wagers are processed, etc.). In the absence of any evidence to the contrary, the location of the server seems to us to be an acceptable proxy for determining where the service is produced. This is what GBGC, as a general rule, purports to be doing, although we are unable to verify from the information provided to us how thoroughly this is done and cross-checked for consistency. However, the evolution of revenues for Antigua and some competitors in the region over the years gives a vague indication that GBGC does account for shifts in revenues following possible shifts in server location.

3.98 Finally, we agree with the United States that for gambling revenue to be considered an export by Antigua, it must be generated from internet operations located there. However, we fail to understand why the United States contends that such revenue ceases to be an Antiguan export if it is not returned to those same operations, for instance because payments are received by a foreign owner or on a foreign bank account. In regard to conceptual issues regarding exports/imports, we refer to the IMF's Fifth Edition of the Balance of Payments Manual published in 1993, noting also that the United States itself uses IMF balance of payments data for its calculations. The Manual clarifies that despite the connotation, the balance of payments is not concerned with payments, as that term is generally understood, but with transactions (para. 26). A transaction is defined as an "economic flow that reflects the creation, transformation, exchange, transfer, or extinction of economic value and involves changes in ownership of goods and/or financial assets, the provision of services, or the provision of labour and capital" (para. 13). The Manual states that the balance of payments records transactions between residents and non-residents (and not between nationals and foreign nationals). The concept of residence is based on a transactor's centre of economic interest. In particular, we note that an enterprise is said to have a centre of economic interest and to be a resident unit of a country when the enterprise is engaged in a significant amount of production of goods and/or services there (para. 73). From this we conclude, as suggested by Antigua, that a service "produced" by a resident and provided to a non-resident should be considered an export by that country even if the resident is a foreign national or payment is received on a non-resident bank account. Hence, we believe that such elements cannot constitute conclusive evidence that the remote gambling services that Antigua sells to the United States are in fact "produced" elsewhere, and we have not received any evidence as to where such a production would take place, if not in Antigua.

(d) Relationship between GBGC remote gambling revenue data and Antigua's reported exports and GDP

(i) *Arguments by the parties*

3.99 The United States argues that the GBGC data does not comport with data on Antigua's exports and GDP.¹³⁴ The United States holds that the GBGC data are inconsistent with official economic statistics prepared by international institutions, such as the Eastern Caribbean Central Bank, the International Monetary Fund and the WTO.¹³⁵ The United States supplies data from all of these sources showing that exports by Antigua of "other services" (ECCB), "other business services" (IMF) and "other commercial services" (WTO), which should include gambling services, are not more than around \$50 million per annum in recent years, and hence, of a completely different order of magnitude than the \$1 to 2 billion of remote gaming revenue cited by Antigua on the basis of the

¹³⁴ US response to question No. 36 by the Arbitrator, paras. 49-51.

¹³⁵ US written submission, paras 30 and 38.

GBGC data.¹³⁶ The United States also provides ECCB data on the development of Antigua's GDP over time, again noting inconsistencies, with alleged remote gaming revenue exceeding total GDP per annum and with changes in alleged remote gaming revenues not being reflected in GDP.¹³⁷

3.100 The United States acknowledges that exports may exceed the value of a country's GDP, as is the case for e.g. Singapore, where in 2005 goods and services exports were 143 per cent greater than GDP. However, the United States holds that Antigua's claimed net revenues from exported internet gambling services in 2001 in addition to its reported exports of goods and services would exceed the value of its GDP by over 300 per cent or be twice in excess of Singapore, the country in the world with the highest ratio of exports to GDP on the basis of official data. Hence, it concludes that even accepting that exports can and do exceed GDP, the Antiguan claims are so out of bounds relative to the experience of other Members that the GDP comparison may serve to question Antigua's export claims.¹³⁸

3.101 The United States further notes that even if Antiguan export revenues from gambling services were unrecorded (claimed to be around \$2.4 billion in 2001), Antigua has made no claim that its \$483 million of imports in 2001 are underrecorded that may have offset the claimed surges in gambling export revenues.¹³⁹ Hence, the surplus could only have derived from additional unrecorded value added within the Antiguan economy itself, corresponding to a GDP that would have been almost 360 per cent larger than Antigua's officially reported GDP. The United States considers it to be implausible that such an enormous understatement of the size of the Antiguan economy exists.¹⁴⁰

3.102 The United States adds that the footprint of the alleged massive inflow and outflow of revenues during the 1999-2005 period should have been felt in the rest of the Antiguan economy, and would have been measured by the ECCB and the IMF.¹⁴¹ In particular, the United States observes that according to footnote 46 to Antigua's answer to question 39 by the Arbitrator, the data considered by the ECCB in its balance of payments reporting include "financial statements and foreign exchange records reported by the commercial banks to the ECCB, and ECCB's financial statement." The United States claims that gambling revenues and the corresponding monetary flows as well as uses of these revenues, notably for domestic consumption and imports, should be reflected in the balance of payment accounting based on bank transactions, even if operators systematically withhold information on the level of their gambling revenues. The ECCB balance of payments statistics submitted by Antigua, however, do not show monetary inflows on the order claimed by Antigua.¹⁴² The United States also observes that in certain years gambling revenues reportedly declined, e.g. in 2003 by \$693 million or an equivalent of 92 per cent of GDP, while GDP was up \$40 million.¹⁴³

3.103 Lastly, the United States submits that the points pertaining to Antigua's explanation of its prior use of a 10 per cent of GDP estimate are some of the most plausible, and relevant, statements made by Antigua regarding its level of nullification and impairment: In particular, the United States refers to Antigua's statement that this figure was based on estimates of the direct impact of the industry on the country in the nature of salaries paid, domestic rents and purchases and similar direct expenditures; and correlations made between estimated employment and the size of the overall domestic workforce. The United States believes this figure to be a more realistic assessment, since any government would notice economic inflows that dwarfed the rest of its economy, because the

¹³⁶ US written submission, paras. 31-32 and 36-37 and Exhibit US-2.

¹³⁷ US written submission, paras. 33-35.

¹³⁸ US response to question No. 33 by the Arbitrator, para. 33.

¹³⁹ US response to question No. 33 by the Arbitrator, para. 34; and US comment on Antigua response to questions Nos. 38, 39 and 40 by the Arbitrator, para. 59.

¹⁴⁰ US response to question No. 33 by the Arbitrator, para. 34.

¹⁴¹ US response to question No. 36 by the Arbitrator, para. 53.

¹⁴² US comment on Antigua response to questions Nos. 38, 39 and 40 by the Arbitrator, paras. 61-62.

¹⁴³ US response to question No. 36 by the Arbitrator, para. 53.

spillover effects on consumption and employment would be the main factors in overall economic growth or decline.¹⁴⁴

3.104 Antigua dismisses the comparisons by the United States between its claimed gaming revenues and its officially reported export and GDP data.¹⁴⁵ Antigua holds that the ECCB data appears to be the source of both the IMF and WTO statistics cited by the US¹⁴⁶ and that the ECCB confirmed that its data did not include revenues earned by operators who were licensed to engage in interactive wagering and gaming, since operators did not report.¹⁴⁷ Antigua also disputes the relevance of historical comparisons of trade-GDP ratios, comparisons with jurisdictions, where no remote gambling industries exist, or comparisons with the non-remote gambling sector. It holds that remote gaming is an unprecedented form of trade and that the only relevant comparisons in this arbitration should be between Antigua and similarly situated small economies with a remote gaming industry, such as the Khanawake Territory, for which the GBGC data shows revenues from remote gaming of similar size to those of Antigua.¹⁴⁸

3.105 Antigua also finds fault with the way in which the United States calculates export to GDP ratios. It notes that the United States increases the numerator (Antigua's goods and services exports) by the claimed level of remote gambling revenues, but leaves the denominator constant (ECCB reported GDP). Antigua claims that, in order to do this calculation correctly, the denominator would need to be increased by the value-added of remote gaming to Antigua's GDP. Making some assumptions about profits, as suggested by the US, Antigua claims that, in this manner, its export to GDP ratio would be in line with comparator economies.¹⁴⁹

3.106 Antigua adds that besides unreported revenues from remote gambling, expenditures would also have to be taken into account to determine the true impact on GDP of the remote gambling industry. In particular, Antigua notes that, while some domestic spending by operators, on employee wages, facilities expenses and the like, might find their way into GDP – even if not actually reported by the operators – many would not. In particular, Antigua states that the greatest expenditures of remote gambling operators, namely, financial services, advertising, computers, servers and other hardware and software development, take place primarily if not exclusively outside of the jurisdiction, i.e. large part of "inputs" are imported and a significant portion of profits are expatriated.¹⁵⁰ It notes that both revenues and expenditures of Antiguan operators are not taken into account by the ECCB in establishing Antigua's GDP.¹⁵¹

3.107 Finally, Antigua provides some additional reasons why revenues from remote gambling do not show up in GDP figures. In particular, it states that a substantial portion of the "knock-on" effect of remote gaming revenues in the economy may itself find its way back into the remote gaming sector or into other sectors of the Antiguan economy that are under- or incorrectly reported or under-represented (a not uncommon feature of developing economies). Specifically in regard to the question why the decline of the remote gambling sector does not appear to affect GDP, Antigua states

¹⁴⁴ US comment on Antigua response to question No. 37 by the Arbitrator, para. 57.

¹⁴⁵ Antigua's written submission, para. 105.

¹⁴⁶ Antigua's written submission, para. 102; Exhibit AB-11.

¹⁴⁷ Antigua's written submission, para. 102; Exhibit AB-12: More precisely, the letter by ECCB states that "the Statistics Act of Antigua and Barbuda cannot enforce an obligation on these entities to provide data". Earlier, Antigua explained in its Methodology Paper, based on a telephone discussion with ECCB staff, that there had been "a low response rate by remote gaming operators to GDP-related surveys" and the few that had responded to the GDP-related surveys "have not often reported a key component of GDP – profits" (footnote 5 to the Methodology Paper).

¹⁴⁸ Antigua comments on responses by the US, pages 19-20.

¹⁴⁹ Antigua comments on answers by the US, page 20.

¹⁵⁰ Antigua written submission: para. 106; and Antigua comments on answers by the US, pages 20-21.

¹⁵¹ Antigua comments on answers by the US, pages 20-21.

that to some extent activities within the reported sectors of the Antiguan economy influenced by remote gaming revenues have decreased with the decline of the industry; hence, it would not be usual to see a substitution effect within the economy, in essence working to mitigate losses as much as possible.¹⁵²

(ii) *Analysis by the Arbitrator*

3.108 Concerning the relationship between the GBGC data for Antigua and Antigua's reported exports and GDP, e.g. pursuant to IMF statistics, we agree with the United States that (i) Antigua's alleged remote gambling export revenue appear large relative to other exports by Antigua and as a percentage of GDP, and that (ii) even if revenues are not reported, there should be a trace of related transactions in Antigua's balance of payments. On the first aspect, we take it that remote gambling is a relatively recent phenomenon and that that revenue margins, especially for early market entrants, may have been extraordinary initially and led to revenue levels that appear large in comparison to traditional export revenues. We note that in other economies mentioned by the parties, revenues from remote gambling may also be large in comparison to other export revenues and may lead to substantial increases in the trade to GDP ratio. This may be even more so in smaller and less diversified economies traditionally running substantial current account deficits.¹⁵³ Nevertheless, from the limited information we have, we tend to agree that Antigua's initial revenue figures based on the May 2007 release of the GBGC database appear out of line by all historical standards. The substantial revisions carried out by GBGC for its October 2007 release lends support to this assessment. Even assuming that the October 2007 figures for Antigua in the early years had been correct (although those still appear generous), we have reason to believe that such extraordinary revenues must be a temporary phenomenon and are quickly competed away. We will discuss the question of competition further below, but note already that adjustments even to the October 2007 numbers appear necessary to bring them more in line with other economic statistics.

3.109 On the second aspect raised in the previous paragraph, we agree with the United States that sizeable export revenues would reflect a considerable value added in the Antiguan economy, and hence corresponding increases in GDP, unless counterbalanced by other positions in the balance of payments, notably imports. In fact, it may well be that the net contribution of the remote gambling industry, despite substantial amounts of revenues, to the external accounts and GDP is small, if, as Antigua notes, important gambling-related imports (notably banking, advertising services etc.) exist and profits are transferred abroad with the industry being mostly foreign-owned. While Antigua claims that both revenues and expenditures are unreported, the United States notes that the ECCB and IMF compile Antigua's balance of payments not only on the basis of company surveys (where remote gambling operators may not respond and, hence, neither revenues nor spending may be reported), but also uses financial statements and foreign exchange records reported by commercial banks, where some of those transaction should show. We sought clarification in this regard from both the ECCB and IMF. In its letter dated 13 December 2007 the IMF confirms that the balance of payments statistics for Antigua and Barbuda, which are compiled by the ECCB and supplied to the IMF, do not separately identify remote gambling services and that the aggregate of personal, cultural and recreational services has a zero entry for all year shown in the IMF's 2006 Balance of Payments Yearbook. Moreover, the IMF notes that the survey report forms used by the ECCB do not indicate where gambling services are separately identified or covered and that the description of balance of payments data compiled by the ECCB and set out in Part III of the Balance of Payments Yearbook

¹⁵² Antigua response to question 46(b) by the Arbitrator, page 38.

¹⁵³ We do not see much merit in the calculations performed by Antigua that increase both its exports and GDP by the claimed revenues from remote gambling. While it is true that it would be incorrect to adjust exports by this figure, but leave GDP unchanged *if* indeed it is affected, this is exactly what Antigua argues is not the case, since most of its revenues are counterbalanced by imports or expatriated profits, as will be further discussed below.

does not refer to gambling services. However, the IMF also confirms that transactions related to gambling may be captured in the financial account, because financial transactions are, to some extent, reported by commercial banks, and the transactions of gambling site operators would be an undifferentiated component of higher level financial account aggregates reported by these institutions.¹⁵⁴ Likewise, transactions related to gambling, such as imports of business services and repatriation of profits by gambling site operators, should be covered in the Yearbook data, but would be undifferentiated components of higher level aggregates as well. The IMF concludes that it cannot determine how comprehensively the data are captured in practice. Hence, we are confident that it would be equally difficult, if not impossible, for us to make an educated guess on balance-of-payments entries of Antigua, which, in addition, over recent years, do not show any unusual magnitudes or movements.

(e) Absence of direct evidence of revenues of remote gambling operators licensed by Antigua and comparison of GBGC remote gambling revenue data with revenue figures from other sources

(i) *Arguments by the parties*

3.110 The United States notes that that Antigua claims to have exempted operators licensed by Antigua from any form of official reporting requirements¹⁵⁵, but then admits that financial statements for gambling companies with operations located in Antigua, which could give support or refute the GBGC data, are actually available to the government.¹⁵⁶ The United States holds that Antigua should not be rewarded for failing to disclose such information, which could have been provided with redactions or in summary tables for privacy concerns or fears of prosecution. It notes that Antigua does not even explain whether it has reviewed such financial statements, or whether the data in those statements is in accord with the GBGC estimates. The United States draws the conclusion that the actual data does not support Antigua's claims pursuant to the GBGC data, or else it would have been used, and that adverse inferences may be drawn, when a party to a dispute declines to provide relevant information.¹⁵⁷

3.111 Antigua confirms that Antiguan remote gaming operators are subject to a number of reporting obligations. This includes the obligation to provide the Directorate of Gaming of Antigua, at least once per year, access to and examination of the books, accounts and financial statements of each licence holder.¹⁵⁸ However, Antigua declines to disclose financial information from Antiguan operators, principally for the reason that the United States has used filings of public companies as a basis for criminal complaints in the past.¹⁵⁹ It only cites gross profits of US\$895.7 million in 2005 that five Antiguan remote gaming operators had confidentially reported to the Antiguan Directorate of Offshore Gaming (Division of Gaming, Financial Services Regulatory Commission). This information is contained in a letter by the Director of Gaming to Mr. Mark Mendel, dated 1 October 2007, written for the purposes of this proceeding.¹⁶⁰

¹⁵⁴ While the United States, in its comments on the IMF letter, sees this point as a confirmation that in Antigua's official economic statistics for its commercial bank transactions there are nowhere any levels of financial deposits approaching the billions of dollars of revenue claimed by Antigua, Antigua, commenting on the IMF letter, emphasizes that commercial banks in Antigua are not and have not been used by the remote gaming industry for gaming transactions.

¹⁵⁵ US response to question No. 1 by the Arbitrator, para. 3.

¹⁵⁶ US comments on Antigua responses to questions by the Arbitrator, paras. 22-23; and Antigua response to question No. 28 by the Arbitrator, pages 27-28.

¹⁵⁷ US comments on Antigua responses to questions by the Arbitrator, paras. 22-23.

¹⁵⁸ Antigua response to question No. 28 by the Arbitrator, pages 27-28.

¹⁵⁹ Antigua response to question No. 27 by the Arbitrator, pages 26-27.

¹⁶⁰ Antigua written submission: Exhibit AB-10.

3.112 Instead, Antigua provides alternative sources that provide data for the remote gambling market of a similar order of magnitude as the GBGC data, including the United States General Accounting Office Report on "Internet Gambling: An Overview of the Issues".¹⁶¹ Antigua also notes that historical revenue estimates for the global remote gaming industry by Christiansen/Cummings Associates, Inc. (apparently, the name was later changed into Christiansen Capital Advisers, CCA), a US-based consultancy, were similar to GBGC data.¹⁶² Upon our request concerning the evolution of the size of the US market, Antigua specifically has provided data on US gross gambling revenues and, in addition, US internet gambling revenues from CCA published for the years 1995-1997 (gross revenues only) and 1999-2006 in the gaming publication "International Gaming & Wagering".¹⁶³ Data on the US market is also included in GBGC's Quarterly eGaming Statistics Report (May and October 2007 releases) on annual remote gambling revenues broken down by certain regions and countries, including the US, and by four types of gambling activities. Antigua notes that the GBGC and CCA data on the US remote gaming market for 2006 are also on the same order of magnitude.¹⁶⁴

3.113 Antigua also provides revenue and employment data for the years 2001 (for some companies 2003) to 2006 from publicly listed companies which are active in the online gambling business and some of which are licensed in Antigua.¹⁶⁵ Antigua observes that there are wide disparities between the companies as far as revenues per employee are concerned. This may be explained by the varying degree of customer service in an internet-based business, such as support centres for customer enquiries or wager acceptance over the telephone. However, Antigua concludes that the reported revenues per employee multiplied by the number of employees are broadly supportive of the GBGC revenues reported for Antiguan operators.¹⁶⁶ In order to verify this, Antigua provides information from the Directorate of Gambling, *inter alia*, on the number of employees directly employed by licence holders for the 1998 (2000 for employment) to 2007 time period (which replaces Antigua's earlier estimate of 3000 employees in 1999 that had taken into account both direct and indirect employment).¹⁶⁷ Antigua also refers to a report commissioned by the European Commission in 2006, which provides estimates of total employment and revenues in the EC remote gaming industry resulting in approximately US\$1 million of revenues per employee in 2006.¹⁶⁸ It submits that such figures as well as comparisons to other e-commerce companies show how much revenue can be generated by a relatively small number of employees in this highly automated, technical industry.¹⁶⁹

3.114 The United States claims that the CCA data should not be given any weight, since Antigua did not provide copies of the cited CCA documents nor information as to CCA's sources. Moreover, it claims that figures provided on the CCA website apparently do not match Antigua's description of CCA figures.¹⁷⁰ Upon our request for data on the size of the US remote gambling market, if not at the country level, but at least for individual states, the United States notes that, since the gambling services Antigua wishes to provide are currently criminal in the US, there are no official US statistics on such activities. It also states that it does not have information on any specific state's statistics on

¹⁶¹ Antigua comments on answers by the United States, pages 3-7.

