

**BEFORE THE ARBITRATORS
OF THE
WORLD TRADE ORGANISATION**

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

WT/DS285

ARBITRATION UNDER ARTICLE 22.6 OF THE DSU

**WRITTEN SUBMISSION
OF ANTIGUA AND BARBUDA**

4 October 2006

Table of Reports Cited in This Submission

SHORT TITLE	FULL TITLE
<i>Brazil – Aircraft</i>	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)
<i>Canada – Regional Aircraft</i>	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)
<i>EC – Asbestos</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R (25 September 1997), as modified by the Appellate Body Report, WT/DS135/AB/R (12 March 2001)
<i>EC – Bananas (Ecuador)</i>	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)
<i>EC – Bananas (US)</i>	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)
<i>EC – Hormones (Canada)</i>	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)
<i>EC – Hormones (US)</i>	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)
<i>US – 1916 Act (EC)</i>	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)
<i>US – Continued Dumping and Subsidy Offset Act of 2000 (Brazil)</i>	Decision by the Arbitrators, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse to Arbitration by Brazil under Article 22.6 of the DSU</i> , WT/DS217/ARB/BRA (31 August 2004)

SHORT TITLE	FULL TITLE
<i>US – Continued Dumping and Subsidy Offset Act of 2000 (Canada)</i>	Decision by the Arbitrators, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse to Arbitration by Canada under Article 22.6 of the DSU</i> , WT/DS217/ARB/CAN (31 August 2004)
<i>US – Continued Dumping and Subsidy Offset Act of 2000 (Chile)</i>	Decision by the Arbitrators, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse to Arbitration by Chile under Article 22.6 of the DSU</i> , WT/DS217/ARB/CHL (31 August 2004)
<i>US – Continued Dumping and Subsidy Offset Act of 2000 (EC)</i>	Decision by the Arbitrators, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS217/ARB/EEC (31 August 2004)
<i>US – Continued Dumping and Subsidy Offset Act of 2000 (India)</i>	Decision by the Arbitrators, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse to Arbitration by India under Article 22.6 of the DSU</i> , WT/DS217/ARB/IND (31 August 2004)
<i>US – Continued Dumping and Subsidy Offset Act of 2000 (Japan)</i>	Decision by the Arbitrators, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse to Arbitration by Japan under Article 22.6 of the DSU</i> , WT/DS217/ARB/JPN (31 August 2004)
<i>US – Continued Dumping and Subsidy Offset Act of 2000 (Korea)</i>	Decision by the Arbitrators, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse to Arbitration by Korea under Article 22.6 of the DSU</i> , WT/DS217/ARB/KOR (31 August 2004)
<i>US – Continued Dumping and Subsidy Offset Act of 2000 (Mexico)</i>	Decision by the Arbitrators, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Recourse to Arbitration by Mexico under Article 22.6 of the DSU</i> , WT/DS217/ARB/MEX (31 August 2004)
<i>US – Gambling</i>	Panel Report, , <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R (10 November 2004), as modified by the Appellate Body Report, WT/DS285/AB/R (7 April 2005)
<i>US – Gambling (Article 21.5 – Antigua)</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 (30 March 2007)
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses From India</i> , WT/DS33/AB/R (25 April 1997)

TABLE OF CONTENTS

I.	INTRODUCTION.	1
A.	In General.	1
B.	Procedural History.	2
C.	Structure of This Submission.	4
II.	ARTICLE 22 OF THE DSU.	4
A.	Purpose and Overview.	4
B.	Burden of Proof.	7
C.	Article 22.3 of the DSU.	8
1.	The Hierarchy.	8
2.	Other Requirements Under Articles 22.3(b) through (d).	9
3.	Application of the Other Requirements.	10
III.	LEVEL OF NULLIFICATION AND IMPAIRMENT.	13
A.	The DSB Rulings.	13
B.	The Starting Point is Market Access.	14
IV.	APPLICATION OF ARTICLE 22 OF THE DSU TO THIS ARBITRATION.	16
A.	The Antigua Request is Sufficient to Place the Burden of Proof on the United States.	16
B.	Level of Nullification and Impairment.	20
1.	Introduction.	20
2.	The GBGC Data.	21
3.	The Economic Analysis.	22
C.	Application of Article 22.3 to Antigua.	23
1.	No Remedy Under the GATS.	23
2.	The “Seriousness of the Circumstances” and the Other Requirements under Article 22.3(d) of the DSU.	25
3.	Inducing Compliance.	31
V.	COMMENTS ON THE US 22 SUBMISSION.	31
A.	Introduction.	31
B.	The United States Misses the “Key Starting Point”.	32
1.	The United States Continues to Mischaracterise the DSB Rulings.	32
2.	The Proper Effect of Article XIV of the GATS.	33
3.	The Meaning of “Market Access”.	36

4.	The United States Cannot Select a Hypothetical Method of Compliance.	38
5.	Back to Market Access.	39
C.	The Economic Data.	40
1.	The GBGC Data.	40
2.	The ECCB, IMF and WTO Data.	42
3.	Gross Domestic Product Issues.	43
4.	Regarding the Counterfactual.	45
D.	“Other Methodological Flaws”.	46
1.	The Use of Worldwide Gambling Revenue.	46
2.	Whether the Loss of Market Share is Attributable to United States Actions.	47
3.	Use of a Multiplier.	50
E.	The United States Position With Respect to Article 22.3 of the DSU.	51
F.	“Ensuring Equivalency”.	51
VI.	CONCLUSION.	52

I. INTRODUCTION

A. IN GENERAL

1. Antigua and Barbuda (“*Antigua*”) makes this Submission to the Panel of Arbitrators (the “*Arbitrators*”) in WT/DS285 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Arbitration Under Article 22.6 of the DSU*. As has been the case throughout the course of this dispute between Antigua and the United States of America (the “*United States*”), this proceeding presents a number of unique circumstances, facts, evidence and legal issues. Not only have there been very few instances of completed arbitration under Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “*DSU*”) of the World Trade Organisation (the “*WTO*”),¹ but there has never been a case in which the economic and demographic disparities between the claiming party and the responding party are so enormous. The nearest comparison to date is the arbitration in *EC – Bananas (Ecuador)*,² but with a land area of 283,560 square kilometres, a population estimated at 13,755,680 and annual exports of approximately US \$12.56 billion, even Ecuador vastly overshadows Antigua.³

2. Antigua deeply regrets that this dispute has resulted in arbitration under Article 22.6 of the DSU. There are so few arbitrations under Article 22.6 because responding parties either tend to come into compliance with adverse recommendations and rulings by the WTO’s Dispute

¹ As of the date of this Submission, there have been 17 arbitration reports under Article 22.6 of the DSU circulated. Of those, eight were issued at the same time on the same issue (*United States – Continued Dumping and Subsidy Offset Act of 2000*), two other reports were also issued at the same time on the same topic (*EC – Hormones*), leaving a total of just nine disputes in the history of the WTO to complete arbitration under Article 22.6 of the DSU.

² *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU (24 March 2000).

³ The combined land area of Antigua and Barbuda is 442.6 square kilometres, its population estimated at 69,481 and its exports (excluding interactive gaming and wagering services) at US \$46.81 million. United States Central Intelligence Agency, *The World Factbook 2007* [<https://www.cia.gov/library/publications/the-world-factbook/docs/profileguide.html>].

Settlement Body (the “**DSB**”) prior to reaching this very final phase of dispute resolution under the DSU or the parties are able to come to an accord or compromise of the dispute before it goes to arbitration. Antigua believes it is very unfortunate that in this, its only use of the dispute resolution system of the WTO, the United States has both failed to bring itself into compliance and failed to negotiate with Antigua towards a reasonable compromise. Antigua has invested now more than four years into the completion of this dispute and has witnessed significant damage to its economy and prospects by the failure of the United States to comply with the DSB recommendations and rulings in this dispute (the “**DSB Rulings**”). While Antigua fully appreciates the seriousness and implications of its recourse to Article 22.2 of the DSU in this dispute, it finds itself without any fair alternative.

B. PROCEDURAL HISTORY

3. In WT/DS285, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (the “**Original Proceeding**”), three federal measures⁴ of the United States (collectively, the “**Federal Trio**”) were found to be contrary to the obligations of the United States under Article XVI of the WTO’s *General Agreement on Trade in Services* (the “**GATS**”). Having been given a period of 11 months and two weeks to come into compliance with the DSB Rulings by an arbitrator,⁵ shortly after the expiration of the reasonable period of time on 3 April 2006 the United States announced that it was in compliance with the DSB Rulings.⁶

4. Antigua disagreed with the United States, and on 23 May 2006, Antigua and the United States concluded “Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding Applicable to the WTO Dispute *United States – Measures Affecting the Cross-*

⁴ These three laws are (i) 18 U.S.C. § 1084 (the “**Wire Act**”); (ii) 18 U.S.C. § 1952 (the “**Travel Act**”); and (iii) 18 U.S.C. § 1955 (the “**Illegal Gambling Business Act**” or “**IGBA**”).

⁵ Award of the Arbitrator, WT/DS285/13 (19 August 2005).

⁶ WT/DSB/M/210 (30 May 2006), paras. 33-35.

Border Supply of Gambling and Betting Services (WT/DS285)” (the “**Agreed Procedures**”).⁷ In conformity with the Agreed Procedures, on 8 June 2006 Antigua made recourse to Article 21.5 of the DSU by requesting consultations with the United States.⁸

5. Subsequent consultations were held in Washington, D.C., but did not result in an agreement. As there was clearly a dispute between the parties “as to the existence or consistency with a covered agreement of measures taken to comply” with the DSB Rulings, on 6 July 2006 Antigua submitted a request for the establishment of a panel pursuant to Article 21.5 of the DSU,⁹ and at its meeting of 19 July 2006 the DSB agreed to form a panel (the “**Compliance Panel**”) to hear the matter.

6. On 30 March 2007 the Compliance Panel issued its final report, in which it concluded that the United States had failed to comply with the DSB Rulings.¹⁰ In accordance with the Agreed Procedures, on 21 June 2007 Antigua made recourse to Article 22.2 of the DSU (the “**Request**”),¹¹ which was followed by a request of the United States for arbitration under Article 22.6 of the DSU (the “**US Request**”).¹² In the US Request, the United States (i) objected to the level of suspension of concessions and obligations contained in the Request and (ii) claimed that Antigua had not followed the principles and procedures set forth in Article 22.3 of the DSU. The matter was referred to arbitration and the Arbitrators constituted by the WTO Secretariat on 6 August 2007.¹³

⁷ WT/DS285/16 (26 May 2006).

⁸ WT/DS285/17 (12 June 2006).

⁹ WT/DS285/18 (7 July 2006).

¹⁰ Report of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW (30 March 2007).

¹¹ WT/DS285/22 (22 June 2007).

¹² WT/DS285/23 (24 July 2007).

¹³ WT/DS285/24 (6 August 2007).

C. STRUCTURE OF THIS SUBMISSION

7. This Submission is comprised of five separate sections in addition to this Introduction:
- Section II contains a general summary of the legal principles and framework applicable to an arbitration under Article 22.6 of the DSU, including the burden of proof and the application of Article 22.3(c) of the DSU.
 - Section III briefly describes the DSB Rulings, the Federal Trio and the proper starting point for this Arbitration.
 - Section IV contains a discussion by Antigua regarding the application of Article 22.3 of the DSU to the facts and circumstances of this dispute.
 - Section V contains comments of Antigua to the submission of the United States to the Arbitrators (the “*US 22 Submission*”).¹⁴
 - Section VI contains the conclusions and requests of Antigua to the Arbitrators.
8. As it has done throughout the course of this dispute, the United States in its submission to the Arbitrators has relied heavily on the selective use of facts and a heavy dousing of adjectives rather than of evidence. Antigua is entitled to the suspension of concessions or other obligations as proposed in the Request, and trusts that it will so demonstrate over the course of this Submission.

II. ARTICLE 22 OF THE DSU

A. PURPOSE AND OVERVIEW

9. Stated simply, the purpose of Article 22 of the DSU is to *induce compliance* by a Member with the recommendations and rulings of the DSB which have not been implemented within a

¹⁴ Written Submission of the United States, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration Pursuant to Article 22.6 of the DSU*, WT/DS285 (19 September 2007).

reasonable period of time.¹⁵ As observed by the arbitrators in *Canada – Regional Aircraft*, the suspension of concessions or other obligations under Article 22 of the DSU is intended to be temporary,¹⁶ to remain in place until the favoured remedy of compliance with the recommendations and rulings of the DSB is achieved.

10. This objective is borne out by the text of Article 22.1, which provides in material part:

“Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements (...).”

While the preferred solution to a dispute between Members under the DSU is a negotiated settlement, in the absence of an agreement “the first objective of the dispute settlement mechanism 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.”¹⁷

11. Although the suspension of concessions or other obligations under Article 22 of the DSU is aimed at inducing compliance, Article 22.4 requires that the level of the suspension be equivalent to the level of nullification or impairment resulting from the failure of the responding party to comply with the DSB recommendations and rulings.¹⁸ In the few decisions rendered

¹⁵ Decision by the Arbitrators, *United States – Anti-Dumping Act of 1916 (Original Complaint by the European Communities) – Recourse to Arbitration by the United States Under Article 22.6 of the DSU*, WT/DS136/ARB (24 February 2004), para. 5.5; Decision by the Arbitrator, *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*, WT/DS222/ARB (17 February 2003), para. 3.48; Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB/ECU (24 March 2000), para. 72.

¹⁶ Arbitrator’s Report, *Canada – Regional Aircraft*, para. 3.105.

¹⁷ DSU, Article 3.7.

¹⁸ See Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB (9 April 1999), para. 6.3.

under Article 22.6 of the DSU to date, the determination of the “level of nullification or impairment” has featured prominently in each of them. While the facts and contexts of each different dispute have led to a lack of precision in defining what exactly is meant by “level of nullification or impairment,”¹⁹ in general prior arbitrators have focussed on the trade loss to the complaining party as a result of the maintenance of the WTO-inconsistent measures by the responding party.

12. For example, in *Brazil – Aircraft*, this was expressed as the “harm” caused to the affected industry as a result of the offending measure,²⁰ whereas in *EC – Bananas (US)* the arbitrators stated that the “benchmark for the calculation of nullification or impairment . . . should be losses in US exports of goods to the European Communities and losses by US service suppliers in services supply in or to the European Communities.”²¹ This approach was basically followed by the arbitrators in the two *EC – Hormones* decisions, where the starting point was held to be what the annual level of exports from the United States and Canada to the European Communities (the “*EC*”) would have been if the EC had withdrawn its prohibition of the affected products at the end of the reasonable period of time.²²

¹⁹ For a good analysis of how prior arbitrators have dealt with this issue, see, e.g., Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by Brazil) – Recourse to Arbitration by the United States Under Article 22.6 of the DSU*, WT/DS217/ARB/BRA (31 August 2004), paras. 3.35 - 3.55.

²⁰ Decision by the Arbitrators, *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*, WT/DS46/ARB (28 August 2000), para. 3.54.

²¹ Arbitrators’ Report, *EC – Bananas (US)*, para. 6.12.

²² Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS26/ARB (12 July 1999), para. 38; Decision by the Arbitrators, *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*, WT/DS48/ARB (12 July 1999), para. 37.

B. BURDEN OF PROOF

13. The burden of proof in an Article 22.6 arbitration is well-settled, and was concisely summarised by the arbitrators in *EC – Hormones (US)*:

“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 US 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 US proposal with the said WTO rule. It is thus for the EC to prove that the US 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 the US 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 US 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.”²³

14. Thus, the burden is *not* on the complaining party to demonstrate that its request for suspension of concessions or other obligations conforms to the requirements of Article 22, *rather* the responding party must 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 the burden shifts to the complaining party to rebut *that* presumption.²⁴

15. In order to establish a *prima facie* case, a party with the burden of proof must put forward evidence and legal argument sufficient to demonstrate the accuracy of its claim.²⁵ As elaborated by the Appellate Body in *US – Gambling*:

“A *prima facie* case must be based on ‘evidence *and* legal argument’ put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party

²³ Arbitrators’ Report, *EC – Hormones (US)*, para. 9 (emphasis in original).

²⁴ Arbitrators’ Report, *EC – Bananas (Ecuador)*, para. 59.

²⁵ Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses From India*, WT/DS33/AB/R (25 April 1997), p. 16.

may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.”²⁶

C. ARTICLE 22.3 OF THE DSU

1. The Hierarchy.

16. The principles and procedures applicable to a suspension of concessions or other obligations under Article 22 of the DSU are contained in Article 22.3, which provides a “hierarchy” of remedies that a complaining party must follow in determining in which sectors or under which covered agreements concessions or other obligations shall be suspended. As stated in Article 22.3(a), the “general principle is that the complaining party should first 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.” In the case of a nullification or impairment under the GATS, “sector” is defined in Article 22.3(f)(ii) of the DSU as the applicable sector of the 11 different services sectors contained in the document known as the “Services Sectoral Classification List.”²⁷

17. If a complaining party seeks to suspend concessions or other obligations within the same sector in which the WTO inconsistency was found, then there is nothing for an arbitrator to review with respect to how the Member expects to achieve its remedy.²⁸ It is only if the Member “considers that it is not practicable or effective” to suspend concessions in the same sector that it may seek its remedy under another sector of the same agreement.²⁹ If the complaining party

²⁶ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (7 April 2005), para. 140 (emphasis in original; footnotes omitted).

²⁷ MTN.GNS/W/120 (10 July 1991).

²⁸ Arbitrators’ Report, *EC – Bananas (US)*, paras. 3.6, 3.10; Arbitrators’ Report, *EC – Bananas (Ecuador)*, para. 64.

²⁹ DSU Article 22.3(b).

further “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.”³⁰

18. Thus, the hierarchy set forth in Article 22.3 of the DSU *first* expects a Member to seek its remedy within the same sector of the same covered agreement, *second* under the same covered agreement and *third* under another covered agreement.

2. Other Requirements Under Articles 22.3(b) through (d).

19. As noted above, a Member seeking to find its remedy in a different sector under the same covered agreement must consider that it is not “practicable or effective” to suspend concessions or other obligations under the same sector of the agreement. Should the Member go further and seek its remedy under another covered agreement, it must also determine that “the circumstances are serious enough.” In making these determinations, the complaining party is required by Article 22.3(d) of the DSU to take into account:

- “(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party; [and]
- (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations.”

20. In all but one of the reported decisions under Article 22.6, the complaining party has sought to suspend concessions or other obligations under the same sector of the same covered agreement.³¹ The only arbitration under Article 22.6 of the DSU to date that has considered the application of Article 22.3 of the DSU is *EC – Bananas (Ecuador)*, in which the arbitrators

³⁰ DSU Article 22.3(c).

³¹ The issue was raised in the *EC – Bananas (US)* arbitration as well, but the arbitrators determined in that case that the concessions were indeed being sought within the same sectors. Arbitrators’ Report, *EC – Bananas (US)*, para. 3.10.

comprehensively discussed the application of the principles and procedures of Article 22.3.³²

21. When a responding party believes that the complaining party has not properly followed the principles and procedures set forth in Articles 22.3(b) through (d) of the DSU in making its request for the suspension of concessions or other obligations, then the responding party bears the burden of proof to establish that those principles and procedures have in fact *not* been followed.³³ In this connection, it is the burden of the responding party to demonstrate that the complaining party *does* have a practicable *and* effective remedy in the same sector or, as applicable, under one or more other sectors of the same covered agreement.³⁴

3. Application of the Other Requirements.

22. Under the reasoning adopted by the arbitrators in *EC – Bananas (Ecuador)*, once the responding party has met its burden of proof and established a *prima facie* assumption that a complaining party has not followed the principles and procedures set forth in Article 22.3, including those in Article 22.3(d), it is up to the complaining party to rebut the presumption. To do this, the Member must overcome the proof of the responding party and demonstrate to the satisfaction of the arbitrators (i) that there is not a “practicable and effective” remedy under the same sector and, in applicable cases, under the same agreement under which the WTO inconsistency was determined; (ii) in the latter case, that “circumstances are serious enough;” (iii) the importance of the trade the subject of the dispute to the complaining party; and (iv) the “broader economic elements and consequences” of the suspension of concessions or other obligations.

23. In its review of the complaining party’s assertion under Articles 22.3(b) and (c) that suspension of concessions or other obligations pursuant to Articles 22.3(a) or (b), respectively, the

³² Arbitrators’ Report, *EC – Bananas (Ecuador)*, paras. 42 - 138.