¹⁶² Antigua's written submission, paras. 95-98.

¹⁶³ Antigua response to question No. 24 by the Arbitrator, pages 19-20.

¹⁶⁴ Antigua response to question No. 25 by the Arbitrator, pages 23-25 and Exhibits AB-14(1) and AB-14(2). Antigua also holds that US demand for remote gambling services, in particular in regard to sports betting, is "astronomical", providing, besides the GBGC estimates, further expert opinions as to its potential. Antigua response to question No. 45(a) by the Arbitrator, pages 35-37.

¹⁶⁵ Antigua response to questions Nos. 22 and 30 by the Arbitrator, pages 19, 28-29 and Exhibit AB-17.

¹⁶⁶ Antigua response to question No. 30 by the Arbitrator, pages 28-29.

¹⁶⁷ Antigua response to question No. 21 by the Arbitrator, pages 18-19.

¹⁶⁸ Antigua comments on answers by the United States, pages 6-7.

¹⁶⁹ Antigua comments on answers by the United States, page 22; and Antigua responses to questions, Exhibit AB-17.

¹⁷⁰ US comment on Antigua response to question No. 24 by the Arbitrator: paras. 55-56.

remote gambling.¹⁷¹ However, it provides consumption data (from statistics of the Bureau of Economic Analysis (BEA) of the US Department of Commerce on personal consumption expenditures by type of product) for the non-remote gambling market, including annual time series data from 1995 to 2006 on pari-mutual net receipts, 90 per cent of which are believed to be accounted for by betting on horseracing.¹⁷²

3.115 The United States contests that the revenues per employee data for various companies provided by Antigua can be used to estimate Antigua's remote gambling revenues, since the sources of this data were not included with Antigua's answers¹⁷³ and since the range of values presented is large and refers to "leading remote gaming companies", supposedly at the exclusion of less successful online and gaming companies that would have revenues per employee at much lower values.¹⁷⁴

3.116 The United States concedes that the data provided by Antigua on the number of employees engaged in offering online gambling services appear less unrealistic than its revenue predictions on the basis of GBGC data. It also notes that employment figures are significantly lower than Antigua's previously stated number of 3000 employees. The United States submits that this employment data is more useful than Antigua's revenue estimates in assessing the level of nullification and impairment. The United States notes that according to Antigua, in the last five full calendar years (2002-2006), Antigua had an average of about 450 employees, although it is not known how many worked on gambling tied to United States citizens, or on a particular gambling activity, such as horse racing.¹⁷⁵ However, the United States also observes that the numbers of employees increased between 2002 and 2005, while during the same time period the GBGC breakout for Antigua's remote gambling revenues shows a decline, calling further into question the accuracy of the GBGC figures.¹⁷⁶

(ii) *Analysis by the Arbitrator*

3.117 We think that the provision of information from Antigua's remote gambling operators directly, in particular financial statements, would certainly have been helpful. However, it is not entirely clear whether the financial reporting requirements by Antiguan remote gambling operators allow for this information to be retained within the government. Antigua only states that these companies have "to provide the Directorate, at least once per year, *access to and examination of the books, accounts and financial statements*" (emphasis added).¹⁷⁷ We consider that we are not in a position to pass judgement on the use of that sort of information in criminal proceedings in the United States in the past, nor do we need to. Nevertheless, we reckon that it should be possible to produce some kind of summary information even from a limited or informal information base on those companies that also takes account of the sensitivities involved in relation to company-specific data. While Antigua has not provided this type of information, we recognize that it has made efforts to substantiate the order of magnitude of the GBGC data in other ways. In particular, we appreciate the collection of data on revenues per employment from publicly listed companies and the provision of historical employment data in the Antiguan remote gambling sector directly from Antigua's Directorate of Gaming. We note quite some variation in the data between companies and years. Although this information may only allow for a rough estimation of average revenues, it provides at least for another reality check of the GBGC data. We also note that the United States considers the

¹⁷¹ US response to questions Nos. 1 and 24 by the Arbitrator, paras. 3 and 30.

¹⁷² US response to question No. 24 by the Arbitrator, para. 31.

¹⁷³ However, the US acknowledges that total annual revenue data of publicly listed gambling operators based in the UK is available on those companies' websites, but says it is not aware of a source of data for employment figures, or for a breakdown by activity or country. US answer to question No. 22 by the Arbitrator, para. 24.

¹⁷⁴ US comments on Antigua response to question No. 22 by the Arbitrator, paras. 51-53.

¹⁷⁵ US comments on Antigua responses to questions by the Arbitrator, paras. 24-25.

¹⁷⁶ US comments on Antigua response to question No. 21 by the Arbitrator, para. 50.

¹⁷⁷ Antigua response to question No. 28 by the Arbitrator, pages 27-28.

employment data by Antigua to be "less unrealistic" than the GBGC revenue data and "more useful" in assessing the level of nullification and impairment.¹⁷⁸

3.118 We also note that both Antigua and the United States have provided figures that can be used to model the development of the US market, which we deem to be an important element in the construction of a more realistic counterfactual.

(f) Application of a multiplier to the remote gambling revenue data

(i) *Arguments by the parties*

3.119 The United States holds that there is no basis under the DSU for "multiplying" trade effects by a factor to reflect other economic effects. Moreover, it observes that the purpose of a 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. 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 or impairment of GATS benefits. Moreover, the United States notes that Antigua cannot reconcile (1) its argument that gambling revenue has a 40 per cent carryover effect on the Antiguan economy (as suggested by the multiplier it proposes), (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. Even if direct gambling revenue were under-reported, the United States argues that 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.¹⁷⁹

3.120 The United States also notes that prior arbitrations under Article 22.6 of the DSU calculated the level of nullification and impairment of the benefit under the covered agreement and not some broader measure of overall economic impact of non-compliance.¹⁸⁰ It observes that the equivalence standard under Article 22.6 of the DSU would not be respected if just the level of nullification and impairment was increased by a multiplier. It points to Article 22.3 of the DSU (which sets out the principles to be followed in determining the sector or agreement under which retaliation is to be sought) as the appropriate place for a consideration of broader economic elements, and sees no legal basis for this being done in the context of calculating the level of nullification or impairment under Article 22.6 of the DSU.¹⁸¹

3.121 Antigua assumes that revenue losses by the Antiguan remote gambling industry led to additional losses in other sectors of the economy, lower income and government revenues. It holds that these "indirect" effects need to be taken into account on top of the direct trade effects in calculating the total level of nullification and impairment and that multipliers are frequently used in economic modelling in that regard.¹⁸²

3.122 Antigua agrees that there is no precedent in which arbitrators considered a multiplier, but declines that it was not allowable under the DSU.¹⁸³ It also notes that the Arbitrator in *EC – Bananas III (US)* contemplated indirect consequences, even if these ultimately were not taken into

¹⁷⁸ US comments on Antigua responses to questions by the Arbitrator, paras. 24-25.

¹⁷⁹ US comments on Antigua response to question No. 46 by the Arbitrator, paras. 65-66.

¹⁸⁰ US written submission, para. 45.

¹⁸¹ US written submission, para. 45.

¹⁸² Antigua's Methodology Paper, pages 8-9.

¹⁸³ Antigua's written submission, para. 122.

account, and that multiplier effects were an accepted feature of economic modelling.¹⁸⁴ Antigua adds that just because multipliers have not been used in past arbitrations, this should not mean that multipliers cannot or should not be used. It also states that Antigua's status as a developing country Member should be relevant in this regard.¹⁸⁵

(ii) *Analysis by the Arbitrator*

3.123 We observe that it is one of the rare points of agreement between the parties to calculate the level of nullification or impairment on the basis of the difference between actual and counterfactual Antiguan exports of remote gambling services to the United States that is due to the non-compliance by the defending party. In other words, parties agree on the use of a "trade effects" approach that has also been used in previous arbitrations. In addition, we realize that the use of a multiplier reflecting the aggregate change in output for a unit change in demand would be contrary to some of Antigua's other arguments concerning the limited impact of remote gambling revenues on GDP.

(g) Point in time, when US measures began to affect Antigua's exports of remote gambling services to the United States and loss of market share to competitors

(i) *Arguments by the parties*

3.124 The United States notes that Antigua bases its estimates, at least in part, on gambling exports for the years 2001-2002, which it argues were the high point of Antigua's exports of gambling services to the US. The United States agrees with Antigua that historical levels of internet gambling services are indicative of the level of nullification or impairment. It explains that although remote gambling has at all relevant times been unlawful under US Federal criminal statutes, enforcement of those federal statutes against foreign operators offering services over the internet has been difficult. It concludes that 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.¹⁸⁶ More precisely, 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".¹⁸⁷ However, the United States believes that any other effects that have influenced Antigua's exports of remote gambling services to the United States would need to be factored out from the calculation of the level of nullification and impairment. In particular, the United States believes that "any decline from 2001 levels would also be due to increasing competition from other gambling operators".¹⁸⁸

3.125 Concerning the "turning point" in time, in its answers to questions by the Arbitrator, the United States further elaborates that it agrees that that historical levels are somewhat instructive as to the level of nullification and impairment resulting from United States non-compliance with the DSB's recommendations and rulings, but that it disagrees that the US measures first began to affect Antigua's exports in 2001-2002 and that this is reflected in the GBGC data.¹⁸⁹ The United States notes that its measures have remained unchanged throughout the relevant time period.¹⁹⁰ The United States notes in this regard that the Cohen prosecution and conviction took place in 1998 and 2000 respectively and that operators from other jurisdictions increased their operations in the US market after 2001, showing that the criminal laws cannot be the cause of any absolute or relative loss of Antiguan market share in the provision of gambling services to US consumers. The United States notes that Antigua's own data

¹⁸⁴ Antigua's written submission, para. 123-124.

¹⁸⁵ Antigua response to question No. 46(a) by the Arbitrator, pages 37-38.

¹⁸⁶ US written submission, para. 47.

¹⁸⁷ US written submission, para. 48.

¹⁸⁸ US written submission, paras. 42-43.

¹⁸⁹ US response to question No. 42 by the Arbitrator, paras. 55-56.

¹⁹⁰ US response to question No. 45 by the Arbitrator, para. 57.

shows a growth in exports to the United States by operators in other jurisdictions, showing the historical trend that Antigua is losing market share, and submits that Antigua's contentions about the changing United States enforcement environment were developed after the fact, in order to match the GBGC figures.¹⁹¹

3.126 Concerning other factors, notably competitors from other countries, the United States is of the opinion that US measures cannot be held responsible for Antigua's loss of market share (especially on a worldwide scale), since US enforcement measures would have affected all providers in the United States market and not only Antigua.¹⁹² In addition, the United States refers to the observation in Antigua's methodology paper that the Antiguan Government itself enacted stricter regulations in mid-2001¹⁹³, although Antigua claims that these regulations were enacted as a result of United States pressure.¹⁹⁴

3.127 The United States then moves on to discuss other factors that may be responsible for Antigua's drop in global market share and should not be attributed to US measures, notably low market entry barriers to internet gambling and the ensuing growth in competition from operators in other locations.¹⁹⁵ According to the US, Antigua has not provided any evidence that its remote gaming industry possesses particular attributes that might place its operators at an advantage as compared to competitors in other countries.¹⁹⁶ It concludes that if internet gambling is a growing trend, as asserted by Antigua, Antigua would continue to lose market share to other nations.¹⁹⁷ More specifically regarding the United States market, Antigua would face competition also from domestic providers, were the United States to legalize internet gambling. In contrast, up to the present, US criminal laws banning remote gambling have been applied rigidly to operators located in the United States while foreign operators have remained outside the reach of United States criminal laws.¹⁹⁸

3.128 The United States observes that Antigua's own data indicates that it has lost market share to gambling service suppliers from other countries.¹⁹⁹ Using the GBGC data (May 2007 release)²⁰⁰ the United States points to two time series showing Antigua's position relative to suppliers from other countries: First, the United States observes that Antigua's gambling revenues increased until 2001 and then declined, while world revenues from North America ("online gross gambling yield by player location") increased continually. According to the United States this implies that non-Antiguan suppliers have been entering the United States market, and doing quite well.²⁰¹ Second, the United States notes that the country-specific GBGC data provided by Antigua, including the data on Costa Rica, Curaçao and Malta, show increasing world revenues for all of these countries with the exception of Antigua.²⁰² The same is true for the South/Central America and Caribbean group in the regional breakdown of remote gambling revenues by operator location, which shows a smooth rising trend. The United States interprets this trend as evidence that the Antigua-specific allocations for 2001-2002 are wrong, that gambling operators diversified their operations by moving servers to other locations in the region and/or that new gambling operators started up in the region. Since the US measures apply equally to operators from Antigua and from other countries, including operators elsewhere in the

¹⁹¹ US response to question No. 42 by the Arbitrator, paras. 55-56, making reference to Antigua's written submission: Exhibit AB-13, page 1.

¹⁹² US written submission, para. 42; and US response to question No. 48 by the Arbitrator: para. 59.

¹⁹³ US written submission, para. 42.

¹⁹⁴ Antigua's Methodology Paper, page 3.

¹⁹⁵ US written submission, para. 43.

¹⁹⁶ US written submission, para. 43.

¹⁹⁷ US written submission, paras. 42-43.

¹⁹⁸ US written submission: para. 44.

¹⁹⁹ US response to question 23 by the Arbitrator, para. 25.

²⁰⁰ Antigua written submission: Exhibit 2; and Antigua Methodology Paper: Exhibit AB-9.

²⁰¹ US response to questions Nos. 23 and 36 by the Arbitrator, paras. 27 and 47.

²⁰² US response to question No. 23 by the Arbitrator, para. 28.

South/Central America and Caribbean region, the United States concludes that either Antigua never had as large a market share as it asserts, or (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. The United States also observes that, according to GBGC, both the sports and non-sports betting have been growing in the United States market; hence, the data does not support Antigua's only explanation of how United States enforcement measures supposedly harmed Antiguan operators more than other operators, namely that Antigua focuses on sports betting, as opposed to Internet poker. The United States also notes that there is no reason to believe that the 2002 United States enforcement actions involving attempts to block credit card and PayPal payments to overseas 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.²⁰³

3.129 The United States concludes that Antigua has presented no convincing reason to believe that United States actions could have such a disproportionate and unique effect on gambling service providers in Antigua as opposed to other gambling service providers located in other markets. The United States cites Antigua as admitting that its initially high market share was because it was an early entrant in the market,²⁰⁴ and that its initial market share eroded over time.²⁰⁵ The United States concludes that there is no information to support the conclusion that United States actions had any effect on Antigua's market share, nor is there reason to believe that Antigua would benefit uniquely from any future change in United States regulations.²⁰⁶

3.130 Concerning timing, Antigua maintains that historical levels of remote gaming services exports by Antigua to the United States prior to 2002 are instructive as to the levels that might exist in the absence of the inconsistent measures.²⁰⁷ According to Antigua, 2002 is the year when measurable damages began to accrue, which is why it does not propose any "lost revenues" for 2001 and earlier.²⁰⁸ Antigua also explains that for its constant market share model it did not use the 2001 value of 59 per cent (but the 2003 share of 21 per cent), since it did not believe that this was a realistic market share number, given the growth in global remote gaming generally and, in particular, the fact that much of that growth was occurring in areas such as poker that were not the major market segment served by Antigua.²⁰⁹

3.131 Concerning other factors causing the decline in Antigua's exports of remote gambling services to the United States, Antigua dismisses the United States arguments. While it admits that it was inevitable that it lost some market share globally as the result of the growth of poker on the internet and the growth of remote gaming in other parts of the world, Antigua is primarily a United States facing, sports betting jurisdiction and therefore more severely affected by the US measures than operators in other locations.²¹⁰ Antigua claims that the three highest profile prosecutions of foreign remote gaming brought by United States authorities in the past few years have been brought against operators with Antiguan licensed subsidiaries and substantial Antiguan operations, whereas to date the United States has not prosecuted any remote gaming operators licensed and located in European jurisdictions, such as Gibraltar, Malta and Guernsey, nor has it prosecuted any operators licensed by the Khanawake Mohawk Tribe of Canada. It goes on to state that the 2001-2003 time frame saw a

²⁰³ US comments on Antigua responses to questions by the Arbitrator, paras. 20-21.

²⁰⁴ Antigua written submission, para. 115.

²⁰⁵ Antigua written submission, Exhibit 2.

²⁰⁶ US response to question No. 23 by the Arbitrator, para. 29.

²⁰⁷ Antigua's Methodology Paper, pages 2-3.

²⁰⁸ Antigua response to question No. 42 by the Arbitrator, page 33.

²⁰⁹ Antigua response to the question No. 43 by the Arbitrator, pages 33-34.

²¹⁰ Antigua's written submission, paras. 117-119; and Antigua comments on responses by the United States, page 16-17.

large number of operators move from Antigua to European jurisdictions that were perceived as being less likely targets of United States efforts than Antigua.²¹¹

3.132 Antigua provides a time line of actions by the United States and other major events²¹² that are each said to have an adverse impact on the Antiguan remote gaming industry.²¹³ As an early entrant in the remote gambling market, Antigua professes its confidence that in the absence of the US measures, it would have stood a good chance of successfully competing against potential new entrants. Antigua attributes its competitive edge to innovative product offerings, experience and particular knowledge of the American sports betting market, location in a time zone convenient to US consumers and tax advantages allowing for larger operating margins. Antigua is convinced that its competitive advantage would also play out against potential US competitors.²¹⁴ It recommends abstaining from speculations about new entrants and rely on historical information.²¹⁵

3.133 Antigua concludes that the decline in the Antiguan industry is solely attributable to the United States actions and hat no adjustments should be made to the counterfactual level of exports for any other possible factors, including the introduction of "stricter regulations" by Antigua itself in 2001, which it claims came as a result of direct pressure from the United States.²¹⁶ It holds that its fixed revenue and constant growth models produce conservative estimates of counterfactual exports and that its constant market share model already reflects the loss of overall market share that Antigua experienced due to factors perhaps unrelated - or less related - to the activities of the United States government.²¹⁷

(ii) *Analysis by the Arbitrator*

3.134 We note that both Antigua (in two out of three models) and the United States in its alternative approach (described in section III.D.2(a) below) use the year 2001 as the point in time after which the US measures began to affect Antiguan export of remote gambling services to the United States. Also, we do not see any concrete proposal by the parties for an alternative "turning point". While the United States emphasizes that its measures have been in place for a long time before that date, it also acknowledges that enforcement has been difficult against foreign remote gambling providers and that it "can accept that exports in 2001-2002 are somewhat instructive regarding the (unlawful) market in the United States for remote gambling services".²¹⁸

3.135 Nevertheless, as foreshadowed above in section III.D.1(d), we must take into account that other factors, over time, in particular an increase of competition, may have affected Antigua's 2001 levels of remote gambling revenues even in the absence of the US measures. In order to not to falsely attribute such declines in revenue to the US measures, we are mindful of the fact that the US measures, in particular the enforcement actions involving the prohibition for credit card companies and systems such as PayPal to make payments to overseas gambling operators, are capable of affecting all providers, and not only those from a particular country of origin. As far as the risk of criminal proceedings is concerned, all remote gambling operators *a priori* seem to be an equally likely target, even though a number of Antiguan operations may have been subject to prosecution in the past.