³³ *Id.*, para. 59.

³⁴ *Id.*, para. 75.

arbitrators should (primarily as a result of the use of the word “considers” in those provisions) “leave a certain margin of appreciation to the complaining party concerned in arriving at its conclusions in respect of an evaluation of certain factual elements, i.e. of the practicability and effectiveness of suspension within the same sector or under the same agreement and the seriousness of circumstances.”³⁵ However, in the opinion of the *EC – Bananas (Ecuador)* arbitrators, any such deference cannot be absolute:

“In our view, the 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 sector under the same agreements, or only under another agreement provided that the circumstances were serious enough.”³⁶

24. The standard of review applicable to a complaining party’s assertions under Article 22.3(d) is, according to the *EC – Bananas (Ecuador)* arbitrators, slightly more rigorous due to the use of the words “shall take into account” in Article 22.3(d).³⁷ What that means practically is left somewhat uncertain, although the arbitrators noted that the review of whether the factors listed in Articles 22.3(d)(i) and (ii) have been taken into account should be “full.”³⁸

a. “Practicable and Effective”

25. Whether a proposed suspension of concessions or other obligations should be considered “practicable and effective” relates primarily to whether the suspension is likely to lead to the compliance by the responding party with the recommendations and rulings of the DSB. As stated by the arbitrators in *EC – Bananas (Ecuador)*:

“[T]he term ‘effective’ connotes ‘powerful in effect’, ‘making a strong impression’, ‘having an effect or result’. Therefore, the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the

³⁵ *Id.*, para. 52.

³⁶ *Id.* (footnote omitted).

³⁷ *Id.*, para. 53.

³⁸ *Id.*

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.”³⁹

26. With respect to the complaining party, it is important to note that it is obligated only to demonstrate that the suspension in the same sector or under the same agreement is *either* not practicable or effective, but not both. This contrasts with the burden of proof on the responding party, which must establish that the suspension in the same sector or under the same agreement is *both* practicable *and* effective.⁴⁰

b. “Serious Circumstances”

27. What constitutes “serious circumstances” in the context of Article 22.3 of the DSU, other than the obvious guidance rendered by the definition of the word itself, must be determined in light of the factors listed in Article 22.3(d). Although the arbitrators in *EC – Bananas (Ecuador)* were unable to articulate a clear general concept of what should be considered as “serious,” in making their analysis of Ecuador’s particular circumstances the arbitrators appeared to conclude that the wide inequality between Ecuador and the EC, as well as the obvious importance of the banana trade to the Ecuadorian economy, were sufficient to consider the circumstances “serious.”⁴¹

c. “The Importance of the Trade”

28. The “seriousness” of the circumstances must also be evaluated in light of the “importance” to the complaining party of the trade that has been nullified or impaired by the responding party. This would call for a relatively straightforward analysis of the economic effect of the trade to the complaining party and, particularly in the case of a developing country Member,

³⁹ *Id.*, para. 72.

⁴⁰ *Id.*, paras. 74 - 75.

⁴¹ *Id.*, paras. 121 - 126.

as compared to the importance of the trade to the responding party.⁴² In the context of Ecuador, the arbitrators came to this determination easily, given that the banana trade was the leading sector of the economy, accounting for over 25 percent of Ecuador’s exports and employing some 11 percent of the workforce.⁴³

d. “The Broader Economic Elements and Consequences”

29. In the view of the *EC – Bananas (Ecuador)* arbitrators, the “broader economic elements” relate primarily to the complaining party, while the “broader economic consequences” take into account effects on both the complaining party and the responding party.⁴⁴ The “broader economic elements” references the economic circumstances of the complaining party in a more comprehensive sense, it being sufficient to show “some relation” between the broader economic events within the economy of the complaining party and the nullification and impairment, rather than some direct or causal connection.⁴⁵

30. As far as the “broader economic consequences” are concerned, the arbitrators considered that Ecuador had demonstrated that it had taken this factor into account in making its determination to suspend concessions or other obligations outside of the covered agreement as it had concluded that the suspension of concessions under the covered agreement would have virtually no economic consequence upon the EC but may well indeed have adverse consequences to Ecuador.⁴⁶

III. LEVEL OF NULLIFICATION AND IMPAIRMENT

A. THE DSB RULINGS

31. The DSB Rulings, as contained in the Report of the Appellate Body in *US – Gambling*

⁴² *Id.*, para. 84.

⁴³ *Id.*, paras. 128 - 130.

⁴⁴ *Id.*, paras. 85 - 86.

⁴⁵ *Id.*, para. 133.

⁴⁶ *Id.*, para. 134.

(the “*AB Report*”), are simple and straightforward:

“The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *General Agreement on Trade in Services*, into conformity with its obligations under that Agreement.”⁴⁷

The “measures . . . found . . . to be inconsistent” with the obligations of the United States under the GATS are the Federal Trio—the Wire Act, the Travel Act and the IGBA—and the inconsistency of the Federal Trio with the covered agreements is in respect of Articles XVI:1 and XVI:2 of the GATS.⁴⁸ Both the panel and the Appellate Body in the Original Proceeding concluded that the United States was not “entitled to maintain these measures under Article XIV of the GATS or under any other article in the covered agreements.”⁴⁹

32. Although the United States had, subsequent to the end of the “reasonable period of time” in this dispute, asserted that it was in compliance with the DSB Rulings, the Compliance Panel found otherwise, concluding that “the United States has failed to comply with the recommendations and rulings of the DSB in this dispute,”⁵⁰ and in the course of reaching its conclusion observing that “no legislation was ever pending in the United States Congress that would have complied with the recommendations and rulings of the DSB in this dispute.”⁵¹

B. THE STARTING POINT IS MARKET ACCESS

33. Because the DSB ruled that the Federal Trio were inconsistent with the obligations of the United States under Articles XVI:1 and XVI:2 of the GATS and because the United States has done nothing to come into compliance with the DSB Rulings, the starting point for determining

⁴⁷ AB Report, para. 374.

⁴⁸ *Id.*, para. 373(C). Predictably, in the US 22 Submission, the United States once again attempts to reargue its failed case from the Original Proceeding and, in effect, apply Article XIV of the GATS as some type of stand-alone “national treatment” provision of the GATS. *See* the discussion at paragraphs 76 through 81 below.

⁴⁹ Panel Report, *US – Gambling (Article 21.5 – Antigua)*, para. 6.26.

⁵⁰ *Id.*, para. 7.1.

⁵¹ *Id.*, para. 6.135, fn. 205.

the level of nullification and impairment for purposes of Article 22 of the DSU is market access for the gambling and betting services offered from Antigua to consumers in the United States. Although the United States could have done so, in its schedule of specific commitments under the GATS (the “*US Schedule*”)⁵² the United States failed to impose *any* restrictions on market access for the cross-border supply of gambling and betting services. Nor, for that matter, did it impose any national treatment restrictions.⁵³ As the panel in the Original Proceeding made clear, if any qualifications or restrictions were to be imposed, they needed to be made in the appropriate place in the US Schedule.⁵⁴

34. In this context, it is important to recall that in the Original Proceeding, the United States did not make any distinction between different types of remote gambling. Rather, its defence under Article XIV of the GATS was predicated solely upon the assertion that the United States prohibited *all* remote gambling because remote gambling presented certain “concerns” that were not applicable to “non-remote” gambling,⁵⁵ and that the regulation of remote gambling was not possible.⁵⁶ Neither did the United States argue in the Original Proceeding that Antigua’s market access was somehow limited to the precise services offered by domestic providers.⁵⁷ This Arbitration is certainly not the proper time and place for the United States to advance for the first time an argument it could have raised in the Original Proceeding but did not. As will be discussed

⁵² The United States of America, Schedule of Specific Commitments, GATS/SC/90 (15 April 1994).

⁵³ *Id.*, Sector 10.D.

⁵⁴ Report of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (10 November 2004), para. 6.290.

⁵⁵ AB Report, paras. 313, 323.

⁵⁶ Second Written Submission of the United States, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (9 January 2004), para. 122.

⁵⁷ Obviously, if the United States had so argued, it would have been directly in conflict with its assertion that it prohibited all remote gambling out of a need to “protect public morals or to maintain public order.” It would also have served as an admission that Antigua was entitled to provide *some* remote gambling and betting services to consumers in the United States, something the United States has steadfastly refused to concede or consider.

below, a failed defence under Article XIV of the GATS cannot be used to superimpose some sort of self-devised “national treatment” restriction on market access.⁵⁸

35. More saliently, “the first objective of the dispute settlement mechanism is the *withdrawal of the measures concerned* if these are found to be inconsistent with the provisions of any of the covered agreements.”⁵⁹ In a case such as this one, where the responding party has done nothing at all to come into compliance, there is simply no basis under the DSU or otherwise for speculating on the various possible ways—absent withdrawal of the offending measures—compliance may have been achieved in determining the level of nullification and impairment.⁶⁰

36. The situation in this Arbitration then is much like that in the two *EC – Hormones* arbitrations and in *EC – Bananas (Ecuador)*—that is, the level of nullification and impairment should be measured by what the trade from Antigua to the United States would have been if the prohibition by the United States on the cross-border supply of gambling and betting services from Antigua to consumers in the United States had been removed by the end of the reasonable period of time.

IV. APPLICATION OF ARTICLE 22 OF THE DSU TO THIS ARBITRATION

A. THE ANTIGUA REQUEST IS SUFFICIENT TO PLACE THE BURDEN OF PROOF ON THE UNITED STATES

37. Consistent with prior arbitration decisions regarding the burden of proof in an arbitration under Article 22.6 of the DSU, it was incumbent upon Antigua to set out in the Request (i) the specific level of suspension of concessions or other obligations requested, that is, level with the nullification and impairment caused by the WTO-inconsistent measures, and (ii) the agreement

⁵⁸ See the discussion at paragraphs 76 through 89 below.

⁵⁹ DSU Article 3.7 (emphasis added). This is supported by the language of Article 22.8 of the DSU regarding the duration of the suspension of concessions or other obligations, providing that they may be applied “until such time as the measure found to be inconsistent with a covered agreement has been removed (...).”

⁶⁰ See the discussion at paragraphs 90 through 94 below.

and the sectors under which the concessions or other obligations would be suspended.⁶¹ As Antigua is also requesting authorisation to suspend concessions or other obligations in a different sector of a covered agreement or under a different covered agreement, it also must have specified in the Request its reasons therefor.⁶²

38. In the Request, Antigua:

- **set forth a specific level of nullification and impairment:**

(“Antigua and Barbuda’s aim through this suspension is the effective withdrawal of concessions and other obligations so as to match the level of nullification or impairment of benefits accruing to Antigua and Barbuda, amounting to an annual value of US \$3.443 billion, as a result of the United State’s failure, as of 3 April 2006, to bring its measures affecting the cross-border supply of gambling and betting services into compliance with the GATS or to otherwise comply with the rulings and recommendations of the DSB”);

- **specified the covered agreements and sectors in which it sought to suspend concessions or other obligations:**

(“Antigua and Barbuda 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

Suspension of Concessions Under the GATS

Antigua and Barbuda may also suspend horizontal and/or sectoral concessions and obligations for the following sector contained in the Antigua Schedule:

2. Communication Services”); and

- **stated the reasons for seeking the suspension of concessions in other sectors of the same covered agreement or under a different covered agreement:**

⁶¹ Arbitrators’ Report, *EC – Hormones (US)*, para. 16.

⁶² DSU, Article 22.3(e).

“In considering what concessions and obligations to suspend, Antigua and Barbuda applied the principles and procedures set forth in Article 22.3 of the DSU, and makes this request pursuant to Articles 22.3(b) and (c). Antigua and Barbuda is a developing country with a population of approximately 80,000. With a combined landmass of only 442 square kilometres, Antigua and Barbuda 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 counter measures against the world’s dominant economy. The natural resources of Antigua and Barbuda 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 and Barbuda is required to import a substantial amount of the goods and services needed and used by the people of the country. 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 and Barbuda will have a disproportionate adverse impact on Antigua and Barbuda 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 and Barbuda, additional duties or restrictions on imports of goods and services from the United States would have a much greater negative impact on Antigua and Barbuda 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. Antigua and Barbuda 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 and Barbuda’s lack of natural resources, the bulk of the economy is dependent upon tourism and the provision of banking and other financial services. Antigua and Barbuda, initially with the cooperation of the United States government, 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. Prior to the actions taken by the United States to prevent the provision of gambling and betting services from Antigua and Barbuda to consumers in the United States, it is estimated that the gambling and betting services sector accounted for more than ten per cent of the gross domestic product of Antigua and Barbuda and was the fastest growing segment of the economy. 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 DS285 forces Antigua and Barbuda 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 and Barbuda which affects its ability to exercise its rights under Article 22.

In addition to the reasons described above, 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 DS285, GATS Sector 10.D., "Sporting and Other Recreational Services," in its Schedule of Specific Commitments under the GATS (GATS/SC/2) (the "Antigua Schedule"). Second, with respect to most of the other services covered by the Antigua 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 Barbuda and little or no impact on the United States. Third, even if Antigua and Barbuda were to rely exclusively on a suspension of concessions under the GATS, Antigua and Barbuda would clearly not be able to recover the full amount of nullification and impairment caused by the inconsistent measures. Additionally, in Antigua and Barbuda's view, the United State's 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 and Barbuda's gaming industry will continue to suffer serious losses, the government of Antigua and Barbuda will be deprived of critical revenue, the people of Antigua and Barbuda 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 DS285 or remove their adverse effects."').⁶³

39. The Request clearly and unambiguously sets forth Antigua's claims in this Arbitration in accordance with the principles and procedures set forth in Article 22.3(c) of the DSU.⁶⁴

⁶³ WT/DS285/22, pp. 1 - 4.

⁶⁴ The presumption of conformity should also be accorded to the methodology paper submitted by Antigua to the Arbitrators, including the counterfactual described therein. See the discussion at

Accordingly, the burden of proof now rests upon the United States to establish a presumption that (i) Antigua’s proposed level of suspension of concessions or other obligations is not “equivalent” to the level of nullification and impairment suffered by Antigua as a result of the failure of the United States to comply with the DSB Rulings and (ii) it is both reasonable *and* effective for Antigua to seek 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.

B. LEVEL OF NULLIFICATION AND IMPAIRMENT

1. Introduction.

40. In its methodology paper submitted to the Arbitrators on 31 August 2007 (the “*Methodology Paper*”),⁶⁵ Antigua presented a reasonable counterfactual under which the United States complied with the DSB Rulings,⁶⁶ from which it performed three alternative computations of the level of nullification and impairment occasioned by the failure of the United States to comply with the DSB Rulings. Each of the modes was based upon the same reasonable counterfactual, historical data and independent third-party projections. Depending upon the model used, Antigua computed the level of nullification or impairment to be no greater than US \$3.443 billion nor less than US \$1.614 billion annually.

41. The level of nullification and impairment was determined by independent, third-party economists retained by Antigua for that purpose. In the performance of their evaluation, the economists selected as their primary source for data on the global gambling market Global Betting and Gaming Consultants Ltd. (“*GBGC*”), an independent, United Kingdom-based gaming

paragraphs 108 through 110 below.

⁶⁵ Methodology Paper of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse by Antigua and Barbuda to Article 22 of the DSU*, WT/DS285 (31 August 2007).

⁶⁶ *Id.*, pp. 3 - 6.

consultancy that is broadly recognised as one the world’s premier collectors and compilers of data regarding gambling and betting services.⁶⁷

2. The GBGC Data.

42. The GBGC data used in the determination of the level of Antigua’s nullification and impairment (the “**GBGC Data**”) is publicly available from GBGC, although it imposes a charge for its use. The GBGC Data is prepared by GBGC in the ordinary course of its business, and is not tailored specifically for the demands of one client or another. In point of fact, Antigua’s independent economic consultants obtained the GBGC Data from GBGC without disclosing what the data was going to be used for or who the client of the economist was. Subsequent to the US 22 Submission, and in light of the unfounded criticisms of the GBGC Data contained therein,⁶⁸ Antigua’s economist contacted GBGC and disclosed Antigua as the economist’s client.

43. The GBGC Data is used by many leading industry operators and suppliers, major financial institutions and governments for the purpose of assessing information regarding the global gaming market. In addition to working on specific projects for clients, the company produces market intelligence and data sets that focus on the betting, gaming and lotteries markets worldwide. The most widely read of these is the GBGC bi-annual global gambling report which covers every aspect of the industry and stretches to over 1,000 pages. The fourth edition of the report is expected to be published during early 2008.

44. Since GBGC was established in 1998 the company has worked with or supplied information to over 350 clients located in every region of the world. GBGC has been involved in a number of the gambling industry’s major financial transactions that have taken place over recent years, furnishing critical industry information to the participants. GBGC’s partners, Warwick

⁶⁷ See the discussion at paragraphs 97 through 98 below.

⁶⁸ That these criticisms are completely unfounded and without merit is discussed in paragraphs 95 through 107 below.

Bartlett and Simon Holliday, are regular speakers at major international conferences and are constantly called upon to provide their opinions regarding all aspects of the industry to investors and others.

45. GBGC has been collecting data and sizing all aspects of the global gambling industry since 2000. The company produces a quarterly online industry data set based on listed company results, website traffic, value of play and GBGC's contact with, knowledge of and work in the industry. GBGC's industry forecasts have become recognised among the global gaming industry as the most reliable available, and have been used by the banking and investment community as well as by the online operators both for internal purposes and in public documentation such as annual reports and presentations. GBGC's numbers have been widely quoted in both the financial and industry media and form the basis of numerous industry and governmental statements regarding the size and scope of the global gaming industry.⁶⁹

46. A communication from GBGC to Antigua, summarising the business, experience and methodology used by GBGC in gathering global gaming economic data is included with this Submission,⁷⁰ as is a copy of a recent GBGC quarterly report.⁷¹

3. The Economic Analysis.

47. Antigua's economic analysis of its level of nullification and impairment was conducted as described in the Methodology Paper. As a measure of the revenue lost by Antigua as a result of the United States maintaining its prohibition on the provision of gambling and betting services from Antigua to consumers in the United States, the economic analysis conforms to the basic

⁶⁹ See the discussion at paragraphs 97 through 98 below.

⁷⁰ See *Exhibit AB-1*. GBGC has confirmed to Antigua that its revenue data does not, unless specifically so noted therein, constitute "gross wagers" or the total amount of the bets placed. See US 22 Submission, para. 39.

⁷¹ *Exhibit AB-2*.

method followed by the arbitrators in the analogous *EC – Hormones* and *EC – Bananas* arbitrations.⁷²

C. APPLICATION OF ARTICLE 22.3 TO ANTIGUA

1. No Remedy Under the GATS.

48. As observed in the Request, Antigua considers that it is neither practicable nor effective for it to seek the suspension of concessions or other obligations under the GATS. The first and most fundamental reason is that the volume of Antigua’s imports in the services sector combined is nowhere near sufficient to absorb the level of concessions that Antigua is entitled to due to the level of nullification and impairment occasioned by the failure of the United States to comply with the DSB Rulings.

49. In 2005, the aggregate total of Antigua’s imports was US \$598.29 million.⁷³ Of this amount, US \$208.11 million consisted of imports in respect of services.⁷⁴ Clearly, it would not be possible for Antigua to reach a level of suspension of concessions or other obligations equivalent to the level of nullification and impairment either under the same sector of the GATS in which the nullification or impairment was found⁷⁵ or under the entire GATS.

a. The Same Sector

50. It is clear from prior arbitrations under Article 22.6 of the DSU that a complaining party does not have to take into consideration trade in a sector where it has not made any commitments.⁷⁶ Accordingly, under Article 22.3(a) of the DSU, Antigua should next look to

⁷² See the discussion at paragraphs 16 through 30 above. The United States’ criticisms of the Antiguan economic analysis are discussed at paragraphs 104 through 121 below.

⁷³ Eastern Caribbean Central Bank, *Balance of Payments for Year Ending December 2005* (December 2006) (“Table 2.2 Antigua & Barbuda Balance of Payments: Standard Presentation 2001 - 2005”).

⁷⁴ *Id.* Antigua has been unable to locate any statistical source that allocates Antigua’s services imports amongst Antigua’s trading partners.

⁷⁵ Sector 10.