²¹¹ Antigua response to questions Nos. 43 and 44 by the Arbitrator, pages 33-35; and Antigua comments on responses by the US, page 16-17.

²¹² Antigua's written submission, Exhibit AB-13.

²¹³ Antigua's written submission, para. 114.

²¹⁴ Antigua's written submission, paras. 115-116.

²¹⁵ Antigua's written submission, paras. 120-121.

²¹⁶ Antigua methodology paper, pages 2-3; and Antigua response to question No. 44 by the Arbitrator, pages 34-35.

²¹⁷ Antigua response to question No. 44 by the Arbitrator, pages 34-35.

²¹⁸ US written submission, paras. 47-48.

3.136 In particular, we recognize that the GBGC data shows that world revenue from North America has continued to rise and that the individual countries from South/Central America and the Caribbean as well as the region as a whole have also experienced further increases in their overall revenues. It seems fair to us assume that countries in the region (as opposed to say European providers) are not unlikely to be actual competitors of Antigua in the United States market, since they benefit from some of the same advantages (possibly more similar cost structures, time zones and the like). We see no reason to believe that these countries would be affected differently by the US measures than Antigua. Hence, part of Antigua's loss may be a reflection of its loss in competitiveness vis-à-vis its competitors and their increase in revenues at Antigua's expense. In the light of this, we do not think it would be appropriate for us to follow Antigua's proposition that its revenue loss is entirely due to the US measures and that no adjustments to reflect relative shifts in competitiveness need to be made.

3.137 But we do not believe either that Antigua's loss in market share has nothing to do with the US measures and is entirely due to new entrants and competitors. While Antigua might have lost market share to competition in any event, it may have seen its revenues decline by more than it would have in the absence of the US measure. In trying to disentangle these impacts, we find it less helpful to look at Antigua's global market share, as the United States does in its alternative approach summarized below in section III.D.2(a), which may be affected by developments in other markets and gambling activities, in which Antigua is not present, and in relation to providers, against whom Antigua is not actually competing. Instead, as suggested above, we do believe that it is important to consider Antigua's relative position vis-à-vis competitors that are competing in the US market and are likely to be equally affected by the US measure. If this is so, we may not be able to follow either one of the two extreme (all or nothing) approaches proposed by the parties.

3.138 An additional consideration regarding competition needs to be made as a function of the counterfactual scenario chosen. As discussed above in section III.C, Antigua's approach presumes that it would continue to provide remote gambling services under the same conditions it faced in 2001, i.e. in the absence of competition from domestic providers in the US. However, if the cross-border provision of remote gambling services were to be legalized, this would likely apply to both foreign and domestic providers. In the absence of any historical experience, any assumption about how Antigua would fare in such a situation belongs to the realm of pure speculation. As a consequence, Antigua's scenario, which completely disregards the possible entry of domestic competitors, seems clearly deficient to us.²¹⁹

3.139 For the moment, the only evidence we have for a competitive situation to exist that includes domestic providers is in the remote betting market on horseracing. Antigua's observation that its operators do very little business in horse race betting²²⁰, certainly for a range of commercial considerations, could, at least in part, be also related to the intensity of competition in a segment of the market, where domestic and foreign providers already compete with one another.

²¹⁹ As noted in paragraph 3.73 in the separate opinion of one of the arbitrators, the issue of potential domestic competition would need to be taken into account if the counterfactual proposed by Antigua was followed. Therefore, if the level of nullification or impairment were to be calculated under the counterfactual proposed by Antigua, the Arbitrator notes that further adjustments would need to be made in that regard, in addition to the ones we undertake below in section III.D.3 to reflect foreign competition and domestic demand.

²²⁰ Antigua response to question No. 10 by the Arbitrator, page 15.

(h) Comparison of actual and counterfactual exports of Antigua's remote gambling services to the United States

(i) *Arguments by the parties*

3.140 The United States agrees with Antigua on the basic concept that the difference between the actual amount of exports that are affected by the WTO-inconsistent measure and the amount of exports in a "counterfactual" scenario, whereby the offending party has brought the WTO inconsistent measure into conformity within the reasonable period of time, typically represents the level of nullification or impairment.²²¹ From parties' original written submissions, hence, it appears that there is agreement that the appropriate point in time for making the comparison between the actual level of exports and the calculated counterfactual is the end of the reasonable period of time, in this case 3 April 2006.²²² However, the United States later states that the precise point in time in that regard should be the date of referral of the matter to arbitration, as this was the date when the terms of reference of the arbitrator were established.²²³

3.141 Concerning Antigua's projection of industry revenues into the future (2012, until which date GBGC industry projections are available), averaging and discounting to the year 2007²²⁴, the United States does not directly address this assumption, but refers to the counterfactual as a hypothetical situation in which the responding party brought the WTO-inconsistent measure into conformity *within* the reasonable period of time, which appears to preclude consideration of developments beyond that date.²²⁵

3.142 Antigua further elaborates in this regard that in order to determine the level of nullification or impairment it needs to be determined what the annual prospective Antiguan exports of remote gambling and betting services to the United States would be if the United States had come into compliance on 3 April 2006. Antigua is of the opinion that this is not to say that in developing the counterfactual and coming to a determination of the level of those "annual prospective exports" only information as of that date is to be taken into consideration.²²⁶ At the same time Antigua argues that while the end of the reasonable period of time marks the point at which Antigua's trade loss begins to accrue, this does not mean that the level of Antigua's nullification or impairment should be determined by reference to a "snapshot" of sorts on that date. It argues that a 3 April 2006 "snapshot" would miss the enactment of the UIGEA in October of that year, which Antigua claims has had a massive adverse impact upon the actual amount of revenues that Antiguan operators are able to earn. This is why Antigua proposes to use projections up to the end of 2012. Antigua argues that using historical data combined with reasoned, professional estimates of developments in the market in the foreseeable future and averaging these figures is a reasonable and generally accepted method for addressing anomalies that might arise in one year as opposed to another. It also notes that averaging has played a role in several previous arbitrations.²²⁷

(ii) *Analysis by the Arbitrator*

3.143 We understand it to be part of our task to determine what the level of Antiguan exports of remote gambling services to the United States would have been had the United States come into compliance within the reasonable period of time, i.e. by 3 April 2006. As such, that date (or the time

²²¹ US written submission, para. 14; Antigua's Methodology Paper, page 3.

²²² US written submission, para. 14; Antigua's methodology paper, page 6.

²²³ US response to question No. 41 by the Arbitrator, para. 54.

²²⁴ Antigua's Methodology Paper, page 8.

²²⁵ US written submission, para. 14.

²²⁶ Antigua response to question No. 41 by the Arbitrator, page 33.

²²⁷ Antigua response to question No. 47 by the Arbitrator, pages 38-39.

period coming closest to that date for which statistical information is available) seems to impose itself as the relevant point in time at which a comparison of actual and counterfactual exports is undertaken. Both Antigua and the United States are doing this in their model, projecting counterfactual levels of exports to the year 2006, since no observations at shorter intervals (quarterly, monthly) appear to be available.

3.144 We do not think that forecasts *beyond* that date should have an impact on the counterfactual level of Antiguan exports of remote gambling services to the United States that would have existed *at* that date in the absence of the United States measures. If forecasts of future exports were to be taken into account (and these would be assumed to be larger or even growing compared to historical values), the discounted and averaged value calculated in this manner may well be larger than the level that would actually have been observed had the United States come into compliance at the end of the reasonable period of time. Such a procedure may violate the equivalence standard we are mandated to pursue. In particular, different time horizons would result in different levels of nullification or impairment that bear no relation to questions of actual compliance.

(i) Concluding remarks

3.145 The United States challenges most of Antigua's proposed methodology, notably its counterfactual and underlying data. It also disagrees with key modelling assumptions, in particular the attribution of all developments concerning Antigua's actual remote gambling revenues to US measures and the use of an economy-wide multiplier. With these fundamental concerns, the United States does not go into further detail on some calculations (for instance regarding the discount rate used by Antigua) nor does it address the question whether one of the models proposed by Antigua was preferable over another. Instead, it proposes an alternative counterfactual as well as modelling approach and calculations altogether.

2. Review of the approach proposed by the United States

(a) Description of the approach proposed by the United States

3.146 As discussed above, the United States contests the counterfactual proposed by Antigua, namely a measure that would allow for all types of cross-border gambling services.²²⁸ It holds that one means to come into compliance would be for the United States to ensure that domestic service suppliers are also prohibited from supplying remote betting services on horseracing as the area where a discriminatory treatment between domestic and foreign service suppliers was found by the compliance panel.²²⁹ The United States observes that in the latter case the level of nullification and impairment would be zero, but does not pursue this approach as an alternative to Antigua's calculation.²³⁰ Instead, it recalls that the DSB recommendations and rulings were addressed to the discriminatory treatment of gambling on horseracing. From that it concludes that a counterfactual scenario could be taken as a basis for the calculation of the level of suspension of concessions where "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*".²³¹ On the basis of its proposed counterfactual, the United States seeks to establish what the level of exports from Antigua to the United States of remote betting services on horseracing would be absent any discriminatory treatment.

²²⁸ US written submission, para. 19.

²²⁹ US written submission, para. 15.

²³⁰ US written submission, paras. 15 and 17.

²³¹ US written submission, para. 19, emphasis added.

3.147 For export data by Antigua, the United States relies on publicly available services trade statistics by the ECCB, IMF and WTO. Finding that the respective statistics from these three sources are of a similar magnitude, the United States takes as a starting point for its own calculations the WTO figure of Antigua's "other commercial services" exports in 2001 (\$47 million), which it sees as "a hard cap on the absolute highest figure of Antigua's gambling service exports in 2001"²³², since it both comprises exports to the world (not just the United States) and more than just gambling services exports.²³³

3.148 The United States then seeks to determine the share of Antigua's remote gambling services exports on horseracing. In the absence of government statistics on remote gambling in the United States (both overall and on breakdowns by type of gambling activity), the United States supplies publicly available government statistics from the website of the Bureau of Economic Analysis (US Department of Commerce) on non-remote gambling in the United States showing that horserace gambling accounts for no more than 7 per cent of total gambling in each of the years 2003 to 2006.²³⁴ It then applies the 7 per cent share to the US\$47 million of Antigua's other commercial services exports to arrive at US\$3.3 million worth of exports. It then corrects this figure for the impact of competition on Antigua's export revenues by reducing it in the same proportion as the fall in Antigua's share of global remote gaming revenue according to the GBGC report²³⁵, i.e. by multiplying it with the term 7 per cent (in 2006) over 50 per cent (in 2001), to arrive at US\$462,000 or approximately US\$500,000. The United States concludes that the latter number constitutes the annual level of nullification or impairment, with the US\$3.3 million figure serving as an upper limit.²³⁶

3.149 Besides its earlier arguments that the United States has failed to overturn the presumptions established by Antigua's proposed methodology on any point²³⁷, Antigua provides specific arguments dismissing the methodology proposed by the US, in particular on the grounds of the underlying counterfactual and data used. In the following, we will review the arguments by the parties on the major concerns raised in relation to the approach proposed by the US.

(b) Antigua's exports of remote gambling services on horseracing

(i) *Arguments by the parties*

3.150 As discussed above, Antigua challenges the counterfactual presumed by the United States on a number of grounds.²³⁸ Therefore, it initially has not argued for a different estimate of the share of betting on horseracing in Antigua's overall exports of remote gambling services, since it considered that share to be of no relevance to this Arbitration. In addition, it notes that if only horseracing was important, the United States would not seek to withdraw its relevant GATS commitments.²³⁹ Antigua also believes that its operators do very little business in horse race betting, but says it does not possess

²³² US written submission, para 49.

²³³ To further shore up that number the US notes that Antigua, in its recourse to Article 22.2, had stated that its "gambling and betting services sector accounted for more than ten percent of the gross domestic product of Antigua and Barbuda" and that this share, on the basis of ECCB GDP information, resulted in gambling service exports to the entire world in 2001 of US\$ 68 million (US written submission, para. 50). This calculation appears to again confuse exports with GDP as a value added concept.

²³⁴ US written submission, paras. 25 and 51; Exhibit US-1.

²³⁵ Antigua's MP: Exhibit AB-2.

²³⁶ US written submission, para 53.

²³⁷ Antigua written submission, para. 71.

²³⁸ Antigua's written submission, paras. 77-94.

²³⁹ Antigua comments on answers by the US, page 15.

precise statistics for Antigua operators.²⁴⁰ It notes that GBGC does not provide a breakdown of Antigua's remote gambling revenues by type of gambling activity.²⁴¹

3.151 Nevertheless, Antigua seeks to provide alternative statistics to the ones proposed by the United States that may give some indication of the share of betting on horseracing in overall gambling activities. For one, Antigua makes reference to a 2002 report on remote gambling by the journal "International Gaming & Wagering Business" mentioning a 22 per cent share of horse racing in the American market.²⁴² Antigua also provides CCA's annual breakdown by type of gambling activity for the years 1995-1997 and 1999-2006 on United States Gross Annual Gaming Revenues excluding remote gambling revenues, published in various volumes of "International Gaming & Wagering."²⁴³ If pari-mutuel betting is supposed to mostly relate to betting on horse races, as conjectured by the US²⁴⁴, revenues in that category almost stay constant over those years with the overall market more than doubling. This results in a declining share from about 8 per cent in 1995 to 3 per cent in 2006. Antigua also provides data from GBGC's Quarterly eGaming Statistics Report (May and October 2007 releases) on annual remote gambling revenues broken down by countries, including the US, and by four types of gambling activities, including sportsbetting which may be presumed to comprise betting on horse racing.²⁴⁵ GBGC data also includes time series data for the world and several geographical regions providing a breakdown of gambling revenues from online and offline betting on horseracing combined.²⁴⁶

3.152 The United States defends the use of its proposed share considering it to be reasonable to assume that there is a correspondence between the levels of remote and non-remote versions of the same types of gambling. It also notes that Antigua, in its written submission, has not argued for a different estimate of the ratio between horserace remote gambling and all remote gambling.²⁴⁷ According to the US, the 7 per cent ratio can then be used as a reasonable estimate of Antigua's ratio of horserace remote gambling exports to total remote gambling exports.²⁴⁸

3.153 The United States also states that absent information by Antigua based on consultation with its own operators, an allocation based on non-remote gambling in the United States provides the best basis for an estimate.²⁴⁹ It also states that the allocation of 22 per cent of the total amount of remote wagers placed by customers in the United States on horse races quoted by Antigua from a 2002 report published by "International Gaming & Wagering Business"²⁵⁰ should not be relied upon in this proceeding, since a copy of this report was not provided by Antigua for comments as to its contents.²⁵¹ It also dismisses the GBGC data, which only provides global figures of remote and non-remote gambling revenues from horseracing.²⁵²

²⁴⁰ Antigua response to question No. 10 by the Arbitrator, page 15.

²⁴¹ Antigua response to questions Nos. 15 and 18 by the Arbitrator, pages 15-16.

²⁴² Antigua response to questions Nos. 15 and 18 by the Arbitrator, pages 15-16.

²⁴³ Antigua response to question No. 24 by the Arbitrator, pages 20-23.

²⁴⁴ US written submission, Exhibit US-1.

²⁴⁵ Antigua response to question No. 25 by the Arbitrator, pages 23-25 and Exhibits AB-14(1) and AB-14(2).

²⁴⁶ Antigua response to questions by the Arbitrator, Exhibits AB-14(1) and AB-14(2).

²⁴⁷ US response to question No. 16 by the Arbitrator, para. 22.

²⁴⁸ US response to question No. 17 by the Arbitrator, para. 23.

²⁴⁹ US comment on Antigua response to question No. 10 by the Arbitrator, para. 47.

²⁵⁰ Antigua response to question No. 15 by the Arbitrator, page 17.

²⁵¹ US comment on Antigua response to question No. 15 by the Arbitrator, para. 48.

²⁵² US response to question No. 36 by the Arbitrator, para. 44.

(ii) *Analysis by the Arbitrator*

3.154 We note that all of the proposed figures for the share of Antigua's exports of betting services on horseracing to the United States are quite approximate, albeit in different respects. One weakness of all of the proxies is that they refer to consumption as opposed to production shares. Hence, they denote the distribution of shares among different gambling activities demanded, which may be different from the composition of Antigua's remote gambling services supplied to the US.

3.155 The 7 per cent share from the US Bureau of Economic Analysis has the advantage of referring to the US market (and not to a larger geographical region), but covers the non-remote market only. It is not unreasonable to assume that certain gambling activities are more or less enjoyable than others depending on whether they are carried out in situ or remotely. Hence, the shares of different gambling activities may vary in the remote and non-remote market. The shares from CCA (referring also to non-remote pari-mutuel betting, i.e. principally betting on horseracing, in the United States) fall in the same range of figures, at least for the earlier years.

3.156 The GBGC data contains figures on the remote market in the US, but only provides rougher aggregates of gambling activities, notably sportsbetting, which supposedly includes betting on horseracing. Alternatively, GBGC provides data on betting on horseracing combining the remote and non-remote market, but this data is only available at the regional level. Finally, Antigua cites a 22 per cent share of remote betting on horseracing according to a journal article. However, that number seems somewhat out of line with the GBGC data and we are unaware of any particular popularity of horseracing in the United States compared to other countries that would justify a substantial difference in these shares.

3.157 It seems that the best approximations under the circumstances are the Bureau of Economic Analysis share for the non-remote market on betting in horseracing in the United States or the GBGC figures, which have the advantage of referring to the remote (or at least the combined remote and non-remote) market, but employ larger aggregates in terms geographical regions or gambling activities.

(c) ECCB/IMF/WTO data on Antigua's services exports and alternative revenue estimates

(i) *Arguments by the parties*

3.158 Antigua notes that IMF and WTO data are based upon information reported by the ECCB.²⁵³ It states that the ECCB, by its own admission, does not capture the revenues or expenditures of the Antiguan remote gambling industry in its entirety. In that regard, it recalls the ECCB statement in connection with its overall data gathering that a major problem has been weak survey response.²⁵⁴ Antigua further explains that there is no legal obligation on behalf of the remote gaming operators (or any other private component of the Antiguan economy for that matter) to answer ECCB surveys or respond to ECCB enquiries.²⁵⁵ Antigua expresses the view that trying to extrapolate remote gaming revenues from flawed GDP data cannot be done in any meaningful manner.²⁵⁶

²⁵³ Antigua's written submission, para. 102; Exhibit AB-11.

²⁵⁴ Antigua comments on answers by the US, page 23; and Antigua's written submission, para. 102; Exhibit AB-12. More precisely, the letter by ECCB states that "the Statistics Act of Antigua and Barbuda cannot enforce an obligation on these entities to provide data". Earlier, Antigua has already explained in its Methodology Paper, based on a telephone discussion with ECCB staff, that there had been "a low response rate by remote gaming operators to GDP-related surveys" and the few that had responded to the GDP-related surveys "have not often reported a key component of GDP – profits" (footnote 5 to the Methodology Paper). Antigua methodology paper, page 2, footnote 5.