⁷⁶ See Arbitrators’ Report, *EC – Bananas (Ecuador)*, para. 71.

commitments that it has made within the “same sector” as defined in Article 22.3(f)(ii). The only trade within the same sector with respect to which Antigua has made commitments in its schedule of specific commitments (the “*Antigua Schedule*”) is Sector 10.A, “Entertainment Services.”⁷⁷

51. Antigua has been unable to locate any statistical sources that specify the total amount of imports to Antigua during 2005 in respect of “entertainment services,” but Antigua believes this trade negligible in overall volume. Were Antigua to suspend concessions or other obligations in this sector, it would most likely impair the already limited entertainment options available to Antiguan citizens while having virtually no impact upon the United States at all.

b. Other Sectors of the GATS

52. The same holds true for other sectors of the GATS in which Antigua has made commitments in the Antigua Schedule. 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).⁷⁸ If Antigua were to suspend concessions with respect to these services, given the low level of these imports it is clear that the suspension would 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.

53. For example, in the Request Antigua had proposed suspending concessions or other obligations in respect of telecommunications services. However, upon more detailed review of the import and use of telecommunications services in Antigua it was determined by Antigua not only that the volume of the trade was low (US \$5.03 million), but that disruptions in changing

⁷⁷ Antigua and Barbuda, Schedule of Specific Commitments, GATS/SC/2 (15 April 1994).

⁷⁸ Eastern Caribbean Central Bank, *Balance of Payments for Year Ending December 2005* (December 2006) (“Table 2.2 Antigua & Barbuda Balance of Payments: Standard Presentation 2001 - 2005”). Imports of government, construction and engineering and management and consultancy services were the next largest three imported services, collectively in the amount of US \$20.8 million in 2005. *Id.*

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.

2. The “Seriousness of the Circumstances” and the Other Requirements under Article 22.3(d) of the DSU.

54. In making its decision to seek suspension of concessions or other obligations under one of the other covered agreements, the WTO’s *Agreement on the Trade-Related Aspects of Intellectual Property Rights* (the “*TRIPS*”), Antigua has fully taken into account the seriousness of the circumstances and the guiding principles of Article 22.3(d) of the DSU. Under the standards adopted and reasoning applied by the arbitrators in *EC – Bananas (Ecuador)*, there can be no question as to the lack of practicability and effectiveness of any suspension of concessions or other obligations under the GATS in this dispute, nor as to the seriousness of the circumstances.

a. Vast Economic and Demographic Disparity

55. It is difficult to imagine a greater disparity between two countries than the vast gap that exists between Antigua and the United States:⁷⁹

	<u>Antigua</u>	<u>United States</u>
1. Area	442.6 sq. km.	9,826,630 sq. km.
2. Population	69,481	301,139,947
3. Gross Domestic Product	US \$905 million ⁸⁰	US \$13.16 trillion
4. GDP per Person	US \$10,900	US \$43,800
5. Exports	US \$46.81 million ⁸¹	US \$1.024 trillion
6. Imports	US \$378 million ⁸²	US \$1.869 trillion

⁷⁹ *The World Factbook 2007*, Antigua and Barbuda, United States [<https://www.cia.gov/library/publications/the-world-factbook/index.html>].

⁸⁰ This excludes revenue from remote gambling and betting services. See the discussion at paragraphs 105 through 106 below.

⁸¹ This excludes exports of remote gambling and betting services. See the discussion at paragraphs 102 through 106 below.

⁸² More recent economic data discussed above places Antigua’s imports at US \$598 million.

56. Unfortunately, as the *EC – Bananas (Ecuador)* arbitrators noted:

“One may ask whether this objective may ever be achieved 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. In such a case, 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. In these circumstances, a consideration by the complaining party in which the 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.*”⁸³

b. Limited Resources and One-Dimensional Economy

57. Antigua has extremely limited natural resources and very limited arable land. Until the early 1960s, Antigua’s economy was dominated by the production and export of cane sugar. The sharp decline in world sugar prices during the 1960s made sugar production in Antigua economically unviable and by the early 1970s sugar production had largely disappeared. The centuries of land clearance for the sugar crops, however, have rendered the islands drought-ridden and the land poor for agricultural purposes—and as a consequence the country cannot produce sufficient agricultural products to satisfy domestic needs much less provide a material amount of exports. In addition, there is neither enough land nor is the land ownership structure such that any realistic opportunity exists to develop agriculture in a meaningful way.

58. Apart from government services, since the end of sugar production Antigua’s economy has become highly dependent upon tourism and services associated with tourism, including hotels and restaurants, retail trade, construction, real estate and housing and transportation.⁸⁴ While

⁸³ Arbitrators’ Report, *EC – Bananas (Ecuador)*, para. 73 (emphasis added).

⁸⁴ CARICOM National Accounts Digest 2000-2003 (August 2007), p. xxvii (“Summary of the Three Most Significant Industries of CARICOM Member States at Constant 2000 Prices: 2003,” showing, after government services, construction and hotels and restaurants as the most significant industries of the Antiguan economy) and p. 9 (noting that, after government services, construction, hotels and restaurants, transportation, communications and banks and insurance were the largest contributors to

tourism does provide significant employment and results in much economic benefit to the country, it is limited in some important respects. In the first instance, the tourism industry is subject to certain material, adverse factors that are not within the control of Antigua, such as economic downturns in key source markets for tourists, the influence of terrorist activities and threats on holiday plans and activities and, particularly in the case of Antigua, hurricanes and other severe weather that have on occasion had a disastrous impact on tourism through the destruction of hotels and other tourist infrastructure.

59. Further, employment in the tourism industry is heavily weighted towards unskilled and lower paying jobs. Higher skilled jobs and advancement opportunities are particularly limited in the tourism industry, and these limitations have an adverse effect on the retention of motivated and skilled individuals within the Antiguan work force. Emigration remains problematic to Antigua, which suffers from one of the highest rates of emigration in the world at more than six persons per thousand.⁸⁵

c. Need to Diversify, Governmental Efforts and the Role of the United States

60. To reduce its dependence on tourism as well as to provide higher skilled and better paying jobs for its citizens, Antigua has tried to diversify its economy by developing trade in services, including trade in remote gambling and betting services. Antigua was either fortunate or prescient—perhaps a bit of both—when it set out in the mid-1990s to encourage the development of trade in remote gambling and betting services. Although the United States government may not

Antiguan GDP).
[<http://www.caricomstats.org/Files/Publications/National%20Accounts%20Digest00-03.pdf>]. See *Exhibit AB-3*.

⁸⁵ *The World Factbook 2007*, Antigua and Barbuda.

have appreciated the demand for remote gambling and betting services at the time,⁸⁶ Antigua certainly did.

61. The growth and development of the remote gambling industry in Antigua has been well described by Antigua in its submissions over the course of this dispute.⁸⁷ What has particularly distinguished Antigua, however, has been the role of the government in the encouragement, development and supervision of the remote gambling and betting industry. Antigua first developed a basic regulatory scheme for remote gambling and betting services in 1994. Since then, the government has continually assessed, improved and added to its regulatory scheme, and has completely overhauled its regulatory scheme on three separate occasions, the latest in 2007.

62. The Antiguan Directorate of Offshore Gaming (the “*Directorate*”), a division of the Antiguan Financial Services Regulatory Commission, was first organised in 1997 and has been staffed and operated since, exercising regulatory and supervisory authority over the industry in Antigua with increasingly stringent requirements and increasingly powerful enforcement tools and rights. In a country with just under 70,000 inhabitants possessing a government with limited resources,⁸⁸ the investment by the government in the remote gaming industry has been and remains substantial—the Directorate’s budget for the current fiscal year is US \$3.3 million. Over a decade of government development and support, as well as the training of employees and the

⁸⁶ United States Trade Representative, Statement of Deputy United States Trade Representative John K. Veroneau Regarding U.S. Actions under GATS Article XXI (4 May 2007) (“‘Unfortunately, in the early 1990s, when the United States was drafting its international commitments to open its market to recreational services, we did not make it clear that these commitments did not extend to gambling. Moreover, back in 1993 no WTO Member could have reasonably thought that the United States was agreeing to commitments in direct conflict with its own laws,’ said Deputy United States Trade Representative John K. Veroneau”)

[http://www.ustr.gov/Document_Library/Press_Releases/2007/May/Statement_of_Deputy_United_States_Trade_Representative_John_K_Veroneau_Regarding_US_Actions_under_GATS_Article_XXI.html].

⁸⁷ See, e.g., First Submission of the Antigua and Barbuda, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (1 October 2003), paras. 27 - 74.

⁸⁸ Total government revenues for 2005 were US \$182.84 million and for 2006 were US \$224.6 million. Eastern Caribbean Central Bank, *Annual Economic and Financial Review 2006* (“Table 17: Antigua and Barbuda - Central Government Fiscal Operations (in millions of Eastern Caribbean dollars)”) [<http://www.eccb-centralbank.org/PDF/aeFr06.pdf>].

parallel development of the business and social infrastructure to support the remote gambling and betting industry is not something easily replicated nor discounted.

63. Antigua believes that the role of the United States in Antigua's development of remote gambling and betting services should also impact an assessment of the seriousness of the circumstances. The United States was the leading proponent of the GATS, and advanced its cause in large part on the purported benefits that the liberalisation in trade in services could provide to developing countries. This position is evidenced in a relatively recent communication circulated to Members by the United States in which it pointed out that further liberalisation of trade in services will benefit developing countries, *inter alia* because:

“developing economies’ participation in this market has increased in recent years due, in part, to the new cross-border delivery options made possible by innovations in information and communication technology”; and

“an increase in cross-border services trade could alleviate poverty and increase wealth in developing countries.”⁸⁹

64. Prior to 1998, the United States government even supported Antigua in its development and supervision of the remote gaming industry. As Antigua brought to the attention of the panel in the Original Proceeding,⁹⁰ as late as September 1997 senior officials with the United States government clearly did not believe that the provision of these services from Antigua were illegal, and relatively high-level officials engaged with Antiguan officials in suggestions to improve the regulation of gaming companies in order to better protect consumers.⁹¹

⁸⁹ Communication from the United States, *An Assessment of Services Trade and Liberalization in the United States and Developing Economies*, TN/S/W/12 (31 March 2003), para. 50.

⁹⁰ Opening Statement of Antigua to the Second Meeting of the World Trade Organisation (WTO) Panel, WT/DS285 (26 January 2004), para. 50.

⁹¹ See Government of Antigua and Barbuda, Report of Director of Offshore Gaming to Prime Minister Lester Bird on Meeting with Mr Scott Charney and Mr Jonathan Winer, 21st and 22nd in Washington, D.C. (30 September 1997) (*Exhibit AB-4*).

d. Importance of Trade and the Broader Economic Elements and Consequences

65. Given the revenues of the Antiguan remote gambling and betting services sector, the importance of the industry to the economy of Antigua cannot be overestimated. With the development of this industry in Antigua, there can be no doubt that the efforts of the government to diversify the economy, to bring much needed foreign revenue on to the island and to provide better opportunities for its citizens were for a time richly rewarded.

66. That being said, it is difficult to assess just how much of an impact the explosive growth of the remote gaming industry has had on Antigua and its economy. At its 2001 high-revenue point, it is estimated that the industry accounted for well over ten percent of all employment in the country, generating wages and salaries in excess of US \$15.8 million. Licensing fees to the government in that year were over US \$4.2 million. Without question some of the growth in Antigua's gross domestic product over the past decade is attributable to the revenues generated by the remote gaming industry.

67. It is also difficult to predict what kind of impact the continued operation and development of the remote gaming industry in Antigua would have had in the coming years *but for* the failure of the United States to comply with the DSB Rulings. But again, given the extraordinary amount of trade in these services that Antigua was able to develop—particularly relative to the size of the country's gross domestic product (excluding remote gaming revenues)—the trade in remote gambling services for Antigua would be considered “important” by any reasonable standard.

68. From Antigua's perspective, the “broader economic elements” related to the nullification or impairment are therefor enormous. Although Antigua's economy most likely would have continued to improve modestly over the past several years in the absence of the remote gaming sector (and the absence of severe hurricanes as well), the revenues, employment and other economic activity generated by the industry have been crucial to the country. In addition, the diversity that the remote gaming industry has brought to the Antiguan economy is extremely

significant. Although Antigua has managed to avoid a major hurricane in the past few years, there is of course no telling what the future holds.

69. With respect to the United States, even were Antigua able to suspend concessions or other obligations in respect of services from the United States at the requested level of US \$3.443 billion, it would have negligible impact on the United States economy, equating to less than 0.026 percent of the American gross domestic product. As was the case with Ecuador, given the economic disparity between the parties, the economic consequences of barring all trade in services from the United States would be felt rather by Antigua.⁹²

3. Inducing Compliance.

70. It is quite possible that Antigua may never be able to suspend concessions or other obligations at a level approximating the level of nullification and impairment suffered as a result of the failure of the United States to comply with the DSB Rulings. And Antigua is not unmindful of the difficulties it will face in achieving a satisfactory outcome under the TRIPS. But what Antigua *is* convinced of is that it has *no chance* of pressurising the United States to comply with the DSB Rulings by suspending concessions or other obligations under the GATS. In a familiar vernacular, the TRIPS might be a long shot for Antigua, but it is the only shot Antigua has.

V. COMMENTS ON THE US 22 SUBMISSION

A. INTRODUCTION

71. Possessing the burden of proof to overturn the presumptions established by Antigua's Request and the Methodology Paper, the United States in its submission has patently failed to establish a contrary presumption on *any* of the points. Although the submission contains a liberal sprinkling of rhetoric and hyperbole, it is thin on facts and evidence and by no means rises to meet the standard of proof required. In this Section, Antigua will demonstrate why.

⁹² See Arbitrators' Report, *EC – Bananas (Ecuador)*, para. 134.

B. THE UNITED STATES MISSES THE “KEY STARTING POINT”

72. With respect to the level of nullification and impairment suffered by Antigua as a result of the failure of the United States to comply with the DSB Rulings, the United States 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. This interpretation has no support either in the facts of this dispute or in WTO jurisprudence.

1. The United States Continues to Mischaracterise the DSB Rulings.

73. Just as it did before the Compliance Panel in the Article 21.5 proceeding, in its submission the United States continues to present a much-filtered view of the DSB Rulings. As noted above,⁹³ the *actual* DSB Rulings in this dispute are simple:

“The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *General Agreement on Trade in Services*, into conformity with its obligations under that Agreement.”⁹⁴

The “measures” are the Federal Trio and the inconsistency of those measures is with Article XVI of the GATS.

74. But in its submission, the United States grossly alters and distorts the DSB Rulings:

“The DSB recommendations and rulings call for the United States to ensure that, in the light of the Interstate Horseracing Act, the U.S. prohibitions embodied in those measures [*sic*] are ‘applied to both foreign and domestic service suppliers of remote betting services for horse racing.’”⁹⁵

“The specific problem found with the U.S. measures at issue was with respect to the limited issue of the regulation of remote gambling on horseracing. In particular, the finding that the United States measures were inconsistent with its GATS obligations was based on the inability of the United States to meet its burden of showing an absence

⁹³ See the discussion at paragraph 31 above.

⁹⁴ AB Report, para. 374.

⁹⁵ US 22 Submission, para. 15. Although in the quoted portion of the US 22 Submission the indicated part of the text is placed in parentheses, there is no citation to the quoted language. It certainly is not contained in the express language of the DSB Rulings.

of discrimination under the chapeau of GATS Article XIV between U.S.-based gambling operators and foreign operators with respect to remote gambling services on horseracing.”⁹⁶

75. There are so many things wrong about these statements it is hard to know where to start. Needless to say, there was nothing in the DSB Rulings “calling” for the United States to ensure *anything*. The “problem found” with respect to the Federal Trio was that they were contrary to the obligations of the United States under Article XVI of the GATS, and nothing else. The findings of the violations of Article XVI of the GATS in respect of the Federal Trio had absolutely *nothing* to do with Article XIV of the GATS. The Compliance Panel clearly understood this,⁹⁷ but the United States apparently remains unable to do so.

2. The Proper Effect of Article XIV of the GATS.

76. The fundamental defect in the way the United States views the DSB Rulings is that it applies a failed defence under Article XIV of the GATS as some sort of stand-alone “national treatment” or “non-discrimination” provision of the GATS. This is based upon a misunderstanding of the object and purpose of Article XIV and its effect in application.⁹⁸

77. Article XIV of the GATS has been uniformly viewed as an “affirmative defence,” to be raised by a responding party in response to a finding (or an anticipated finding) that one or more of its measures is inconsistent with the GATS.⁹⁹ Thus, it follows clearly that Article XIV of the

⁹⁶ *Id.*, para. 21. *See also id.* at para. 19 (“To the contrary, the DSB recommendations and rulings were addressed to discriminatory treatment of gambling on horseracing.”).

⁹⁷ Panel Report, *US – Gambling (Article 21.5 – Antigua)*, paras. 6.10 - 6.15, 6.26 - 6.29.

⁹⁸ It also represents yet another attempt by the United States to relitigate its failed case in an improper forum. *See* Article 17.14 of the DSU.

⁹⁹ Appellate Body Report, *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (25 April 1997), p. 16; Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, (25 September 1997), paras. 8.177 - 8.178. Indeed, the United States agrees with this uniform view. *See, e.g.*, Oral Statement of the United States, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285 (27 November 2006), para. 5.

GATS is not relevant in a proceeding unless and until asserted by a responding party *as* an affirmative defence.¹⁰⁰

78. As an affirmative defence, the effect of Article XIV is to excuse a GATS violation, but *only* if all of the conditions of the affirmative defence are met. Taking this case as the obvious example, the Federal Trio were found to be contrary to the obligations of the United States in respect of Article XVI of the GATS. Asserting the affirmative defence, the United States argued that notwithstanding the inconsistency of the measures with Article XVI, the United States was entitled to maintain the Federal Trio under Article XIV of the GATS as “necessary to maintain the public morals or to maintain the public order.” In the view of the Appellate Body, the United States successfully demonstrated that the Federal Trio are “‘measures (...) necessary to protect public morals or maintain public order’, within the meaning of paragraph (a) of Article XIV of the GATS.”¹⁰¹

79. But the enquiry does not stop there. To successfully establish the affirmative defence, the responding party must also demonstrate that its claim under Article XIV of the GATS is not in reality a “disguised restriction on trade.” Returning to the example in this dispute, the United States asserted that prohibiting remote gambling was “necessary to protect the public morals or to maintain the public order” because remote gambling possessed special, adverse characteristics that were not present in non-remote gambling and that were not subject to amelioration through regulation.¹⁰² Crucially, the United States avowed that these special circumstances that related to remote gambling required it to prohibit *all* remote gambling within the United States.¹⁰³ As observed by the Appellate Body:

¹⁰⁰ AB Report, para. 282.

¹⁰¹ *Id.*, para. 327.

¹⁰² Second Written Submission of the United States, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (9 January 2004) paras. 111-114, 122.

¹⁰³ *Id.*, paras. 116, 118.

“The United States based its defence under the chapeau of Article XIV on the assertion that the measures at issue prohibit the remote supply of gambling and betting service by *any supplier*, whether domestic or foreign. In other words, the United States sought to justify the Wire Act, the Travel Act, and the IGBA on the basis that there is *no discrimination* in the manner in which the three federal statutes are applied to the remote supply of gambling and betting services.”¹⁰⁴

80. With the burden on its shoulders to prove compliance with the chapeau, the United States failed to meet that burden, and thus was not entitled to the benefit of the affirmative defence. While it is true that the Appellate Body pegged that failure to the “ambiguity” regarding the Interstate Horseracing Act,¹⁰⁵ it is equally true that in reviewing the applicability of the chapeau, neither the original panel nor the Appellate Body conducted an exhaustive survey of all domestic gambling in the United States and determined that the *only* remote gambling in the United States was or was possibly remote gambling on horse racing. Rather, the existence of that *one* instance or that *one* possibility was enough to cause the United States to fail to meet its burden of proof under the chapeau.

81. By failing to satisfy the chapeau, the United States’ argument that the Federal Trio were “necessary” under paragraph (a) of Article XIV of the GATS was in essence voided. The claim of necessity was just that, a *claim*. Viewed in this light, the chapeau of Article XIV worked *perfectly* in this case. The Federal Trio are contrary to Article XVI of the GATS. The United States said it prohibited all remote gambling to protect its citizens. However, in practice, the United States prohibits *only* remote gambling that crosses an international or, in many cases, a state border. There is no overall prohibition of remote gambling in the United States *at all*.¹⁰⁶ Thus, the United States’ assertion that the Federal Trio is “necessary” under paragraph (a) of Article XIV is exposed for what it really is—“a disguised restriction on trade.” The Federal Trio remain contrary

¹⁰⁴ AB Report, para. 350 (emphasis in original).