²⁵⁵ Antigua response the question No. 39 by the Arbitrator, page 32.

²⁵⁶ Antigua response the question No. 38 by the Arbitrator, page 32.

3.159 Antigua also notes that the alternative data proposed by the United States is only supported by ECCB figures that does not include the relevant data (remote gambling revenues), while the data it uses in its proposed approach (GBGC) data is supported by several sources.²⁵⁷

3.160 The United States maintains that the IMF and WTO remain the best available source of data on the level of Antigua's services exports and claims that Antigua has not established that IMF and WTO data do not include export revenues associated with Antiguan gambling operators. It observes that, at most, Antigua has shown that the ECCB was unable to include in its figures data on Antiguan gambling operators, because Antigua has chosen to shield those companies from any disclosure requirements.²⁵⁸ The United States also observes that the ECCB in its letter to Antigua²⁵⁹ only states that the GDP figures for Antigua do not include revenues earned by operators who are licensed to engage in interactive wagering and gaming, but that the ECCB does not comment on whether these revenues were included or not in its balance of payments information.²⁶⁰ Finally, the United States holds that if no direct data is available on Antigua's exports of gambling services, then this would also include the GBGC data. The United States also notes that in none of the IMF Annual Article IV consultations with Antigua, nor in the WTO Trade Policy Reviews has the service trade data in the balance of payments been questioned.²⁶¹

3.161 To provide further support for the order of magnitude of its calculations, the United States proposes three other ways to estimate Antigua's exports of remote gambling services to the United States on the basis of figures that Antigua has mentioned itself.

3.162 First, the United States takes the statement by Antigua in its request pursuant to Article 22.2, namely that its "gambling and betting sector accounted for more than ten per cent of the gross domestic product of Antigua and Barbuda", to be about the relative sizes of Antigua's exports to its GDP, concluding that Antigua's gambling services exports to the entire world must have been on the order of \$68 million, if the GDP of 2001 is taken as a basis for that calculation.²⁶²

3.163 Second, the United States proposes to take the US\$15.8 million figure for wages and salaries earned in the Antiguan internet gambling industry in 2001, as per Antigua's statement in para. 66 of its written submission, as a basis for estimating Antigua's net revenues from remote gambling. Making some assumptions about labour and profit shares, the United States estimates total net revenues to be between US\$136 million and US\$190 million depending on the precise shares chosen, which it calls a reasonable estimate of net revenues based on Antigua's own allegation of salaries of gambling operators.²⁶³ The United States concludes that this type of approach is the only means of determining historical Antiguan gambling revenues that would comport with economic reality.²⁶⁴

3.164 Third, at the oral hearing, the United States observed that the 2007 Trade Policy Review on Antigua and Barbuda, Report by the Secretariat²⁶⁵ stated that interactive wagering and/or gaming operators in Antigua enjoyed the same tax exemptions as offshore financial services companies, with the exception of an income tax of 3 per cent introduced in 2001 by the International Business

²⁵⁷ Antigua comments on answers by the US, page 25.

²⁵⁸ US response to question No. 35 by the Arbitrator, para. 39; and US comments on Antigua responses to questions by the Arbitrator, paras. 31-32.

²⁵⁹ Antigua's written submission, Exhibit AB-12.

²⁶⁰ US response to question No. 36 by the Arbitrator, para. 52.

²⁶¹ US response to question No. 36 by the Arbitrator, para. 52; and US comment on Antigua response to question 39 by the Arbitrator, para. 59.

²⁶² US response to question No. 34 by the Arbitrator, para. 36. See also the discussion above in section III.D.1(d)(i).

²⁶³ US response to question No. 33 by the Arbitrator, para. 35.

²⁶⁴ US response to question No. 35 by the Arbitrator, para. 41.

²⁶⁵ Document WT/TPR/S/190/ATG, 1 October 2007

Corporation (Amendment) Act, 2001. Tax records could then be used to calculate the operators' income, i.e. gross take-in minus payouts to clients on bets. Since the Antigua Government did not provide any comments on the WTO Secretariat report in that regard, this information would need to be assumed to be correct.²⁶⁶

3.165 On the first point, Antigua concedes that it cannot trace the source of that statement, which appear to relate to the year 1999. Antigua believes that the statement could be attributable in whole or in part to (i) basic ignorance within the government as to the true size of the remote gaming industry; (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.²⁶⁷

3.166 Antigua rejects also rejects the second approach as being full of conjecture. It asserts that none of the figures are supported by any data, nor is there any support for the assumptions made and methodology used by the United States.²⁶⁸

3.167 Finally, in regard to income taxation, Antigua counters that the three per cent tax introduced in 2001 was repealed in 2003 and has never been imposed, implemented or collected. It clarifies that the only direct fees paid by remote gaming operators to the Antiguan government are in respect of licensing and related fees in the nature of "flat" fees.²⁶⁹

(ii) *Analysis by the Arbitrator*

3.168 We note that the WTO services trade data on Antigua used by the United States is based on information from the IMF, which in turn has been sourced from the ECCB. The ECCB in its letter confirms that revenues by Antiguan remote gambling operators are not included in its GDP accounting for Antigua. In addition, the IMF, in its letter dated 13 December 2007, confirms that the balance of payments statistics for Antigua and Barbuda are compiled by the ECCB and supplied to the IMF and that the IMF does not conduct any independent data collection of importers or exporters of gambling services. As mentioned above in paragraph 3.109, the IMF further explains that the data supplied by the ECCB does not separately identify remote gambling services, that the aggregate of personal, cultural and recreational services has a zero entry for all year shown in the IMF's 2006 Balance of Payments Yearbook, that survey report forms used by the ECCB do not indicate where gambling services are separately identified or covered, and that the description of balance of payments data compiled by the ECCB and set out in Part III of the Balance of Payments Yearbook does not refer to gambling services. Hence, if we must assume that the available balance-of-payments information on Antigua does not include revenues from remote gambling, it does not seem justified to us to use aggregates, such as "other commercial services", as an upper limit for the calculation of the level of counterfactual exports knowing that this aggregate maybe should, but does not contain the required information. Also, as we mentioned before in paragraph 3.109, in regard to other transactions related to gambling, the IMF concludes that it cannot determine how comprehensively the data are captured in practice, and we have noted that there are no unusual movements in other BOP entries, such as the debit position of various business services in the current account or of investment income, that could, (even vaguely) be related to changes in the use of remote gambling revenues and allow for an educated guess of their size.

3.169 Concerning the three alternative "back-of-the-envelope" calculations mentioned by the United States, we note that the one approach using reported wages and salaries in the Antiguan industry as a

²⁶⁶ US remarks at the oral hearing on 18 October 2007.

²⁶⁷ Antigua response to question No. 37 by the Arbitrator, pages 30-31.

²⁶⁸ Antigua comments on US response to question No. 35 by the Arbitrator, page 22.

²⁶⁹ Antigua response to questions Nos. 28 and 31 by the Arbitrator, pages 28-30.

starting point could have been promising. However, the United States does not provide any evidence on reasonable estimates of the wage share in total earnings. At a minimum, one could have provided information from a range of companies in the remote gambling business on their total revenues from internet gambling as well as on the number of employees and wage costs in that segment. Regarding the other two approaches, the necessary tax information does not appear to exist at all (the relevant legislation on income taxation was repealed shortly after its promulgation and has never been implemented) or, as far as the Antiguan remark on the contribution of gambling to GDP is concerned, it is not clear what is being referred to (apparently there is no documentation underlying the rather vague statement made, nor even a reference to GDP in a particular year).

(d) Loss of market share to competitors

(i) *Arguments by the parties*

3.170 As described above in section III.D.2(a), the United States approach factors in an alleged loss of competitiveness by Antigua using a 7 over 50 per cent factor representing Antigua's global market share in 2006 and 2001 respectively to adjust the calculated level of nullification or impairment downwards. Referring to the arguments by parties portrayed already in section III.D.1(g)(i), we recall that Antigua opposes any adjustment to the counterfactual level of exports for other factors arguing that the revenues losses of its remote gambling industry are entirely attributable to the US actions²⁷⁰, while the United States maintains that Antigua's loss of global market share cannot be attributed to the US measures at all.²⁷¹

(ii) *Analysis by the Arbitrator*

3.171 As explained above in section III.D.1(g)(ii), we consider the issue of competition to be important, but we do not think that it is appropriate to use Antigua's global market share in an attempt to quantify Antigua's loss of competitiveness. Instead, Antigua's competitive position should be gauged in relation to its competitors in the United States market that are likely to be equally affected by the US measures. As stated above, being unable to rely on the way parties have modelled (or not) the issue of competition, we are required to develop our own approach in that regard.

3. Approach of the Arbitrator

3.172 At the outset, we note that the approaches by both parties are radically different in terms of both the underlying data and the methodology used to determine Antigua's counterfactual levels of exports of remote gambling services to the United States. Both parties have made a number of valid arguments criticizing key aspects of the approach proposed by the other party. We feel unable to rely on the approach used by Antigua, as laid out in its methodology paper, in calculating the requested amount of countermeasures. At the same time, the approach put forward by the United States does not represent a convincing alternative either.

3.173 We, therefore, have no choice but to adopt our own approach. In so doing, we feel we are on shaky grounds solidly laid by the parties. The data is surrounded by a degree of uncertainty. For most variables, the data consists of proxies for what needs to be measured, and observations are too few to allow for a proper econometric analysis. Certain data that we have requested and that, to some extent, could have remedied this situation has not been provided. On methodological questions, parties, in a number of respects, have retained their extreme positions and have failed to propose alternative solutions that would have taken into account the exchange of arguments.

²⁷⁰ Antigua Methodology Paper, pages 2-3; and Antigua response to question 44 by the Arbitrator, pages 34-35.

²⁷¹ US response to question No. 23 by the Arbitrator, para. 29.

3.174 Hence, we are left with preciously little information and guidance. Nevertheless, we will attempt to stay as closely to the approaches proposed by parties as possible and to make a maximum use of the limited information base we were given, in particular to carry out some sensitivity analysis in support of our main approach. We will broadly follow the spirit of Antigua's original approach, while making the necessary adjustments in light of our analysis above. We will proceed in four steps. First, we will seek to establish a workable assumption about Antigua's revenues from remote gambling services exports to the United States. Second, we will adjust this time series for the apparent impact of competing suppliers. Third, we will determine a plausible share of betting services on horseracing in Antigua's total revenues from remote gambling. Finally, we will take account of developments in US demand for gambling services on horseracing.

(a) Antigua's exports of remote gambling services to the United States

3.175 In view of the non-reporting of remote gambling services data by Antigua and the consequent non-inclusion of such information in the relevant categories of the services trade statistics compiled by the ECCB/IMF/WTO, we are left with no real alternative to the GBGC data for a time series of Antigua's revenues from remote gambling. We have to assume that such revenues indeed constitute exports, i.e. that the domestic market in Antigua is negligible and that the allocation of revenues to various jurisdiction has been done according to the actual location of operations. On the basis of some of the additional information provided, we can check whether the order of magnitude of the GBGC data is not out of line with other statistics. Notably, we will calculate an average of revenues per employee using the public company data provided by Antigua. Another interesting point of comparison would have been an estimation of total revenues on the basis of the 2001 wage bill in Antigua's remote gambling sector, but, unfortunately, we were not provided with any evidence as to the average share of wages in total revenues.

(i) *GBGC data*

3.176 We note that the GBGC data on Antigua's annual remote gambling revenues for the years 1999-2006 from the October 2007 release of the Quarterly eGaming Statistics Report has been significantly revised downwards, especially for the years before 2002, compared to the data of the May release, which was used by Antigua in its methodology paper.²⁷² Given GBGC's own corrections, we feel, of course, compelled to use the most recent update of the data. We also recall that these figures constitute Antigua's global revenues and that no information on bilateral exports of gambling services from Antigua to the United States has been provided. However, Antigua provides some anecdotal evidence that the US share in Antigua's total revenues from remote gambling should be around 80 per cent. In the absence of better information and of any indication about how this share has developed over time, we feel that the most we can do is to reduce the GBGC time series of Antiguan remote gambling revenues by 20 per cent to obtain an estimate of its revenues from the United States and to do at least some justice to our impression that the United States indeed represents the dominant market for Antigua.

3.177 Like Antigua (in two of its three models) and the United States, we take the 2001-2002 period as the turning point when the US measures began to affect Antiguan exports of remote gambling services to the United States. Following the basic idea of Antigua's constant revenue methodology, we calculate the difference between Antigua's 2001 revenues and its actual revenues in each year 2002 to 2006. From these numbers, we determine the average annual revenue loss in the US market for Antigua to be about **\$304 million**, according to the GBGC data.²⁷³

²⁷² Antigua responses to questions by the Arbitrator, Exhibits AB-14(1) and AB-14(2).

²⁷³ See Annex E, Annex Table 1.

3.178 However, only part of this loss is due to the US measures. By the same token, the assumption that Antigua's revenues would have remained constant represents a conservative starting point, since Antigua may well have benefited from an increase in US demand (that may have increased Antigua's revenues or cushioned its loss to competitors compared to the 2001 level). To take account of market developments, Antigua, in its methodology paper, proposes to use either a constant market share or constant growth methodology. We think that the constant market share methodology is not appropriate for a number of reasons. As was said before, Antigua's market share may be influenced by a number of events totally unrelated to the question at hand. Also, it is unlikely that an early mover advantage in a market with seemingly low barriers to entry guarantees a constant market share; to the contrary, as long as "supernormal" profits can be earned in a particular market, one would expect new entry and declining market shares of early entrants, even if revenues continue to grow. Most importantly, the GBGC data itself shows signs of increased competition that do not justify such an assumption. Concerning Antigua's constant growth assumption, we think that its 2001 revenues are the product of extraordinary growth in the early years and, if anything, would grow at a decelerating rather than linear rate, more in line with an S-curve pattern commonly observed in competitive markets. Despite the very limited number of observations, a logistic curve can be fit to the pre-2002 Antiguan revenue data, using the Levenberg-Marquardt algorithm. Its saturation point κ converges to US\$1,411 million. Taking this value as a benchmark, the average annual loss would have been US\$411 million. Yet, we are not going to pursue this approach further preferring instead to model the impact of competition as well as possible increases in United States demand directly.

(ii) *Revenues per employee*

3.179 As stated above, we use the information on revenues per employee from public listed companies as well as the data on employment in the remote gambling sector provided by Antigua to conduct a rough test of the order of magnitude of Antigua's remote gambling revenues.²⁷⁴ The data for seven publicly listed companies (three of which are licensed in Antigua) was taken from annual reports and is available for the years 2001 (for some companies 2002, 2003 or 2004) to 2006. Taking the average over those years gives an annual value of about \$446,000/employee, and \$447,000/employee if extreme values are removed.²⁷⁵ Multiplying the former value by the difference between the number of employees in 2001 and the number of employees in each year 2002 to 2006 (adjusted for the assumed 80 per cent US market share) and taking the average over those years results in an average annual revenue loss of about **\$196 million**.²⁷⁶

3.180 In the following, we will make further adjustments to both of these numbers.

(b) *Competing suppliers*

3.181 Analysing the arguments by parties and the available evidence, we have found that we cannot agree with either extreme position taken by parties that either none or all of Antigua's loss in market share experienced since 2002 is due to its loss of competitiveness vis-à-vis providers from other locations. Using the October release of the GBGC data provided by Antigua, we find it particularly revealing that world revenues increase for both individual countries/territories in the region, namely Costa Rica, Curaçao and the Khanawake Territory, as well as for the South/Central America and Caribbean region as a whole, while the opposite is true for Antigua. As discussed above, it seems reasonable to us to assume that countries in the region compete with Antigua for the US market and *a priori* should be affected similarly by the US measures than Antigua. While these countries also lose global market share between 2002 and 2006, this decline is less pronounced than that for Antigua. In order to operationalize the notion of competition, we interpret the underperformance of Antigua since

²⁷⁴ Antigua response to question No. 21 by the Arbitrator, pages 18-19 and Exhibit AB-17.

²⁷⁵ See Annex E, Annex Table 2.

²⁷⁶ See Annex E, Annex Table 3.

2002 in terms of its contribution to the regional share in global remote gambling revenues as a loss in competitiveness by Antigua compared to its main competitors that it would have suffered even in the absence of the US measures. If this is so, only part of the revenue loss calculated in III.D.3(a)(i) and III.D.3(a)(ii) above should be attributed to the US measures.

3.182 To make the necessary adjustments, we proceed as follows: Assuming that Antigua would have continued to do as well as its Central/South American and Caribbean competitors, its contribution to the region's global market share would have remained constant at the 2001 value. However, its contribution declined each year to reach about half of its 2001 value in 2006.²⁷⁷ Hence, the revenue loss by Antigua should be corrected for by the decline in its relative contribution to the region's global market share for each year 2002 to 2006. If this is done the average annual revenue loss calculated in III.D.3(a)(i) and III.D.3(a)(ii) above is reduced to **\$164 million** and **\$128 million** respectively.²⁷⁸

3.183 If, in addition, we include the Khanawake Territory in the group of regional competitors, the average annual revenue loss calculated in III.D.3(a)(i) and III.D.3(a)(ii) above would only amount to \$118 million and \$108 million respectively. However, while inclusion of the Khanawake Territory makes sense conceptually, we prefer to avoid the use of country-specific information, besides Antigua, as far as possible, since we have more confidence in GBGC's global and regional estimates. Specifically, for the Khanawake Territory, we note some small inconsistencies in certain years with the North America total of revenues by operator location that, unlike for Antigua, have not been corrected between the May and October 2007 releases of the GBGC database.

(c) Gambling on horseracing

3.184 In light of the chosen counterfactual and our analysis above in III.D.2(b)(ii), we have identified two strategies concerning an approximation of the unknown share of gambling on horseracing in Antigua's exports of remote gambling services to the US, which seem preferable over the other possible options identified by parties. The first option is to use the GBGC data combining remote and non-remote revenues from gambling on horseracing in various regions of the world. It is not clear whether the regional numbers refer to player or operator location. Since the main markets are separated out, it may refer to the former; however, the figure for sportsbetting in North America is rather small. Hence, it is probably more prudent to take the world total. Globally, the share of horseracing in all gambling activities declines from 13 per cent in 2001 to 9 per cent in 2006, while the total amount stays about constant. Applying the average share of 11 per cent to the figures in boldface calculated in III.D.3(b) above, one obtains an estimated annual revenue loss by Antigua from gambling on horseracing of about **\$18 million** and **\$14 million** respectively.

3.185 If the 7 per cent share of gambling on horseracing in the United States non-remote market is used (based on the average for the years 2003 to 2006), the amounts calculated III.D.3(b) above would be reduced to about \$11 million and \$9 million respectively.

(d) Growth in US demand

3.186 As we said above in III.D.3(a)(i), we need to take account of the possible growth in the US remote gambling market, in this case in the horseracing segment of the market, that Antigua may have been able to take advantage of in the absence of the US measures. Parties have provided alternative datasets in that regard. Antigua has provided data showing that revenues from the gambling market on horseracing in North America have practically stagnated between 2001 and 2006. Fitting a linear time trend through the data, the world market has barely done better growing at an average of 0.5 per

²⁷⁷ See Annex E, Annex Table 4.

²⁷⁸ See Annex E, Annex Table 5.

cent annually. This would only marginally affect the estimated annual revenue losses by Antigua from gambling on horseracing calculated in III.D.3(c) (in boldface), which remain at about US\$18 million and US\$14 million.

3.187 However, the remote gambling statistics for the North American market may be biased by the effects of the US measures. This is why we prefer to work with the data provided by the United States on pari-mutuel net receipts in the non-remote gambling market from BEA statistics on consumption expenditures, although these figures may still be influenced by a degree of substitution from remote to non-remote gambling on horseracing due the impact of the US measures on foreign suppliers. The United States provides data for the non-remote gambling market from 1995 to 2006, which includes a breakdown of pari-mutuel net receipts, 90 per cent of which are believed to be accounted for by betting on horseracing. Over the 2001-2006 time period, expenditures in that segment grew by 5 per cent annually on average (the same is true if the whole time period is used to calculate a linear trend). Applying the resulting compound growth rate to the amounts (in boldface) calculated in III.D.3(c) results in an average annual revenue loss for Antigua of about **\$23 million** or **\$18 million** respectively.

4. Conclusion

3.188 Taking account of the data uncertainties we have discussed earlier, we have decided to take the average of the two figures we calculated in paragraph 3.187 above in making our final award. Averaging and rounding to the next full million results in an amount of **US\$21 million**.

3.189 We therefore find that the annual level of nullification or impairment of benefits accruing to Antigua is US \$21 million.

IV. PRINCIPLES AND PROCEDURES OF ARTICLE 22.3 OF THE DSU

4.1 As noted in Section I.B, Antigua requested to be authorized to suspend concessions and other obligations under the GATS and the TRIPS Agreement, in accordance with the principles and procedures of Article 22.3 of the DSU.

A. MAIN ARGUMENTS OF THE PARTIES

4.2 In its request, Antigua states that, in considering what concessions and obligations to suspend, it applied the principles and procedures set forth in Article 22.3 of the DSU, and makes its request pursuant to Articles 22.3(b) and (c). Antigua notes that is a developing country with a population of approximately 80,000, and that with a combined landmass of only 442 square kilometres, Antigua is by far the smallest WTO Member to have made a request for the suspension of concessions under Article 22 of the DSU and realises the difficulty of providing effective countermeasures against the world's dominant economy. Antigua argues that its natural resources are negligible and as a result not only are the country's exports limited (approximately US\$4.4 million annually to the United States) but Antigua is required to import a substantial amount of the goods and services needed and used by the people of the country. Antigua submits that on an annual basis, approximately 48.9 per cent of these imported goods and services come from single source providers located in the United States. The imposition of additional import duties on products imported from the United States or restrictions imposed on the provision of services from the United States by Antigua will, in Antigua's view, have a disproportionate adverse impact on Antigua by making these products and services materially more expensive to the citizens of the country. Given the vast difference between the economies of the United States and Antigua, additional duties or restrictions on imports of goods and services from the United States would have a much greater negative impact on Antigua than it would on the United States. In fact, ceasing all trade whatsoever with the United States (approximately US\$180 million annually, or less than 0.02 per cent of all exports from the United States) would have virtually no

impact on the economy of the United States, which could easily shift such a relatively small volume of trade elsewhere.

4.3 Antigua further considers that the circumstances are serious enough to justify the suspension of concessions or obligations under other covered agreements in addition to the GATS. As a result of Antigua's lack of natural resources, the bulk of the economy is dependent upon tourism and the provision of banking and other financial services. Antigua explains that, initially with the cooperation of the United States Government, it looked to the provision of gambling and betting services as a way to diversify its economy and create the growth needed to assist the country in moving from a developing to a more advanced status, and that recent efforts by the United States Government to further prohibit and impede the provision of these services to consumers in the United States have greatly harmed the Antiguan service providers, while domestic providers in the United States continue to prosper in the absence of prohibition and criminal prosecution. Under the circumstances, the United States' prohibition of these services and its non-compliance with the recommendations and rulings of the DSB in this dispute forces Antigua to proceed in the manner requested despite the difference in level of development with the United States, the large disparity in their trade relations and despite the harsh economic reality affecting Antigua which affects its ability to exercise its rights under Article 22.

4.4 Antigua also considers that the suspension of concessions and other obligations corresponding to a value of US\$3.443 billion and wholly applied to the importation of services from the United States is neither practicable nor effective for various reasons. First, Antigua and Barbuda made no commitments under the sector at issue in this dispute, GATS Sector 10.D., "Sporting and Other Recreational Services," in its Schedule of Specific Commitments under the GATS (GATS/SC/2) ("Antigua's Schedule"). Second, with respect to most of the other services covered by Antigua's Schedule, as noted above suspension of concessions in the form of higher duties, tariffs, fees or other restrictions would have a disproportionate impact on the economy of Antigua and little or no impact on the United States. Third, even if Antigua were to rely exclusively on a suspension of concessions under the GATS, it would clearly not be able to recover the full amount of nullification and impairment caused by the inconsistent measures.

4.5 Additionally, in Antigua's view, the United States' continued non-compliance renders the circumstances serious enough, within the meaning of Article 22.3(c) of the DSU, to justify the imposition of appropriate countermeasures under other covered agreements, given that Antigua's gaming industry will continue to suffer serious losses, the government of Antigua will be deprived of critical revenue, the people of Antigua will be enjoined from participating in much needed employment and the overall economy of the nation will continue to suffer adverse effects for such time as the United States does not withdraw the measures at issue in this dispute or remove their adverse effects.

4.6 The United States, however, considers that Antigua has not followed the principles of Article 22.3 of the DSU, which required it to first seek to suspend concessions in the same sector as that covered by gambling services (namely, the United States states, "10. Recreational, Cultural and Sporting Services"), and that if it is not practicable to do so, Antigua must then seek to suspend concessions or obligations under the same agreement, namely the GATS.²⁷⁹

4.7 The United States considers that 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. The United States notes that Antigua makes conclusory statements that it is a developing country and that it generally needs to import goods and services, but provides no specific explanation of why it would not be practicable or effective to suspend concessions on specific services. The

²⁷⁹ US written submission, paras. 56 and 57.

United States also considers that the argument that the level of Antigua's request is greater than all of its trade with the United States, and thus it must suspend concessions under other agreements, is flawed because the amount of the request is out of line with any economic reality. Once the level is recalculated, it is in line with Antigua's services imports and suspension of services concessions is possible (and required). In the United States view, the argument that no suspension in either goods or services could have an impact on the United States because of the disparity in the relative size of both economies cannot provide a *carte blanche* permission to deviate from the general principles set out in Article 22.3.

4.8 Antigua considers that with the explanations it has provided in its request, it has clearly and unambiguously set forth its claims in accordance with the principles of Article 22.3 of the DSU²⁸⁰, so that it is now for the United States to establish "that it is both reasonable and effective for Antigua to seek [to suspend] concessions either in the same sector under the GATS or under one or more other sectors of the GATS in which Antigua has made commitments."

4.9 Antigua also indicates in its written submission that it has no remedy under the GATS, most fundamentally because its volume of imports in the services sector is nowhere near sufficient to absorb the level of concessions that it is entitled to.²⁸¹ Specifically, Antigua then further explains why suspension under GATS is practicable or effective neither in the same sector nor in other sectors.

B. OVERALL APPROACH BY THE ARBITRATOR

4.10 Article 22.3 sets out certain principles and procedures to be followed by a complaining party seeking to suspend concessions, as to the sector(s) and/or covered agreement in which the suspension can take place, which the United States claims that Antigua did not follow in its request.

4.11 Article 22.7 of the DSU provides that "if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim" and that "[i]n the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3". We are therefore required to examine the US claim that Antigua has not followed the principles and procedures of Article 22.3 of the DSU.

4.12 As a general principle, Article 22.3(a) of the DSU provides that suspension of concessions or other obligations should first be sought in the same sector as that in which a violation was found. Article 22.3 provides in relevant part that:

"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."

4.13 Subparagraphs (b), (c) and (d) of Article 22.3 further specify the principles and procedures to be followed by a complaining party wishing to seek suspension in another sector, or another agreement, than that in which a violation was found:

²⁸⁰ Antigua's written submission, para. 39.

²⁸¹ Antigua's written submission para.48.

- "(b) if that party considers that it is not practicable or effective for it 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."

4.14 In addition, subparagraph (d) provides that:

"(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 the 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."

4.15 In considering our mandate with respect to the principles and procedures set forth in Article 22.3 of the DSU, we find it useful to refer to the analysis of the arbitrators in the *EC – Bananas III (Ecuador)* case. As noted in Section I.A above, in determining the scope of their authority to review the principles and procedures relating to requests for suspension of concessions or other obligations under subparagraphs (b) and/or (c), the arbitrators in that case considered that "the fact that the powers of arbitrators under subparagraphs (b)-(c) are explicitly provided for in Article 22.6 implies *a fortiori* that the authority of Arbitrators includes the power to review whether the principles and procedures set forth in these subparagraphs have been followed by the Member seeking authorization for suspension".²⁸²

4.16 The arbitrators then considered the terms of Article 22.3, including the fact that a certain margin of appreciation is left to the complaining party in arriving at conclusions in respect of certain factual elements (i.e. "if *that party considers*" in subparagraphs (b) and (c)) as well as the fact that the party concerned is required to apply the principles of Article 22.3 (i.e. "*shall* apply the following principles and procedures" in the introductory clause of Article 22.3). On the basis of that textual analysis, the arbitrators determined that:

"[T]he margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same

²⁸² Decision by the arbitrators, *EC – Bananas III*, (request by Ecuador), para. 50.

sector under the same agreements, or only under another agreement provided that the circumstances were serious enough."²⁸³

4.17 The arbitrators in the *EC – Bananas III (Ecuador)* case also considered more broadly the terms of Article 22.3 and noted that "these provisions imply a sequence of steps towards WTO-consistent suspension of concessions or other obligations which respects both a margin of appreciation for the complaining party as well as a margin of review by Arbitrators, if a request for suspension under Article 22.2 is challenged under Article 22.6".²⁸⁴

4.18 We agree with these determinations. Specifically, we agree that the principles and procedures set forth in Article 22.3 of the DSU, which require the complaining party to make certain determinations, imply "a margin of appreciation" for the complaining party in making these determinations. At the same time, Article 22.3 sets out specific principles and procedures, that the complaining party must follow, and we understand the role of the arbitrator acting pursuant to Article 22.7 of the DSU to involve a review of whether those principles and procedures have been followed. We agree with the arbitrators in *EC – Bananas III (Ecuador)* that this includes a determination "whether the complaining party in question has considered the necessary facts objectively" and also "whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough".

4.19 Turning now to the specific principles and procedures set forth in Article 22.3 of the DSU, we first note that, as observed by the arbitrators in *EC – Bananas III (Ecuador)*, "these provisions imply a sequence of steps towards WTO-consistent suspension of concessions or other obligations".²⁸⁵ In other words, as Antigua has expressed it, Article 22.3 of the DSU provides a "hierarchy" of remedies that a complaining party must follow in determining in which sectors or under which agreements suspension of concessions or other obligations can be sought, namely (1) seek to suspend in the same sector in the same agreement, (2) seek to suspend within the same agreement and (3) seek to suspend under another agreement.²⁸⁶

4.20 In this instance, Antigua first indicated in its request that it "may" suspend "horizontal and/or sectoral concessions and obligations for the following sector contained in the Antigua schedule: 2. Communication services", as well as under the TRIPS Agreement. However, it now considers that suspension of concessions or other obligations under the GATS, whether in the sector in which a violation was found or in other sectors, is not practicable or effective, and that the circumstances were serious enough, so that it may seek to suspend concessions or other obligations under the TRIPS Agreement (under which no violation was found).²⁸⁷

4.21 Since Antigua seeks to suspend obligations under another covered agreement than that in which a violation was found (i.e. the TRIPS Agreement rather than the GATS), this implies that it made two successive determinations, under the "sequence of steps" foreseen in Article 22.3 of the DSU: first, a determination that it was not practicable or effective to suspend concessions or other obligations in the sector in which a violation was found, in accordance with Article 22.3 (b), and

²⁸³ Decision by the arbitrators, *EC – Bananas III*, (request by Ecuador), para. 52.

²⁸⁴ Decision by the arbitrators, *EC – Bananas III*, (request by Ecuador), para. 55.

²⁸⁵ Decision by the arbitrators, *EC – Bananas III*, (request by Ecuador), para. 55.

²⁸⁶ Antigua's written submission, paras. 16 to 21.

²⁸⁷ We take note of the fact that Antigua has modified its assessment of the practicability or effectiveness of suspending concessions or other obligations under the GATS in the course of its proceedings, in that it no longer considers, as it had suggested in its request for authorization to suspend, that it "may" suspend concessions or other obligations in telecommunications services. For the purposes of our assessment, we consider Antigua's determinations as clarified in the course of the proceeding, that is, its determination that it is not practicable or effective to suspend concessions or other obligations in any sector under the GATS.

secondly, a determination that it was also not practicable or effective to suspend concessions or other obligations under another sector within the agreement in which a violation was found, and that the circumstances were serious enough, so that it was entitled to seek suspension of concessions or other obligations under another agreement as foreseen in subparagraph (c). We will consider these two aspects in turn.

C. PRELIMINARY OBSERVATIONS

4.22 Before we start our assessment of Antigua's determinations, we find it useful to make some preliminary observations to take into account the fact that we have found, in Section III above, that the annual level of nullification or impairment of benefits accruing to Antigua is in the amount of US\$ 21 million, rather than US\$3.443 million as estimated by Antigua.

4.23 Antigua's arguments in relation to the availability of suspension of concessions or other obligations under the GATS rely in part on assumptions concerning the amount of suspension that it is entitled to. Specifically, Antigua has explained that the "first and most fundamental reason" for which it is not practicable or effective to suspend concessions or other obligations under the GATS is that the volume of its imports from the United States in services is nowhere near sufficient to absorb the level of suspension of concessions that it is entitled to.²⁸⁸ The United States, for its part, considers that Antigua's argument is flawed because the amount of the request is out of line with any economic reality. Once the level is recalculated, the United States argues, it is in line with Antigua's services imports and suspension of services concessions is possible (and required).

4.24 We agree that, to the extent that the annual level of nullification or impairment of benefits accruing to Antigua exceeds the total annual level of imports of services by Antigua from the United States, it would not be possible for Antigua to suspend obligations only in the services sector to cover the entire level of nullification or impairment. However, we have determined in paragraph 3.188 above that the level of nullification or impairment of benefits accruing to Antigua is significantly lower than Antigua had estimated, at US\$21 million. We will therefore take this finding into account, in reviewing Antigua's determinations.

4.25 With these preliminary considerations in mind, we now turn to Antigua's determination that suspension of concessions or other obligations is not practicable or effective, in the same sector as that in which a violation was found, or in any other sector under the GATS.

D. REVIEW OF ANTIGUA'S DETERMINATION IN RESPECT OF "SAME-SECTOR" SUSPENSION

4.26 As noted above, it is only if the complaining party considers that it is "not practicable or effective" to suspend obligations with respect to the same sector that it may seek to suspend obligations in other sectors (or, ultimately, under another agreement). In addition, Article 22.3 subparagraph (d) requires the complaining party to take into account two specific aspects in applying the principles of paragraphs (a) to (c).

4.27 We have determined in the previous section that our task is to examine whether, in making a determination in this case, Antigua, as the complaining party, has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension with respect to the same sector within the same agreement.

4.28 In order to conduct this assessment, we must clarify the elements that are relevant to such determination, and specifically the meaning of the terms "not practicable or effective" within the

²⁸⁸ Antigua's written submission, para. 48.

terms of Article 22.3(b), as well as the role of the elements identified in subparagraph (d) in this assessment, before turning to Antigua's determination in this case.

1. The principles and procedures of Article 22.3(b)

4.29 In the *EC – Bananas III (Ecuador)* case, the arbitrators analyzed the meaning of the criteria of "practicability" and "effectiveness" in subparagraphs (b) and (c) of Article 22.3 of the DSU in some detail, as well as the role of the elements referred to in subparagraph (d) of Article 22.3 of the DSU. The arbitrators in that case determined *inter alia* that:

- an examination of the "practicability" of an alternative suspension concerns the question whether such an alternative is available for application in practice, as well as suited for being used in a particular case;²⁸⁹
- in contrast, the thrust of the "effectiveness" criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time;²⁹⁰
- a consideration by the complaining party of the practicability and the effectiveness of an alternative suspension within the same sector or under the same agreement does not need to lead to the conclusion that such an alternative suspension is both not practicable and not effective in order to meet the requirements of Article 22.3;²⁹¹
- these criteria have to be read in combination especially with the factors set out in subparagraphs (i) and (ii) of Article 22.3(d) which, as the introductory clause of subparagraph (d) stipulates, the complaining party seeking authorization for suspension shall take into account in applying the above principles, i.e. those provided for in subparagraphs (a)-(c).²⁹²

4.30 We consider that these interpretations provide a useful starting point for our assessment of Antigua's determination that it was not practicable or effective for it to suspend obligations with respect to the same sector under the GATS.

4.31 With respect to the elements referred to in subparagraph (d) of Article 22.3, which the complaining party is required to "take into account" in making its determination, we also find it useful to refer to the interpretations of the arbitrators in *EC – Bananas III (Ecuador)*.

4.32 With respect to the reference in subparagraph (d)(i) to "the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation" and the "importance of such trade" to the complaining party, that arbitrators did not "exclude the possibility" that trade in the entirety of the relevant sector or agreement may be pertinent, but considered that these criteria related primarily to trade nullified or impaired by the WTO-inconsistent measure at issue.

4.33 In our view, the ordinary meaning of the terms of subparagraph (d)(i) suggests that a consideration of the entirety of "trade in the sector" under which a violation was found is pertinent, rather than, as the *EC – Bananas III (Ecuador)* arbitration suggests, primarily the "trade nullified or

²⁸⁹ *EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 70.*

²⁹⁰ *EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 72.*

²⁹¹ *EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 74.*

²⁹² *EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 79.*

impaired by the WTO-inconsistent measure at issue". This appears to us also to be consistent with the context of this provision as well as with its object and purpose.

4.34 First, the term "sector" is also referred to in subparagraph (b), where it defines the scope of the examination to be conducted. The term "sector" is also specifically defined for the purposes of Article 22.3 in subparagraph (f). We therefore find it appropriate to give the term "sector" in subparagraph (d) of Article 22.3 of the DSU the meaning that has been ascribed to it in subparagraph (f) of the same provision, and to assume, reading the terms "trade in the sector" in their context, that there should be parallelism between the sector in which the practicability and effectiveness of suspension is being considered and the trade to be taken into account in making this determination. In other words, in order to determine whether suspension is practicable or effective in a certain sector, it is appropriate to take into account all the trade in that sector and its importance to the complaining party. This also appears to us consistent with the purpose of this provision, which is to provide certain objective parameters to guide the conduct of such determinations.

4.35 In addition, subparagraph (ii) of Article 22.3(d) requires the complaining party to take into account "the broader economic elements related to the nullification or impairment" as well as "the broader economic consequences" of the suspension of concessions or other obligations. In respect of these factors, the arbitrators in the *EC – Bananas III (Ecuador)* case determined that:

"The fact that the former criterion relates to 'nullification or impairment' indicates in our view that this factor primarily concerns 'broader economic elements' relating to the Member suffering such nullification or impairment, i.e. in this case Ecuador.