¹⁰⁵ *Id.*, para. 368.

¹⁰⁶ Nonetheless, the United States continues to so insist. *See* US 22 Submission, para. 25.

to the obligations of the United States under Article XVI of the GATS without justification under Article XIV.

3. The Meaning of “Market Access.”

82. In paragraph 20 of its submission, the United States appears to argue that an unsuccessful Article XIV defence can be “superimposed” in effect over Article XVI of the GATS to limit the applicability of the provision. There is no basis or justification for this at all. The text of Article XVI:1 reads as follows:

“With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.”¹⁰⁷

The unambiguous text of Article XVI:1 requires that when a Member has made a commitment to market access, it provide that access on a basis no less favourable than what it committed to *in its schedule*. In a case such as this, where a “full” commitment to the cross-border provision of gambling and betting services was made, what that means is that the Member may not impose any market access restrictions *at all*. This issue was considered both by the original panel and the Appellate Body in the Original Proceeding:

“[T]he United States does not challenge separately the Panel’s findings as regards restrictions on the supply of part of a sector, or as regards restrictions on part of a mode of supply (that is, on one or more means of supplying a given service).”¹⁰⁸

83. In the footnote to the above extract from the Appellate Body Report in *US – Gambling*, the Appellate Body clarified this further:

“We understand the relevant findings to be those in paragraphs 6.287 and 6.290 of the Panel Report. The Panel found that: (i) as regards a particular service, a Member that has made an unlimited market access commitment under mode 1 commits itself not to maintain measures that prohibit the use of one, several or all means of delivery of that service; and (ii) a Member that has made a market access commitment in a sector or

¹⁰⁷ Footnote omitted.

¹⁰⁸ AB Report, para. 220 (footnote omitted).

subsector has committed itself in respect of all services that fall within the relevant sector or subsector.”¹⁰⁹

84. It is worth quoting the language of the original panel in this regard:

“In our view, if a Member makes a market access commitment in a sector or sub-sector, that commitment covers all services that fall within the scope of that sector or sub-sector. A Member does not fulfil its GATS obligations if it allows market access for only some of the services covered by a committed sector or sub-sector while prohibiting all others. If a Member wishes to restrict market access with respect to certain services falling within the scope of a sector or sub-sector, it should set out the restrictions or limitations on access in the appropriate place in the Member’s schedule. Indeed, a specific commitment in a given sector or sub-sector is a guarantee that the *whole* of that sector, i.e. *all* services included in that sector or sub-sector are covered by the commitment. Any other interpretation would make market access commitments under the GATS largely meaningless.”¹¹⁰

85. Further, and of particular relevance here, when full access is granted in a particular sector, the Member’s own domestic market is not relevant. Again, in the words of the original panel in this dispute:

“The ordinary meaning of the terms used in the first paragraph of Article XVI also indicates that nothing would prevent a Member from providing to services and service suppliers of *all* Members treatment *more favourable* than that provided for in its schedule or that it provides to its own services and service suppliers.”¹¹¹

86. Thus, very clearly the *United States is wrong* when it says in its submission:

“Thus, Antigua is wrong in asserting that the United States (or more generally any other Member) has an unconditional obligation to allow access to each and every type of service covered by the service sectors included in the Member’s schedule of GATS commitments.”¹¹²

87. Given the express language of Article XVI of the GATS and its interpretation by the original panel and the Appellate Body in this very dispute, there is no basis for taking a failed Article XIV defence and using it to alter the object and purpose of Article XVI. There is no

¹⁰⁹ *Id.*, fn. 262.

¹¹⁰ Panel Report, *US – Gambling*, para. 6.290 (emphasis in original).

¹¹¹ *Id.*, para. 6.264 (emphasis in original).

¹¹² US 22 Submission, para. 20.

support for this in WTO jurisprudence at all, much less during the course of an arbitration under Article 22 of the DSU.

88. Antigua observes that at no time during the course of the Original Proceeding did the United States make any distinction under Article XIV of the GATS (or otherwise) between different types of remote gambling. It never claimed, for example, that remote gambling on horse racing did not pose the “special concerns” that the United States sought to protect against, while other types of remote gambling *did* present those concerns. Nor did it argue that *intrastate* remote gambling services did not pose the special concerns, while those that crossed a border did.

89. While the United States did not make those arguments in the Original Proceeding, it certainly *could* have. Instead, it chose to defend the Federal Trio on a different basis altogether. Having failed in that regard, it must be barred from doing what it is trying to accomplish here—presenting a completely new argument in the course of this Arbitration in hopes of minimising its exposure to Antigua for having failed to come into compliance with the DSB Rulings.

4. The United States Cannot Select a Hypothetical Method of Compliance.

90. The United States also asserts in its submission to the Arbitrators that, for purposes of determining the level of nullification and impairment being suffered by Antigua, the United States is entitled to present a “smorgasbord” of sorts of hypothetical means of compliance in this dispute from which the Arbitrators are encouraged to select a means of compliance that will result in the lowest level of nullification and impairment.¹¹³ There is no support for this.

91. Having been given a period of almost a year in which to come into compliance with the DSB Rulings, the United States instead did *nothing at all*.¹¹⁴ In fact, more than five months following the end of the reasonable period of time in this dispute and *while the Compliance Panel*

¹¹³ US 22 Submission, paras. 15 -17.

¹¹⁴ Panel Report, *US – Gambling (Article 21.5 – Antigua)*, para. 6.38

was reviewing the status of compliance, the United States Congress adopted legislation that emphasises the trade discriminatory approach of the United States towards remote gambling services and has resulted in greatly increased restrictions on non-domestic suppliers of these services.¹¹⁵

92. For the United States to *now* come before the Arbitrators and ask them to determine what hypothetically *may* have constituted compliance in this dispute is not only without any foundation under WTO law, but is completely unconscionable. If the United States wanted a WTO panel to assess compliance under one or more scenarios, then it should have complied with the DSB Rulings. Then, a panel with appropriate terms of reference could have considered the issue, the point could have been briefed and debated by the parties, and any ruling of the panel finally assessed, if need be, by the Appellate Body.

93. Instead, the United States is asking the Arbitrators to speculate on how compliance may have been achieved and to set Antigua’s level of nullification accordingly. This, it cannot and must not be able to do.

5. Back to Market Access.

94. Under the circumstances of this case, where there has been no attempt at compliance with the DSB Rulings by the United States and the measures violating the GATS—the Federal Trio—remain unchanged, the only assumption that may be used by the Arbitrators in assessing the level of nullification and impairment is that expressly set forth in the DSU—“the first objective of the dispute settlement mechanism is the *withdrawal of the measures concerned* if these are found to be inconsistent with the provisions of any of the covered agreements.”¹¹⁶

¹¹⁵ 31 U.S.C. §§ 5361 to 5367 (enacted 13 October 2006). This legislation in particular has had a substantial and materially adverse impact upon the ability of foreign remote gambling service providers to transact business with consumers in the United States, while not impacting the financial transactions of sanctioned domestic service providers at all. See *Exhibit AB-13*.

¹¹⁶ DSU Article 3.7 (emphasis added). This is supported by the language of Article 22.8 of the DSU regarding the duration of the suspension of concessions or other obligations, providing that they may be applied “until such time as the measure found to be inconsistent with a covered agreement has

C. THE ECONOMIC DATA

1. The GBGC Data.

95. The United States expends considerable effort in its submission criticising the GBGC Data. Its primary criticism appears to be the fact that GBGC is a private, for-profit company and not an arm of any government.¹¹⁷ Why GBGC's status as a private company should adversely affect the reliability of its data base is not explained by the United States.

96. As Antigua mentioned earlier,¹¹⁸ the GBGC Data was not prepared for Antigua and is publicly available for those willing to pay for it. While Antigua submitted with its Methodology Paper GBGC data with respect to both historical and projected Antiguan remote gaming revenue, GBGC maintains similar data for *all* countries with measurable gambling and betting industries.

97. GBGC has excellent credentials and considerable experience in the gaming industry where its historical data and estimates have significant credibility. For example, in recent public reports two industry-leading publicly held companies—Cryptologic Ltd. and PartyGaming plc—have expressly referred to GBGC as their source for industry data.¹¹⁹

been removed (...).”

¹¹⁷ US 22 Submission, paras. 28 (“a private consultant unassociated with any government or international institution”); 32 (“an unsubstantiated report prepared by a private, for-profit consultancy”).

¹¹⁸ See the discussion at paragraphs 42 through 46 above.

¹¹⁹ Cryptologic Ltd. (“**Cryptologic**”) is a publicly traded Canadian-based remote gaming software developer and supplier. Its products include poker, casino and bingo software for remote casinos and card rooms. Cryptologic’s revenues for 2006 were US \$104 million, up from US \$86.3 million in 2004 and US \$63.7 million in 2003. In both its Annual Report and a recent securities filing, Cryptologic cited GBGC’s global remote gaming revenue data. See Cryptologic 2006 Annual Report, pp. 23 - 24 (**Exhibit AB-5**); see also Cryptologic Current Report on Form 6-K filed on 30 April 2007, p. 70 (“The global online gaming industry including the United States grew from \$5.7 billion in 2003 to \$10.7 billion in revenue in 2005 (source: Global Betting and Gaming Consultants, February 2007 (‘GBGC’)).”) (**Exhibit AB-6**). PartyGaming plc (“**PartyGaming**”) is listed on the London Stock Exchange and is the world’s leading publicly traded remote gaming company. PartyGaming offers online poker, casino, sports betting, bingo and backgammon. In its 2006 Annual Report and in other securities filings, PartyGaming has relied upon GBGC data to describe the global remote gaming market. See, e.g., PartyGaming Plc Annual Report 2006, p. 40 (“An independent estimate by Global Betting and Gaming Consultants (‘GBGC’) puts the global gaming market’s gross gaming yield for 2006 at \$279.0 billion, up from \$265.5 billion in 2005. Online gaming is estimated to represent just 5.4% of the total, or \$15.2 billion, compared with 4.7% (\$12.4 billion) in the previous year.”) (**Exhibit AB-7**). See also PartyGaming Plc Interim Report 2007, p. 6 (**Exhibit AB-8**).