We believe, however, that the fact that the latter criterion relates to the suspension of concessions or other obligations is not necessarily an indication that 'broader economic consequences' relate exclusively to the party which was found not to be in compliance with WTO law, i.e. in this case the European Communities. As noted above, the suspension of concessions may not only affect the party retaliated against, it may also entail, at least to some extent, adverse effects for the complaining party seeking suspension, especially where a great imbalance in terms of trade volumes and economic power exists between the two parties such as in this case where the differences between Ecuador and the European Communities in regard to the size of their economies and the level of socio-economic development are substantial."²⁹³

4.36 We agree with these determinations.

4.37 In conclusion, we understand subparagraph (d) of Article 22.3 to require a consideration, by the complaining party, of the following elements:

- (a) the trade in the relevant sector (as defined in subparagraph (f)) and the importance of such trade to the complaining party (in this case Antigua), including considerations relating to the relative importance of that trade to the complaining party and to the Member to which the requested suspension would apply (the United States);
- (b) "broader economic elements" relating to the Member suffering the nullification or impairment (in this case Antigua);
- (c) "broader economic consequences" of the suspension of concessions or other obligations, both for the party which was found not to be in compliance with WTO law (the United States) and for the complaining party (Antigua).

²⁹³ *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 85-86.

4.38 With these general considerations in mind, we now review Antigua's determination that it was not practicable or effective to suspend concessions or other obligations with respect to the same sector as that in which a violation was found under the GATS in this case.

2. Review of Antigua's determination that is not practicable or effective to suspend concessions or other obligations in the "same sector"

4.39 In order to review Antigua's determination, we find it useful to first clarify what the relevant "sector" is, as well as the scope of the "concessions or other obligations" to be considered. We will then turn to Antigua's determination on the practicability and effectiveness of suspension of these obligations, including its consideration of the factors identified in subparagraph (d).

(a) Identification of the relevant sector and scope of obligations to be considered

4.40 Subparagraph (a) of Article 22.3 provides that :

"[T]he 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" (emphasis added).

4.41 Article 22.3 (f) of the DSU further defines the term "sector" for the purposes of Article 22.3. Specifically, it defines the term "sector" as meaning:

"[W]ith respect to trade in services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors".

4.42 As is clarified in footnote 14 of the DSU, this list is contained in document MTN.GNS/W/120, which identifies 11 principal sectors.

4.43 In this case, a violation was found in sub-sector "10.D" (Sporting and Other recreational services). The "principal sector" in which the violation was found, as defined in Article 22.3(f), is therefore Sector 10 ("Recreational, Cultural and Sporting Services"). Antigua has confirmed, in response to a question from the Arbitrator, that it agrees that the entirety of Sector 10 is relevant for the purposes of this determination.²⁹⁴

4.44 Article 22.3 refers to "*concessions or other obligations*" (emphasis added) with respect to the relevant sector. This indicates, in our view, that the entire range of obligations incurred under the relevant agreement with respect to the sector concerned is relevant in considering whether suspension is practicable or effective in that sector. This would include, as expressly noted in the text, scheduled concessions, as well as, as is also expressly stated in the text, any "other obligations" incurred with respect to the sector at issue.

4.45 In this case, this means that the relevant range of obligations that should be considered for the purposes of assessing whether suspension is practicable or effective with respect to the same sector includes not only any specific commitments made by Antigua with respect to Sector 10 (Recreational, Cultural and Sporting Services), but also other obligations under the GATS that apply to this sector, such as the MFN obligation contained in Article II of the GATS.

²⁹⁴ Antigua's response to question No. 47 of the Arbitrator.

(b) Antigua's determination that it is "not practicable or effective" to suspend concessions or other obligations with respect to the same sector

(i) *Arguments of the parties*

4.46 In its request for authorization to suspend concessions or other obligations, Antigua noted that it had made no commitments under the sector at issue in this dispute, "namely GATS Sector 10.D, 'Sporting and Other Recreational Services,'"²⁹⁵ in its Schedule of Specific Commitments, and did not elaborate further on the potential suspension of concessions or other obligations with respect to Sector 10 as a whole ("Recreational, Cultural and Sporting Services").

4.47 The United States argues that Antigua's explanation of its rationale for seeking suspension of obligations under the TRIPS Agreement in its request under Article 22.3 is "unconvincing" and does not follow the principles of Article 22.2. The United States further notes that Antigua's identification of the relevant sector under the GATS as "10.D" (Sporting and Other Recreational Services) is incorrect, as the relevant sector is all of Sector 10 (Recreational, Cultural and Sporting Services). The United States notes that Antigua has in fact made commitments under 10.A (Entertainment Services)²⁹⁶, and that it has provided no explanations of why it is not seeking to suspend concessions for Entertainment Services, where it has specific market access and national treatment commitments.²⁹⁷

4.48 In its written submission, Antigua accepts that the relevant sector is Sector 10, and further elaborates on the possibility of same-sector suspension within the entirety of Sector 10 under the GATS. Antigua considers that it is clear from "prior arbitrations" that a complaining party does not have to take into consideration "trade in a sector where it has not made any commitments"²⁹⁸ and notes that the only trade within the same sector with respect to which it has made commitments in its GATS Schedule is sub-sector 10.A ("Entertainment Services"). It states that it has been unable to "locate any statistical sources" on trade in entertainment services and believes that such trade is negligible in its overall volume. Antigua further considers that suspension of concessions or other obligations in this sector "would most likely impair the already limited entertainment options available to Antiguan citizens while having virtually no impact on the United States at all"²⁹⁹.

4.49 In response to a question from the Arbitrator concerning the possible suspension of obligations other than specific commitments, such as the MFN obligation under the relevant agreement, Antigua responded that this was most likely an academic question in the context of this dispute and that "even if this enquiry were carried out to its farthest extent to where Antigua had no obligations to the United States under the GATS *at all*", "the trade disparity is so great [between Antigua and the United States] that United States service providers would suffer little harm at all, if any, while Antiguan consumers would be forced to scramble for replacement services at uncertain cost".³⁰⁰

4.50 The United States also generally argues that Antigua has not provided an adequate explanation of why it cannot seek to suspend concessions under the GATS, as opposed to under the GATS and the TRIPS Agreement. The United States notes that Antigua's request includes "conclusory statements along the lines that Antigua is a developing country and that it generally needs

²⁹⁵ Recourse by Antigua to Article 22.2 of the DSU, WT/DS285/22.

²⁹⁶ US written submission, para. 59.

²⁹⁷ US written submission, para. 59.

²⁹⁸ Antigua's written submission, para. 50.

²⁹⁹ Antigua's written submission, para. 51.

³⁰⁰ Antigua's response to question No. 48 of the Arbitrator.

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".³⁰¹

4.51 More generally, Antigua argues that the "first and most fundamental reason" why it is neither practicable nor effective for it to seek suspension under the GATS is that the volume of its imports from the United States in services is nowhere near sufficient to absorb the level of suspension of concessions that it is entitled to.³⁰² Antigua argues that, given that its total imports of services in 2005 amounted to US\$208.11 million, it would not be possible for Antigua to reach a level of suspension of concessions or other obligations equivalent to the level of nullification or impairment "either under the same sector of the GATS in which the violation was found [Sector 10] or under the entire GATS".³⁰³ The United States, on the other hand, considers that the argument that the level of Antigua's request is greater than all of its trade with the United States, and thus it must suspend concessions under other agreements, is flawed because the amount of the request is out of line with any economic reality. Once the level is recalculated, the United States argues, it is in line with Antigua's services imports and suspension of services concessions is possible (and required).³⁰⁴

(ii) *Assessment by the Arbitrator*

4.52 As noted above, Antigua considers that it was only required to take into consideration, for the purposes of determining whether suspension is practicable or effective, trade in sectors where it has made a commitment.³⁰⁵ It notes that the only trade within Sector 10 under the GATS with respect to which it has made commitments in its GATS Schedule is sub-sector 10.A ("Entertainment services"). It states that it has been unable to "locate any statistical sources" on trade in that sub-sector and believes that such trade is negligible in its overall volume. Antigua further considers that suspension of concessions or other obligations in this sector "would most likely impair the already limited entertainment options available to Antiguan citizens while having virtually no impact on the United States at all".³⁰⁶

4.53 The United States also appears to have considered, at least initially, that the only trade that was relevant in this determination was that in respect of which Antigua has made a specific commitment, namely sub-sector 10.A.³⁰⁷ The United States did not, however, specifically respond to any of the arguments provided by Antigua in its written submission in respect of the volumes of trade concerned and the potential adverse impact of a suspension under this sub-sector.

³⁰¹ US written submission, para. 60.

³⁰² Antigua's written submission, para. 48.

³⁰³ Antigua's written submission, para. 49 (the bracketed text in the quotation is a footnote in the original text).

³⁰⁴ US written submission, para. 61.

³⁰⁵ Antigua draws support for this assumption from the arbitral decision in the *EC – Bananas III (Ecuador)* case, where the arbitrators considered it "obvious" that "suspension of commitments in service sub-sectors or in respect of modes of service supply which a particular complaining party has not bound in its GATS Schedule is not available for application in practice and thus cannot be considered as practicable *EC – Bananas III (Ecuador)*, Decision by the Arbitrators, para. 71". The arbitrator in that case further considered that it was "evident" for it "that Ecuador cannot suspend commitments or other obligations in sub-sectors of the distribution service sector in respect of which it has not entered into specific commitments in the first place *EC – Bananas III (Ecuador)*, Decision by the Arbitrators, para. 103 *in fine*. However, as we have observed above, the text of Article 22.3 of the DSU refers to "concessions *and other obligations*" (emphasis added) within the relevant sector, rather than simply "concessions". Therefore, the scope of the relevant obligations is not limited, in our view, to specific commitments bound in Antigua's GATS schedule.

³⁰⁶ Antigua's written submission, para. 51.

³⁰⁷ US written submission, para. 59: "the issue is not whether Antigua has made any commitments in sub-sector 10.D, but rather whether Antigua has made any commitments in all of sector 10".

4.54 As we have explained above, we believe that the range of obligations to be considered for the purposes of a determination of whether suspension is practicable or effective in the same sector is not limited to those sub-sectors in which specific commitments have been made. Nonetheless, we consider first Antigua's determination in respect of sub-sector 10.A ("Entertainment Services"), where it has made such commitments.³⁰⁸

4.55 Antigua first notes that it has been unable to locate statistical sources in relation to trade in entertainment services and thus concludes that the volume of such trade must be negligible. We note that the United States does not dispute this assertion. Nor has it suggested, in fact, that there exists any amount of imports from the United States falling under sub-sector 10.A, in respect of which Antigua could suspend concessions or other obligations. We also note that the IMF Balance of Payments Statistics country tables submitted by the United States provide a breakdown of Antigua's services imports by category, including a category for "personal, cultural and recreational services" under which no amount is reported for the years 1998 to 2005.

4.56 In these circumstances, we consider that Antigua could plausibly arrive at the conclusion that it was not practicable or effective for it to suspend concessions or other obligations under the GATS in respect of sub-sector 10.A, under which it has made a specific commitment.

4.57 However, as observed above, we consider that, in addition to market access and national treatment specific commitments, other obligations under the GATS, including general GATS obligations, should also have been taken into account by Antigua in making its determination as to whether suspension was practicable or effective in Sector 10. In this respect, we note that Antigua has only made a very general observation, in response to a question from the arbitrator, that "even if this enquiry were carried out to its farthest extent to where Antigua had no obligations to the United States under the GATS *at all*", "[t]he trade disparity is so great that United States service providers would suffer little harm at all, if any, while Antiguan consumers would be forced to scramble for replacement services at uncertain cost".³⁰⁹ Antigua also observes that the United States has not argued that Antigua has a practical and effective remedy in respect of "other obligations" under the GATS.³¹⁰

4.58 In considering this matter, we first note that there is only a limited number of such "other obligations" under the GATS, that Antigua would be able to suspend under the whole of Sector 10, i.e. including sub-sector "10.B, News agency services"; "10.C, Libraries, archives, museums and other cultural services"; "10.D, Sporting and other recreational services"; and "10.E, Other". In our view, the main relevant obligation in this respect is the MFN obligation, contained GATS Article II, which obliges Antigua to accord immediately and unconditionally to US services and service suppliers treatment no less favourable than that it accords to like services and service suppliers of any other country.

4.59 We recall our observation above that the IMF Balance of Payments statistics do not reflect any volumes of imports by Antigua in relation to "Personal, Cultural and Recreational Services" between 1998 and 2005. This would tend to suggest that no significant volumes of imports of such services takes place. We also note that the United States has not in fact suggested that any amount of imports takes place with respect to Sector 10 from the United States, that could form the basis for suspension of obligations under the GATS. We also note Antigua's argument that "[t]he trade disparity is so great that United States service providers would suffer little harm at all, if any, while

³⁰⁸ We also note that Antigua's request for authorization to suspend concessions actually referred only to Sector 10.D and appeared to assume that this was the "sector" to be considered. Antigua subsequently acknowledged the relevance of the entirety of Sector 10 (although it then limited its enquiry, within Sector 10, to sub-sector 10.A, where it has made a commitment).

³⁰⁹ Antigua's response to question No. 48 by the Arbitrator.

³¹⁰ Antigua's response to question No. 49 by the Arbitrator.

Antiguan consumers would be forced to scramble for replacement services at uncertain cost³¹¹, and the fact that the United States has not given any specific indication that Antigua's assessment in respect of the practicability or effectiveness of suspension of other obligations under Sector 10 is incorrect.

4.60 In light of these elements, we find that Antigua could plausibly arrive at the conclusion that it was not practicable or effective for it to suspend concessions or other obligations under the GATS in respect of Sector 10.

(c) Whether Antigua has taken into account the factors identified in subparagraph (d) of Article 22.3

4.61 We must now consider whether Antigua has taken due account, in making its determination, of the factors identified in subparagraph (d) of Article 22.3.

4.62 Antigua's arguments to explain that same-sector suspension is not practicable or effective, as examined above, relate to the volume of trade in the relevant sector and to the potential impact of suspending concessions or other obligations in that sector both for Antigua (which it considers would be negative) and for the United States (which it considers would be virtually non-existent).

4.63 These elements fall squarely within the range of factors that are pertinent for the purposes of paragraphs (i) and (ii) of subparagraph (d). Specifically, we find that these considerations relate to "the trade in the sector ... under which the panel or the Appellate Body has found a violation" within the meaning of subparagraph (d)(i), as well as to the "broader economic elements" and "broader economic consequences" within the meaning of subparagraph (d)(ii).

4.64 We find, therefore, that Antigua has taken into account the relevant elements in subparagraph (d) of Article 22.3, in determining that it was not practicable or effective for it to seek suspension in the GATS sector in which the violation was found in accordance with subparagraph (b) of Article 22.3.

(d) Conclusion

4.65 In light of our determinations in sections (b) and (c) above, we find that Antigua could plausibly arrive at the conclusion that it was not practicable or effective to suspend concessions or other obligations under the GATS in respect of Sector 10, and determine that suspension of concessions or other obligations is not practicable or effective, with respect to the same sector as that in which a violation was found. We also find that the United States has not demonstrated that Antigua had not followed the principles and procedures of Article 22.3(b), in making this determination.

E. REVIEW OF ANTIGUA'S DETERMINATION IN RESPECT OF "OTHER SECTORS" UNDER THE GATS

4.66 As noted above, Antigua sought an authorization to retaliate both under the GATS and the TRIPS Agreement, but then indicated in the course of the proceedings that it considered that it had no effective remedy under the GATS and was now seeking to suspend obligations under the TRIPS Agreement only.

4.67 The United States considers that Antigua has not provided an adequate explanation of why it cannot seek to suspend concessions under the GATS, as opposed to under the GATS and the TRIPS Agreement, and that Antigua's trade figures indicate that Antigua would have the option of suspending concessions or other obligations in the services area.

³¹¹ Antigua's response to question 48 by the Arbitrator.

4.68 The relevant provision, Article 22.3 (c), provides that:

"[I]f [the complaining] 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 agreement."

4.69 Two cumulative conditions therefore have to be met for a complaining party to be able to seek suspension under another agreement:

- (a) that complaining party considers that it is not practicable or effective for it to suspend concessions or other obligations with respect to other sectors within the same agreement; and
- (b) that party considers that the circumstances are "serious enough".

4.70 In addition, subparagraph (d) requires, in the application of the principles of subparagraph (c), that the two factors considered above in the context of paragraph (b) suspension also be taken into account.

4.71 We consider these elements in turn.

1. Whether suspension of concessions or other obligations is practicable or effective in "other sectors" under the GATS

4.72 The first condition under Article 22.3(c) of the DSU for the suspension of concessions to be sought in another agreement than that in which a violation was found, is that the complaining party has determined that it is "not practicable or effective" to suspend concessions or other obligations in other sectors within that agreement.

4.73 In determining whether suspension is practicable or effective, the complaining party is also required to take into account the two factors identified in subparagraph (d), namely, in the case of an application of subparagraph (c):

- (a) the trade under the agreement under which a violation has been found and the importance of such trade to the complaining party (i.e., in this case, trade under the GATS and the importance of such trade to Antigua); and
- (b) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations (which as noted above, could include a consideration of the impact of the retaliation both on the party seeking to retaliate and on the party against whom retaliation is being sought).

4.74 In approaching this part of our determination, we are guided, *mutatis mutandis*, by the interpretations that we have developed in Section IV.C.1 above in relation to the same principles and procedures, as they relate to "same-sector" suspension in the context of Article 22.3(b).

4.75 We must therefore determine whether Antigua has considered the relevant facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension of concessions or other obligations with respect to other sectors under the GATS.

4.76 In this part of our assessment, the relevant sectors to be considered are all principal sectors, within the meaning of MTN.GNS/W/120, other than Sector 10, under the GATS. In respect of such sectors, the relevant "concessions or other obligations" under the GATS include, as determined above in relation to Article 22.3(b), not only any specific commitments made by Antigua with respect to those sectors, but also other obligations under the GATS that apply to this sector, such as the MFN obligation contained in Article II of the GATS.³¹²

4.77 We first address Antigua's general argument that its volume of imports is insufficient to support suspension of obligations under the GATS alone at the level it is entitled to, before turning to the detail of Antigua's consideration of the practicability and feasibility of such suspension.

(a) Level of suspension and availability of suspension under the GATS

4.78 As noted above, Antigua has explained that the "first and most fundamental reason" for which it is not practicable or effective to suspend concessions or other obligations under the GATS is that the volume of its imports from the United States in services is nowhere near sufficient to absorb the level of suspension of concessions that it is entitled to.³¹³ The United States, for its part, considers that Antigua's argument is flawed and that once the level is recalculated, it is in line with Antigua's services imports and suspension of services concessions is possible (and, in the US view, required).³¹⁴

4.79 As we noted in our preliminary observations, we will take into account, in assessing Antigua's arguments, our own earlier determination that the annual level of nullification or impairment of benefits accruing to Antigua is in the amount of US\$21 million, significantly lower than Antigua's estimation. We will compare this amount to the annual level of Antigua's services imports from the United States in order to determine the extent to which suspension of concessions or other obligations entirely under the GATS is at least conceivable.

4.80 Antigua indicates that its total imports of services amount to US\$208.11 million for 2005.³¹⁵ In response to a question by the Arbitrator, the United States observes that the figures presented by Antigua on its services imports appear to be consistent with the IMF Balance of Payment statistics that the United States has itself presented to the Arbitrator as evidence.³¹⁶ These statistics indicate a total value of US\$204.85 for imports of services by Antigua.³¹⁷

4.81 Antigua indicates that it has not been able to allocate these services imports among its trading partners, and cites the US CIA's World Factbook in support of the proposition that the United States accounts for 21.1 per cent of Antigua's services imports. The notes and definitions of this Factbook suggest, however, that these figures relate to merchandise imports, rather than services imports.³¹⁸ In its request for authorization to suspend obligations, Antigua indicated that "[o]n an annual basis, approximately 48.9 per cent of these imported goods and services come from single source providers located in the United States".³¹⁹ The United States does not dispute this figure and refers to it in order to estimate the total value of Antigua's imports of services for the United States.³²⁰ In the absence of

³¹² See above our determinations in paras. 4.41-4.45.

³¹³ Antigua's written submission, para. 48.

³¹⁴ US written submission, para. 61.

³¹⁵ Antigua's written submission, para. 48.

³¹⁶ US response to question 51 of the Arbitrator, para. 67.

³¹⁷ See US Exhibit US-2. IMF Balance of Payments country table, Antigua and Barbuda.

³¹⁸ See US CIA, The World Factbook 2007, at <https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html#2087>.

³¹⁹ Recourse by Antigua to Article 22.6 of the DSU, WT/DS285/22. No source is cited for this assertion.

³²⁰ See US written submission, para. 60, footnote 39.

any reliable alternative estimation provided by either party, we rely on Antigua's initial statement that the United States share in Antigua's imports of services is "approximately 48.9 percent".

4.82 Combining the amount of US\$204.85 million with this percentage, we arrive at a total annual value of services imports from the United States to Antigua of US\$101.77 million. This thus represents the maximum value of services trade in respect of which Antigua could potentially seek to suspend concessions or other obligations. In light of our earlier determination that the annual level of nullification or impairment of benefits accruing to Antigua in this case is in the amount of US\$21 million, this means that it would in principle be possible for Antigua to seek suspension of concessions or other obligations entirely within the GATS.

4.83 With this initial determination in mind, we turn to a consideration of whether such suspension is, nonetheless, not practicable or effective within the meaning of Article 22.3(c).

(b) Practicability and effectiveness of suspension in other sectors

4.84 In considering this question, we first recall our determinations in paragraph 4.29 above on the nature of the assessment to be conducted in applying the principles of Article 22.3. Specifically, we recall our determinations that an examination of the "practicability" of an alternative suspension concerns the question whether such an alternative is available for application in practice as well as suited for being used in a particular case. We also recall our determination that in contrast, the thrust of the "effectiveness" criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB recommendations and rulings within a reasonable period of time.

4.85 We also bear in mind our related determination that a consideration of the practicability and the effectiveness of an alternative suspension within the same sector or under the same agreement does not need to lead to the conclusion that such an alternative suspension is both not practicable and not effective in order to meet the requirements of Article 22.3. This implies that it would be sufficient for Antigua to have determined that suspension under the GATS in respect of other sectors is not effective, even if it is practicable.

4.86 Antigua has provided some general arguments relating to the size of its economy and the relative sizes of the economies of the United States and Antigua, as well as some more specific indications why it would not be practicable or effective to suspend concessions in specific services sectors. We consider these in turn.

4.87 Antigua has first stressed the fact that, as a small economy with limited natural resources, it is heavily dependant on imports of goods and services, including from the United States, so that the imposition of additional duties on products imported from the United States or on the provision of services from the United States would have "a disproportionate adverse impact on Antigua and Barbuda by making these products and services materially more expensive to the citizens of the country".³²¹ Antigua also notes that with respect to most services other than "Sector 10.D", covered by Antigua's GATS schedule, suspension of concessions in the form of higher duties, tariff, fees or other restrictions would have a disproportionate impact on the economy of Antigua and virtually no impact of the United States.

4.88 As a preliminary matter, we note that Antigua's arguments include references to the potential impact of a suspension in respect of trade in goods. Our assessment is however limited to a

³²¹ Recourse to Article 22.2 by Antigua, WT/DS285/22.

consideration of suspension of obligations under the GATS. We therefore make no determination in relation to the potential impact of a possible suspension of obligations in relation to trade in goods.

4.89 To the extent that it relates to the suspension of obligations under the GATS, Antigua's concern that, as a small import-dependent economy, it could suffer an adverse impact from such suspension, is in our view pertinent to an assessment of whether suspension is practicable or effective. Specifically, we consider that these circumstances have the potential to affect significantly the effectiveness of the proposed suspension.

4.90 We note in this respect the determination of the arbitrators in *EC – Bananas III (Ecuador)*, that, in a situation "where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party which has failed to bring WTO-inconsistent measures into compliance with WTO law" "and in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party".³²² In the view of that arbitrator, "in these circumstances, a consideration by the complaining party in which sector or under which agreement suspension may be expected to be least harmful to itself would seem sufficient for us to find a consideration by the complaining party of the effectiveness criterion to be consistent with the requirement to follow the principles and procedures set forth in Article 22.3".³²³

4.91 At the same time, we agree with the United States that general statements relating to the size of the complaining party's economy or the relative size of the economies of both parties do not justify a departure from the requirements of Article 22.3 of the DSU. Rather, the complaining party is required, in all cases, to follow the specific sequence of steps provided in this provision and to make a determination in respect of each of its elements as relevant. In this context, an explanation of how such circumstances affect the practicability or effectiveness of the proposed suspension would in our view be required, in order for these considerations to validly support a determination that it is not practicable or effective to suspend concessions or other obligations in other sectors under the same agreement within the meaning of Article 22.3.

4.92 In this case, Antigua has not limited itself to general assertions as to the size of its economy, in itself or relative to the US economy. It has also provided arguments to explain how the potential adverse impact of suspension of obligations would manifest itself in various specific sectors under the GATS in respect of which suspension might be considered.

4.93 Antigua thus explained that it initially envisaged the suspension of concessions or other obligations in telecommunication services, but that, upon more detailed review of the import and use of telecommunications services in Antigua, it had determined not only that the volume of the trade was low (US\$5.03 million) but that disruptions in changing services and suppliers and increased cost to Antiguan consumers would result in a heavier burden on Antiguan citizens as the result of suspending concessions in this area while having no perceptible impact on the United States.³²⁴

4.94 Antigua has also explained that the arguments it made in respect of Sector 10 ("Entertainment services") also hold true for other sectors of the GATS in which Antigua has made specific commitments in its Schedule. Antigua explains that, of the total value of services imports to Antigua in 2005, the main services imported were transportation (US\$ 70.7 million), travel (US\$ 40.1 million) and insurance services (US\$35.5 million). Antigua argues that if it were to suspend concessions with respect to these services, given the low level of these imports, it is clear that the suspension would

³²² *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 73.

³²³ *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 73.

³²⁴ Antigua's written submission, para. 53.

have virtually no impact upon the United States, while having to replace these services from other service providers, if reasonably practicable at all, would most likely prove to be more expensive to Antiguan consumers.³²⁵

4.95 The United States considers that WTO statistics indicate that Antigua's "other services imports" (services other than travel and transport) are in fact larger than its "other services exports", and thus are "an obvious candidate" for a request for suspension of concessions.³²⁶ It is not clear to us why the United States considers that the fact that Antigua's exports of services other than travel and transport are larger than its imports of services in the same category makes such imports "an obvious candidate" for suspension of concessions. To the extent that the United States assumes that, in these circumstances, the provision of the imported services could be replaced with the provision of the same services by local suppliers, this assumption would seem to be unverifiable, in the absence of any specific indication on the composition and distribution of such imports and exports.

4.96 The United States further notes that Antigua has even higher levels of services imports for travel and transport services. The United States argues that 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 and transport would adversely affect Antigua's tourism industry.³²⁷ The United States also notes, however, that, in light of the reliance of the Antiguan economy on tourism, it has not contested Antigua's assertion that it would not be practicable or effective for Antigua to suspend concessions in a manner that might discourage US tourists.³²⁸ Thus, the United States notes, it has not argued, for example, that Antigua should suspend concessions with regard to US travel services.³²⁹

4.97 The United States therefore seems to accept that the suspension of concessions or other obligations in respect of tourism services, or of other services that may have an impact on the tourism industry, may be such as to adversely affect Antigua, and that this may render such suspension not practicable or effective within the meaning of Article 22.3(c). We agree that suspension of obligations in respect of such services would have the potential to adversely affect Antigua's economy, while not necessarily having any perceptible impact on inducing compliance by the United States.

4.98 We also note that, by their very nature, services transactions are closely woven into a country's domestic economic fabric, with many cross-sectoral linkages. This is typically the case for so-called infrastructural services, such as large segments of the transport, telecommunications and financial services sectors. In our view, it is plausible that suspension of obligations against US firms established in Antigua in such sectors could entail a negative impact for the Antiguan local economy. The risk of economic disruption in case of forced divestiture, or similar measures, is not negligible, in particular for small economies. For instance, it is not clear to what extent Antiguan services suppliers would be able or willing to step in for US services suppliers obliged to suspend their operation or even leave the country. Moreover, legislative and other measures protecting foreign investors may make it difficult in practice to take and enforce action against them.

³²⁵ Antigua's written submission, para. 52.

³²⁶ US written submission, para. 60.

³²⁷ US written submission, para. 60.

³²⁸ See Antigua's oral statement, para. 37: "the United States apparently suggests that we prohibit American entertainers from offering services to consumers in Antigua, that we ban American tourists from visiting our resorts and that we prohibit American vessels and aircraft from bringing goods and holiday-makers to our tiny island. It should not require any deep economic analysis to see the futility of these suggestions". The Arbitrator notes that "ban[ning] American tourists from visiting [Antigua's] resorts" would not constitute a relevant form of retaliation under the GATS for Antigua.

³²⁹ US response to question 69 of the Arbitrator.

4.99 Overall, in light of all these elements, we consider that Antigua has provided sufficient elements in support of its determination, to satisfy us that it has considered objectively the relevant elements and that it could plausibly, on the basis of these elements, reach the conclusion that it was not practicable or effective to suspend concessions or other obligations with respect to "other sectors" under the GATS. By contrast, the United States has not demonstrated to us that Antigua has not met the requirements of Article 22.3(c) of the DSU. In fact, even if it considers Antigua's explanations to be overall insufficient, the United States apparently recognizes the legitimacy of Antigua's concerns, and their relevance to this determination, with respect to at least some sectors. The United States has not, on the other hand, persuaded us that there are services sectors in which Antigua could suspend concessions or other obligations practicably or effectively.

4.100 In making this determination, we recognize that the elements provided by Antigua in explaining how it arrived at its determination are somewhat limited. Specifically, we have been provided with only limited information on the exact composition of Antigua's services imports, including the share of US imports in various sectors. However, we are not persuaded that it would be reasonable to expect Antigua to be in a position to produce, in the context of these proceedings, such detailed sector-specific statistics and data relating to its bilateral services trade. In this respect, we find it appropriate to take into account, in reviewing Antigua's determination, that it may not maintain such data on a regular basis, in the same way as some developed countries or larger developing countries may do. Indeed, the United States itself has also not provided us with any more detailed information on the volume and distribution of its services trade with Antigua.

(c) Antigua's consideration of the elements in subparagraph (d)

4.101 We must now consider whether Antigua has taken due account, in making its determination, of the factors identified in subparagraph (d) of Article 22.3.

4.102 As determined in paragraph 4.73 above, we consider that the relevant trade to be considered for the purposes of subparagraph (d)(i) is the trade under the relevant agreement, namely, in this case, trade in services (with the exception of trade in respect of Sector 10). Antigua's arguments as discussed in the preceding section sufficiently establish, in our view, that Antigua considered the relevant trade, as well as the importance of such trade to Antigua's economy, in making its determination.

4.103 Subparagraph (d)(ii) requires that the "broader economic elements" relating to the Member suffering the nullification or impairment, as well as the "broader economic consequences" of the suspension also be taken into account. As we have determined in paragraph 4.37 above, we consider that the latter element relates to the consequences both on the complaining party and on the party that was found not to be in compliance with its obligations under the covered agreements. As observed in the preceding section, Antigua's consideration of the effectiveness or practicability of suspension of obligations in "other sectors" under the GATS turned importantly on a consideration of the general economic circumstances of Antigua as a small import-dependent economy, in other words, the "broader economic elements" relating to Antigua. Antigua's determination also importantly involved a consideration of the potential adverse impact of such suspension on Antigua's economy, contrasted with the limited impact that such suspension could be expected to have on the United States, in other words, the "broader economic consequences" of such suspension for both parties.

4.104 We are therefore satisfied that Antigua has taken into account the relevant factors identified in Article 22.3(d) in its determination of whether suspension of concessions or other obligations with respect to "other sectors" under the GATS is practicable or effective.

(d) Conclusion

4.105 In light of our determinations in sections (b) and (c) above, we find that Antigua could plausibly arrive at the conclusion that it was not practicable or effective for it to suspend concessions or other obligations in respect of other sectors under the GATS, and determine that suspension of concessions or other obligations is not practicable or effective, with respect to other sectors than that in which a violation was found, under the same agreement. We also find that the United States has not demonstrated that Antigua has not followed the principles and procedures of Article 22.3(c), in making this determination.

2. Whether the circumstances are serious enough

4.106 Finally, we must review Antigua's determination that the "circumstances are serious enough", so that suspension of obligations can be sought under another agreement, in accordance with Article 22.3(c).

4.107 The text of Article 22.3(c) provides no express guidance how this aspect of the determination is to be understood. Like the arbitrators in the *EC – Bananas III (Ecuador) (Article 22.6 – EC)* case, we note that the factors to be taken into account under subparagraph (d) may provide some contextual guidance. We therefore consider that the trade at issue and its importance to the complaining party, as well as the broader economic elements relating to the Member suffering the nullification or impairment and the broader economic consequences of the proposed suspension on the parties may be relevant in the context of a determination that the circumstances are "serious enough".

4.108 We also consider, more generally, that this aspect of the determination, which relates to "circumstances", is of necessity an assessment to be made on a case-by-case basis, and that the circumstances that are relevant may vary from case to case. We note however, that these circumstances should be "serious enough", which suggests that it is only when the circumstances reach a certain degree or level of importance, that they can be considered to be "serious enough" within the meaning of Article 22.3(c).

4.109 In order to demonstrate the seriousness of the circumstances in this case, Antigua first presents some basic figures comparing the population, size, GDP, exports and imports of the United States and Antigua, which illustrate a considerable disparity in all of these areas.³³⁰

4.110 Antigua also highlights that it has extremely limited natural resources and very limited arable land, such that it cannot produce sufficient agricultural products to satisfy domestic needs, let alone for export. Antigua further notes that its economy has become highly dependent on tourism and associated services, including hotels and restaurants, retail trade, construction, real estate and housing and transportation.³³¹ Antigua also highlights the vulnerability of the tourism sector to external factors (such as weather conditions, security threats or economic downturn in source markets) and the fact that it tends to employ unskilled workers and generate low-paying jobs.

4.111 Third, Antigua highlights the need to diversify its economy, and that in order to do this it has tried to develop trade in services, including trade in remote gambling, with the active involvement of the Antiguan Government. Antigua suggests that prior to 1998, the United States Government even supported Antigua in its efforts to develop and supervise the remote gaming industry.³³²

³³⁰ Antigua's written submission, para. 55.

³³¹ Antigua's written submission, para. 58.

³³² Antigua's written submission, para. 64.

4.112 The United States disagrees with Antigua's understanding of the US Government support provided to Antigua in developing trade in remote gambling³³³, but it does not otherwise dispute Antigua's statements in respect of the elements described above.

4.113 In our view, it was reasonable for Antigua to determine, in light of the elements it highlights, that the circumstances are "serious enough" within the meaning of Article 22.3(c). Specifically, in our view, the various considerations highlighted by Antigua are such as to exacerbate the difficulties in finding a way to suspend concessions or other obligations in a practicable or effective manner under the GATS.

4.114 We note in this respect that the extremely unbalanced nature of the trading relations between the parties makes it all the more difficult for Antigua to find a way of ensuring the effectiveness of a suspension of concessions or other obligations against the United States under the same agreement. We also note that the heavy reliance of Antigua's economy on the very sectors that would be candidates for retaliation under the GATS increases the likelihood that an adverse impact would arise for Antigua itself, including for low-wage workers.

4.115 These circumstances can be directly related to the practicability and effectiveness of suspension under the GATS, i.e. the first condition in order for Antigua to seek suspension outside that agreement.

4.116 In light of these elements, we find that Antigua could plausibly make a determination that "the circumstances are serious enough", within the meaning of Article 22.3(c).

F. OVERALL CONCLUSION

4.117 In light of our determinations above, we conclude that Antigua has applied the principles and procedures of Article 22.3 of the DSU consistently with the terms of that provision.

4.118 Specifically, we find that Antigua's determination that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector as that in which a violation was found is consistent with the requirements of Article 22.3.(b), and that its determination that it is also 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 is consistent with the requirements of Article 22.3(c) of the DSU.

4.119 Accordingly, we find that Antigua may seek to suspend obligations under the TRIPS Agreement.

V. EQUIVALENCE AND IMPLEMENTATION OF SUSPENSION OF OBLIGATIONS UNDER THE TRIPS AGREEMENT

5.1 The United States has requested the Arbitrator to require Antigua to specify how it will ensure that any suspension of concessions or other obligations does not exceed the level of nullification and impairment found by the Arbitrator. We now address this matter.

A. ARGUMENTS OF THE PARTIES

5.2 In its written submission, the United States notes that Antigua's request does not place any value on GATS and TRIPS concessions and does not explain what mechanisms Antigua intends to use to ensure that the level of suspension does not exceed the level of nullification and impairment.

³³³ US declaration in response to oral question by the Arbitrator at the meeting with the parties.

The United States argues that the Arbitrator should require Antigua to specify how it will ensure this³³⁴ and that without this information, it would be impossible for the Arbitrator to determine the equivalence of the level of suspension of concessions with the level of nullification and impairment, as is required by DSU Article 22.7.³³⁵ In the United States view, therefore, the Arbitrator should thus not find that Antigua is allowed to suspend TRIPS concession.³³⁶

5.3 The United States argues that the Antiguan gambling industry has been targeting US consumers in knowing violation of US criminal laws. 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, its responses indicate that although it had adopted a corporate income tax in the period 2001-2003, the gambling companies never paid it. The United States also alleges that even where Antigua has information from the gambling companies that is relevant to the outcome of the arbitration, it refuses to provide such information in order to shield those companies from prosecution under the criminal laws of another WTO Member. The United States expresses its concern that, in these circumstances, 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. According the US, Antigua has explained that it has not even begun to address such issues. The United States asserts that an authorization to suspend TRIPS concessions could encourage rampant and uncontrolled IPR piracy, and that such an outcome would serve no legitimate interests of any WTO Member.³³⁷

5.4 Antigua counters that the imposition of a requirement for it to specify how it will ensure that the level of suspension of concessions does not exceed the level of nullification determined by the Arbitrators would not be within the terms of reference of the Arbitrators under Article 22.7 of the DSU. It argues that it is well established from prior arbitrations under Article 22 of the DSU that the complaining party is not required to specify precisely which "obligations" it intends to suspend once the suspension of concessions or other obligations is authorized by the DSB, nor is it the role of the arbitrators to so determine.³³⁸

5.5 In Antigua's view, the Arbitrators do not need to have knowledge of how Antigua intends to achieve its remedy under the covered agreements. Furthermore, Antigua would not be in a position to indicate how it intends to calculate and track the retaliation value in each sector of the TRIPS Agreement under which it seeks to suspend concession or other obligations, and to ensure that the level of suspension of concessions does not exceed the level of nullification and impairment. Once Antigua is given authorization to suspend concessions or other obligations, and once the level of authorization is set, then Antigua will assess its alternatives. Authorization does not require Antigua to actually impose any retaliatory measures and its Government has decided to make that decision when the time comes.³³⁹ Antigua argues that the "equivalence" is achieved by first setting the level of nullification and impairment and thereafter Antigua setting the suspension of concessions or other obligations at the same level.³⁴⁰

³³⁴ Para. 63 of the US written submission.

³³⁵ US response to question 55.

³³⁶ Para. 28 of US comments on Antigua's responses.

³³⁷ *Ibid.*, paras. 29-30.

³³⁸ Paras. 127-128 of Antigua's written submission.

³³⁹ Antigua's responses to questions Nos. 55 and 56.

³⁴⁰ Para. 78 of Antigua's comments on US responses.

B. ANALYSIS BY THE ARBITRATOR

5.6 In its request for authorization to suspend concessions or other obligations, Antigua identified certain obligations under the TRIPS Agreement, that it proposed to suspend. Specifically, Antigua indicated that it intends to take countermeasures in the form of suspension of concessions and obligations under the following sections of Part II of the TRIPS:

Section 1:	Copyright and related rights
Section 2:	Trademarks
Section 4:	Industrial designs
Section 5:	Patents
Section 7:	Protection of undisclosed information.

5.7 As we have determined above, Antigua may seek to suspend obligations under the TRIPS Agreement. In order for such suspension to be equivalent to the level of nullification or impairment of benefits accruing to Antigua, it must not exceed US\$21 million.

5.8 It is incumbent on Antigua to ensure that, in applying such suspension, it does not exceed this level. Antigua has declined to provide any explanation on how it proposes to apply such suspension and how it will ensure that the level of the proposed suspension does not exceed the level to be authorized by the DSB. We regret that Antigua did not find it useful to provide such explanations.

5.9 We note that our mandate does not allow us, in reviewing the equivalence of the proposed suspension with the level of nullification or impairment, to consider the "nature" of the obligations to be suspended.³⁴¹ We understand this to mean that we may not question the complaining party's choice of specific obligations to be suspended (other than in the context of considering a claim that the principles and procedures of Article 22.3 have not been followed) and that we must assess the level of the proposed suspension, rather than its form, against the level of nullification or impairment.

5.10 At the same time, it is important that the form that is chosen in order to enact the suspension is such as to ensure that equivalence can and will be respected in the application of the suspension, once authorized. The form should also be transparent, so as to allow an assessment of whether the level of suspension does not exceed the level of nullification. We also note that the suspension of obligations under the TRIPS Agreement may involve more complex means of implementation than, for example, the imposition of higher import duties on goods, and that the exact assessment of the value of the rights affected by the suspension is also likely to be more complex.³⁴²

5.11 In the light of these considerations, we note the remarks made by the arbitrators in *EC – Bananas III (Ecuador)*, on the suspension of TRIPS obligations in that case.³⁴³ We consider these remarks to also be relevant to this case, in that the same considerations will be pertinent to the manner in which Antigua might implement a suspension of its obligations under the TRIPS Agreement.

5.12 Like the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)*³⁴⁴, *US – 1916 Act (EC) (Article 22.6 – US)*³⁴⁵, and *US - Byrd Amendment (Article 22.6 - EC)*³⁴⁶, we also note that the United

³⁴¹ See Article 22.7 of the DSU ("The arbitrator acting pursuant to paragraph 6 shall not review the nature of the concessions or other obligations to be suspended...").

³⁴² This is illustrated well by the explanations provided by Ecuador in the *EC – Bananas III (Ecuador) (Article 22.6 – EC)* case as to how it proposed to implement the proposed suspension of TRIPS obligations, including through the setting up of specific government-run schemes.

³⁴³ *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, section V (paras. 139 to 165).

³⁴⁴ *EC – Hormones (US) (Article 22.6 – EC)*, para. 82.

³⁴⁵ *US – 1916 Act (EC) (Article 22.6 – US)*, para.9.2.

³⁴⁶ *US - Byrd Amendment (Article 22.6 – EC)*, para. 4.27.

States may have recourse to the appropriate dispute settlement procedures in the event that it considers that the level of concessions or other obligations suspended by Antigua exceeds the level of nullification or impairment we have determined for purposes of the award.

5.13 Finally, we note that Article 22.8 of the DSU provides that:

"The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or ruling provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. ..."

VI. AWARD

6.1 For the reasons set out above, the Arbitrator determines that the annual level of nullification or impairment of benefits accruing to Antigua in this case is US\$21 million and that Antigua has followed the principles and procedures of Article 22.3 of the DSU in determining that it is not practicable or effective to suspend concessions or other obligations under the GATS and that the circumstances were serious enough. Accordingly, the Arbitrator determines that Antigua may request authorization from the DSB, to suspend the obligations under the TRIPS Agreement mentioned in paragraph 5.6 above, at a level not exceeding US\$21 million annually.

ANNEX A

***United States – Measures Affecting the Cross-Border Supply
of Gambling and Betting Services
(WT/DS285)***

Arbitration pursuant to Article 22.6 of the DSU

Working Procedures

The Arbitrator will follow the normal working procedures of the DSU where relevant and as adapted to the circumstances of the present proceedings, in accordance with the timetable it has adopted. In this regard:

1. The Arbitrator will meet in closed session;
2. The deliberations of the Arbitrator and the documents submitted to it shall be kept confidential. This is without prejudice to the parties' disclosure of statements of their own positions to the public, in accordance with the normal working procedures of the DSU;
3. At its substantive meeting with the parties, the Arbitrator will ask the United States to present its views first, followed by Antigua and Barbuda;
4. The Arbitrator may at any time during the proceedings put questions to either party. Whenever appropriate, the Arbitrator shall accord the other party a period of time to comment on the responses;
5. Each party shall make available to the Arbitrator and to the other party a written version of its oral statement by noon of the first working day following the meeting with the parties. Each party is encouraged to provide a provisional written version of its oral statement at the time the oral statement is presented;
6. Each party shall submit all factual evidence to the Arbitrator no later than in its written submission to the Arbitrator, except with respect to evidence necessary for the purposes of rebuttal or for answers to questions. Derogations to this procedure will be granted upon a showing of good cause. In such cases, the Arbitrator shall accord the other party a period of time for comments, as appropriate;
7. To facilitate the maintenance of the record of the arbitration and to maximize the clarity of submissions and other documents, in particular the references to exhibits submitted by parties, each party shall sequentially number its exhibits throughout the course of the arbitration;
8. Each party has the right to determine the composition of its own delegation. Delegations may include, as representatives of the government concerned, private counsel and advisers. Parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and these Working Procedures, particularly in regard to confidentiality of the proceedings. Each party shall provide a list of the participants of its delegation prior to, or at the beginning of, any meeting with the Arbitrator;
9. Any request for a preliminary ruling to be made by the Arbitrator shall be submitted no later than in a party's first submission. If the United States requests any such ruling, Antigua and Barbuda

shall submit its response to such a request in its first submission. If Antigua and Barbuda requests any such ruling, the United States shall submit its response to such a request no later than the beginning of the substantive meeting with the Arbitrator. Derogations to this procedure will be granted upon showing of a good cause;

10. Each party shall provide an electronic copy (on a computer format compatible with the Secretariat's programmes) together with the printed version (8 copies) of its submissions, including the methodology paper, on the due date foreseen in the timetable. All these copies must be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (office 2150). Electronic copies should be sent by e-mail to Mr. Ferranco at DSregistry@wto.org;

11. Except as otherwise indicated in the timetable or in these working procedures, submissions should be provided at the latest by 5.00 p.m. on the due date. As is customary, distribution of submissions to the other party shall be made by the parties themselves;

12. These working procedures may be modified by the Arbitrator as appropriate, after having consulted the parties.

ANNEX B

LETTER FROM THE ARBITRATOR TO THE ECCB

22 November 2007

Dear Sir Dwight,

I am writing to seek your assistance in clarifying certain factual issues that have arisen in relation to data collected by the ECCB for Antigua and Barbuda. These questions arise in the context of ongoing arbitral proceedings in the WTO dispute settlement case *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, which I am chairing. We would be extremely grateful for any assistance you may be able to provide.

.....
.....
In the context of these proceedings, the parties (the United States, and Antigua and Barbuda) have presented evidence relating to the market for remote gambling services. Reference has been made in particular to the ECCB's National Account Statistics (see attachment – Exhibit AB 6, Table 3.1). In relation to this data, Antigua and Barbuda has produced a letter by the ECCB stating that remote gambling revenues are not accounted for in GDP (see attachment – Exhibit AB 12).

We would be very grateful if you could respond to the following questions:

1. Are Antigua and Barbuda's remote gambling revenues reported for balance of payments (BOP) purposes? Specifically, we would like to know how you report (i) bets placed (i.e. gross amounts wagered), (ii) payments of winnings and (iii) the margin between bets placed and payments of winnings, i.e. net remote gambling revenues. . In addition, could you please inform us under which item of the financial account you record the corresponding entries, e.g. under bank deposits?
2. Could you clarify whether related transactions, such as imported inputs into remote gambling (perhaps reflected in the debit position of various business services of the current account) and expatriated profits (perhaps reflected in the debit position "investment income" of the current account) are reported.
3. If none of these transactions are reported, please indicate how this is possible given that, as we understand it, the ECCB compiles the information, to a certain extent, from records of commercial banks, and not exclusively from company surveys of gambling operators, who may not report.
4. May we also ask you whether data on Antigua and Barbuda's remote gambling revenue is contained in any other information base that you may maintain or whether you may be able to point us to alternative sources of information in that regard.

We are also sending a similar inquiry to the International Monetary Fund. In view of the extremely tight deadlines under which we are operating in these proceedings, we would appreciate it greatly if you are able to provide us with a response to these questions by Friday, 30 November 2007.

We thank you in advance for your kind assistance and very much look forward to receiving your response, which I am certain will be of great help to the Arbitrator in its assessment of the matter before it.

Yours sincerely,

Lars Anell
Chairman
*United States - Measures Affecting the Cross-Border
Supply of Gambling and Betting Services –
Recourse by the United States to Article 22.6 of the DSU*

c.c. Ms Laurel Bain, Director of the Statistics Department (statistics-sec@eccb-centralbank.org).

ANNEX C

LETTER FROM THE ARBITRATOR TO THE IMF

22 November 2007

Dear Mr. Strauss-Kahn,

I am writing to seek your assistance in clarifying certain factual issues that have arisen in relation to data for Antigua and Barbuda published by the IMF. These questions arise in the context of ongoing arbitral proceedings in the WTO dispute settlement case *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, which I am chairing. We would be extremely grateful for any assistance you may be able to provide.

In the context of these proceedings, the parties (the United States, and Antigua and Barbuda) have presented evidence relating to the market for remote gambling services. Reference has been made in particular to the IMF's 2006 Balance of Payments Yearbook, country table for Antigua and Barbuda (see attachment – Exhibit US 2).

We would be very grateful if you could respond to the following questions:

1. Could you please let us know the source of that data and whether it includes Antigua and Barbuda's remote gambling services? Specifically, we would like to know how you report (i) bets placed (i.e. gross amounts wagered), (ii) payments of winnings and (iii) the margin between bets placed and payments of winnings, i.e. net remote gambling revenues. In addition, could you please inform us under which item of the financial account you record the corresponding entries, e.g. under bank deposits?
2. Could you clarify whether related transactions, such as imported inputs into remote gambling (perhaps reflected in the debit position of various business services of the current account) and expatriated profits (perhaps reflected in the debit position "investment income" of the current account) are reported.
3. If none of these transactions are reported, please indicate how this is possible given that, as we understand it, the ECCB compiles the information, to a certain extent, from records of commercial banks, and not exclusively from company surveys of gambling operators, who may not report.
4. May we also ask you whether data on Antigua and Barbuda's remote gambling revenue is contained in any other information base that you may maintain or whether you may be able to point us to alternative sources of information in that regard?

We are also sending a similar inquiry to the Eastern Caribbean Central Bank. In view of the extremely tight deadlines under which we are operating in these proceedings, we would appreciate it greatly if you are able to provide us with a response to these questions by Friday, 30 November 2007.

We thank you in advance for your kind assistance and very much look forward to receiving your response, which I am certain will be of great help to the Arbitrator in its assessment of the matter before it.

Yours sincerely,

Lars Anell
Chairman
*United States - Measures Affecting the Cross-Border
Supply of Gambling and Betting Services –
Recourse by the United States to Article 22.6 of the DSU*

c.c. Mr. Edwards Director of the Statistics Department, IMF (redwards@imf.org).

ANNEX D

LETTER FROM IMF TO THE ARBITRATOR

13 December 2007

The Fund's Executive Board has authorized me to respond to your letter dated November 22, 2007 to Mr. Strauss-Kahn, seeking clarifications of statistical data for Antigua and Barbuda published by the IMF in the *Balance of Payments Statistics Yearbook*.

As a general reply, I can say that we have very little information on the value of Antigua and Barbuda's remote gambling revenue.

In response to your specific questions, please find below our responses:

1. The data published in the *Yearbook* for Antigua and Barbuda were supplied by the Eastern Caribbean Central Bank (ECCB). The ECCB is responsible for compiling balance of payments statistics for all member countries in collaboration with the statistical offices of its member countries.

The data supplied by the ECCB do not separately identify remote gambling services. Under classification rules for services, receipts for gambling services are a subset of personal, cultural, and recreational services (code 2 287 of Table 2 in the attachment to your letter), but this line has a zero entry for all years shown for Antigua and Barbuda. We also have received copies of many of the survey report forms now used by the ECCB, as well as of those that the ECCB plans to utilize in the future, and we do not see where gambling services are separately identified or covered. Also, the description of balance of payments data compiled by the ECCB and set out in Part III of the *Balance of Payments Statistics Yearbook* does not refer to gambling services.

Transactions related to gambling, however, may be captured in the financial account because (as you point out in question #3) financial account transactions are, to some extent, reported by commercial banks, and the transactions of gambling site operators would be an undifferentiated component of higher level financial account aggregates reported by these institutions.

2. Transactions related to gambling, including imports of business services and repatriation of profits by gambling site operators, should be covered in the data in the *Yearbook*, but here too the data would be undifferentiated components of higher level aggregates. We cannot determine how comprehensively the data are captured in practice.

3. National compilers strive to report transactions in their jurisdictions following the concepts and guidelines outlined by the IMF. In our opinion, it is likely that receipts and payments, and imports and exports of gambling site operators, are captured to some extent in the data that are reported in the *Yearbook*, but the data in the *Yearbook* do not specifically identify gambling services. Data in the *Yearbook* are classified in broader categories, such as "personal, cultural, and recreational services," or direct investment income.

4. Essentially all of the data in the *Yearbook* for Antigua and Barbuda are provided by the ECCB. The IMF does not conduct any independent data collection of importers or exporters of

gambling services. We therefore believe that the ECCB, and probably also the authorities in Antigua and Barbuda, are best placed to provide answers to your detailed questions about remote gambling revenue.

If you have any additional questions or need clarification of the above, please do not hesitate to contact me.

Sincerely yours,

Robert W. Edwards Director
Statistics Department

ANNEX E

Annex Tables

Annex Table 1

Antigua's remote gambling revenues
(million dollars)

	Global revenues	Difference to year 2001	80% revenues	Difference to year 2001
2001	1630		1304	
2002	1693	-63	1354	-50
2003	1185	445	948	356
2004	1145	485	916	388
2005	1138	492	910	394
2006	1086	544	869	435
Average		381		304

Source: GBGC, October 2007.

Annex Table 2

Revenues per employee, selected companies
(dollars)

	Partygaming	YouBet	Betfair	888	Sporting bet	Unibet	Betcorp	Average
2001		82,895						
2002	266,372	342,105						
2003	356,876	807,463			410,810	360,490	229,886	
2004	825,240	804,938	425,299	258,206	470,563	524,934	155,686	
2005	719,426	837,736	460,808	305,869	560,964	650,895	118,069	
2006	918,453	305,817	295,830	393,885	749,645	737,052	167,777	
Average w/o extr.	617,273	530,159	369,800	319,320	547,996	568,343	167,855	445,821
Average	633,847	565,081	361,282	305,869	515,764	587,915	161,732	447,356

Notes: For the average without extreme values the two years with the highest and lowest revenues have been removed from the calculations. Amounts in other currencies have been converted to dollars using the average exchange rate of the respective year according to the IMF International Financial Statistics, November 2007.

Source: Antigua response to question 21 by the Arbitrator, pages 18-19 and Exhibit AB-17.

Annex Table 3

Revenues per employee and number of employees

	Number of employees Antigua remote gambl.	80% of number of employees	Difference of number of 80% empl. to year 2001	Average revenues per employee times empl. difference (dollars)
2001	1014	811		
2002	328	262	549	244,666,459
2003	431	345	466	207,930,824
2004	492	394	418	186,174,769
2005	628	502	309	137,669,465
2006	442	354	458	204,007,601
Average				196,089,823

Notes: Small errors in the numbers of employees are due to rounding. For the present calculations, average revenues per employee of US\$445,821 have been used.

Source: Antigua response to question 21 by the Arbitrator, pages 18-19 and Exhibit AB-17.

Annex Table 4

Online revenues from world, by country/group

	C&Sam&Car rev.	World rev.	C&Sam&Car share in World rev.	A&B share in World rev.	A&B share in C&Sam&Car rev.	A&B contrib. to C&Sam&Car share in World rev. compared to 2001
	(million dollars)	(million dollars)	(per cent)	(per cent)	(per cent)	(per cent)
2001	2,397	3,530	68	46	68	100
2002	2,639	4,380	60	39	64	94
2003	2,676	5,650	47	21	44	65
2004	3,095	8,930	35	13	37	54
2005	3,232	11,890	27	10	35	52
2006	3,152	15,320	21	7	34	51

Source: GBGC, October 2007.

Notes: C&Sam&Car denotes the Central and South American and Caribbean region, A&B refers to Antigua and Barbuda and rev. means revenues.

Annex Table 5

Antigua's revenue loss, adjustment for competition

	GBGC			Revenues per employee		
	Revenue loss	Contrib. A&B to 2001 share	Revenue loss adjusted	Revenue loss	Contrib. A&B to 2001 share	Revenue loss adjusted
	<i>(million dollars)</i>	<i>(per cent)</i>	<i>(million dollars)</i>	<i>(million dollars)</i>	<i>(per cent)</i>	<i>(million dollars)</i>
2002	-50	94	-48	245	94	231
2003	356	65	232	208	65	135
2004	388	54	211	186	54	101
2005	394	52	204	138	52	71
2006	435	51	221	204	51	103
Average	304		164	196		128

Source: GBGC, October 2007 and Antigua response to question 21 by the Arbitrator, pages 18-19 and Exhibit AB-17.