98. Data prepared by GBGC also tends to be generally supported in reports prepared by other sources. For example, Christiansen Capital Advisors, LLC (“*CCA*”) is a United States-based consultancy that has performed economic studies in the gaming industry and, like GBGC, is frequently cited and referred to in industry reports and publications. In June 2004, CCA published historical revenue estimates and projections for the global remote gaming industry.¹²⁰ As illustrated by the following chart, the CCA figures are roughly similar to those of GBGC:¹²¹

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
GBGC	\$4.0	\$5.1	\$6.7	\$9.1	\$12.4	\$15.0	\$13.7	\$16.9	\$19.5	\$21.3
CCA	\$3.1	\$4.0	\$5.9	\$8.2	\$11.9	\$15.2	\$18.4	\$20.7	\$22.7	\$24.5

99. Although the Antigua government has not historically maintained data regarding the remote gaming industry, in 2006 the Directorate undertook its own internal estimate of revenues from the Antigua industry in 2005.¹²² The Directorate requested and obtained confidential information from five Antiguan remote gaming operators, who confidentially reported collectively earning gross profits of US \$895.7 million in 2005. The gross profits reported to the Directorate were not reduced by the reporting licence holders’ operating costs or expenses. Further, the five operators who reported data represented only a portion of the total number of Antiguan remote gaming operators. Based on the operating costs and expenses associated with conducting interactive gaming and wagering in Antigua, and in view of the total number of licence holders in 2005, the Directorate estimated that the gross revenues of all Antiguan license holders in 2005

¹²⁰ Christiansen Capital Advisors, LLC, “Global Internet Gambling Revenue Estimates and Projections (2001 - 2010)” (1 June 2004) (*Exhibit AB-9*).

¹²¹ All figures in billions of United States Dollars.

¹²² See Letter to Mark Mendel from Director of Gaming (1 October 2007) (*Exhibit AB-10*).

exceeded US \$1.0 billion—again, consistent with the data obtained from GBGC in June 2007 by Antigua’s economist.

100. While critical of GBGC and its data, the United States did not provide the Arbitrators with any other source for industry revenue data, other than generalised data from other sources which the United States contends is more reliable than the GBGC Data.

2. The ECCB, IMF and WTO Data.

101. As dismissive as the United States is regarding private data collection, it is enthusiastically supportive of governmental or quasi-governmental efforts at the same task. These latter data sets are considered by the United States to constitute “*actual* economic data,”¹²³ “*official* economic statistics”¹²⁴ and “*official and internationally accepted* economic data.”¹²⁵ However, the United States does not explain in its submission what makes its preferred data entitled to the benefit of adjectives such as “actual,” “official” and “internationally accepted.”

102. The basic problem with the alternative data sources used by the United States in its submission is that those sources do not take into account the Antiguan remote gambling and betting industry. The difficulty begins with the information provided by the Eastern Caribbean Central Bank (the “*ECCB*”), which in fact appears to be the source for the data compiled both by the International Monetary Fund (the “*IMF*”)¹²⁶ and by the WTO itself.¹²⁷ However, the ECCB has expressly confirmed to Antigua¹²⁸ that the data compiled by it does not include “revenues

¹²³ US 22 Submission, para. 27 (emphasis added).

¹²⁴ *Id.*, para. 30 (emphasis added).

¹²⁵ *Id.*, para. 38 (emphasis added).

¹²⁶ International Monetary Fund, *Antigua and Barbuda, Statistical Appendix* (8 December 2006) (citing the ECCB as a primary source of economic data on Antigua) (*Exhibit AB-11*).

¹²⁷ The WTO’s Statistics Database information with respect to Antigua (*see Exhibit US-5*) does not appear to expressly refer to a source for the data. However, in the “links” function to data sources, the only source cited by the WTO that would appear to include information pertaining to Antigua is the ECCB (http://www.wto.org/english/res_e/statis_e/intl_orgs_e.pdf).

¹²⁸ *See* Letter to Mark Mendel (4 October 2007) (*Exhibit AB-12*).

earned by operators who are licenced to engage in interactive wagering and gaming” for the same basic reasons mentioned by Antigua in the Methodology Paper—the operators do not report it.¹²⁹

103. As a result, *all of the alternative data relied upon or suggested by the United States in its submission to the Arbitrators is by and large completely useless in determining the level of nullification or impairment.*¹³⁰

3. Gross Domestic Product Issues.

104. The United States more indirectly contests Antigua’s remote gambling data on the basis that if Antiguan gaming revenue was as large as reported and estimated by GBGC, not only would Antigua’s gross domestic product (“**GDP**”) reflect that,¹³¹ but economic activity in Antigua would have to increase (and decrease) at or near the same pace as the remote gaming revenues.¹³²

105. *First*, GDP is generally calculated as the sum of private consumption plus investment plus government expenditures plus exports minus imports. It is frequently underestimated because it excludes non-monetary transactions, unreported transactions, illegal transactions and volunteer and other unpaid work. *Second*, GDP as an economic measure is the sum of value added (including factors such as wages, depreciation, profits and taxes on production) at every stage of production for all final goods and services. It is *not* the sum of revenue at each stage of production. All non-labour and non-depreciation expenses at each stage are excluded from GDP. Thus, an economic sector’s contribution to GDP will always be lower than its revenue at least by the amount of its non-labour and non-depreciation expenses. *Third*, for small island economies

¹²⁹ Methodology Paper, fn. 5.

¹³⁰ In addition to vitiating the United States arguments contained in paragraphs 26 through 39 of the US 22 Submission, the fact that remote gaming revenues are not captured in national GDP data also completely invalidates the United States’ creative calculation of the level of nullification and impairment contained in Section VI of the US 22 Submission.

¹³¹ US 22 Submission, para. 32.

¹³² *Id.*, paras. 34 - 35.

such as Antigua, GDP tends to be low given small populations and high negative trade balances.¹³³

106. Because “revenue” as such is not a component of GDP (and putting aside for the moment the fact that the revenue of Antiguan remote gambling operators has not historically been taken into account by the ECCB in determining GDP), there is no basis upon which to assume that GDP would *directly* reflect the remote gaming services sector. Further, a substantial part of the gaming revenues may not be entirely reflected in GDP for other, more practical reasons, including (i) a large amount of the goods and services used by the remote gaming industry are primarily purchased offshore and then imported; (ii) many of the banking services for the industry are performed outside of Antigua so that a significant amount of the money retained by the industry is not reflected in the Antiguan financial services sector; (iii) a significant portion of the profits of the industry may be invested or expatriated to shareholders, holding companies or affiliates located elsewhere; (iv) the Antiguan remote gaming industry, as a countermeasure to United

¹³³ N. Gregory Mankiw, Harvard University, *Macroeconomics* (Worth Publishers, Inc. 1992), pp. 180-81; Stanley Fischer, Rudiger Dornbusch, and Richard Schmalensee, Professors of Economics at Massachusetts Institute of Technology, *Economics: Second Edition* (McGraw-Hill, Inc. 1988), pp. 439-440; *see also* Wikipedia, Gross Domestic Product [<http://en.wikipedia.org/wiki/Gdp>] (noting that “official GDP estimates may not take into account the black market, where the money spent is not registered, and the non-monetary economy, where no money comes into play at all, resulting in inaccurate or abnormally low GDP figures. For example, in countries with major business transactions occurring informally, portions of local economy are not easily registered” and “cross border trade within companies distorts the GDP and is done frequently to escape high taxation. Examples include the German Ebay that evades German tax by doing business in Switzerland, and American companies that have founded holdings in Ireland to “buy” their own products for cheap from their continental factories (without shipping) and selling them for profit via Ireland - thereby reducing their taxes and increasing Irish GDP”). Antigua observes that Gibraltar seems to experience the same phenomenon when it comes to GDP and its remote gaming operators. Gibraltar is home to, among others, PartyGaming and 888 Holdings, plc (“888”), another publicly listed company with shares trading on the London Stock Exchange. According to public reports, in 2005 and 2006, the revenues of PartyGaming were US \$.978 billion and US \$1.105 billion, respectively, and those of 888 were US \$261 million and US \$278 million, respectively. Yet for 2005, the GDP of Gibraltar was estimated at approximately US \$1.02 billion. United Kingdom Foreign and Commonwealth Office, *Countries and Regions – Country Profiles – Gibraltar* (2007) [<http://www.fc.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394365&a=KCountryProfile&aid=1018965242498>].

States efforts to impede the flow of funds to and from operators and consumers, has had to conduct its financial operations in a strictly confidential manner that does not lend itself to remote gaming data being captured in government reports; and (v) much of the goods and services generated by the remote gaming industry are simply not captured by the ECCB because of the nature of Antigua’s economy and the inability to adequately track and capture concise economic data, particularly related to a tax-free and largely privately held industry such as the remote gaming industry in Antigua.

107. Nonetheless, Antigua believes that the remote gaming sector has contributed to the overall growth in the Antiguan economy in a number of ways that are virtually impossible to measure specifically but are reflected more generally in areas such as growth in construction spending, increases in the financial services sector, growth in retail trade and housing construction.

4. Regarding the Counterfactual.

108. The United States makes the claim in its submission that the counterfactual used by Antigua in the Methodology Paper is “wrong as a legal matter.”¹³⁴ Far from being wrong, the Antiguan counterfactual is (i) based on sound historical statistical data and estimates from recognised market specialists and (ii) assumes the preferred remedy of the withdrawal of the illegal measures. On the other hand, the United States proposes a counterfactual that not only relies on baseless speculation as to how the markets *could* look if the United States complied with the DSB Rulings but also is constructed around a failed Article XIV defence.

109. To claim, as the United States does, that the level of nullification and impairment generated by a breach of Article XVI of the GATS should be assessed vis-à-vis a counterfactual where the United States would somehow justify its GATS violations is absurd and grossly unreasonable. Applying such a counterfactual would ignore the *actual* findings of the DSB that

¹³⁴ US 22 Submission, para. 20.

have already established that the United States was incapable of justifying its illegal measures under Article XIV of the GATS. It would also ignore the fact that the appropriateness of the suspension of concessions or other obligations should be assessed on the date on which the reasonable period of time expired.¹³⁵ As was determined by the Compliance Panel, as of the end of the reasonable period of time the United States had taken no measures to comply, much less the implementation of its hypothetical defence.

110. As a “reasonable” counterfactual,¹³⁶ Antigua’s counterfactual is entitled to the same presumption of conformity that the Request is.¹³⁷ The contortionist counterfactuals proposed by the United States¹³⁸ do not stand up even as reasonable proposals on their own, much less suffice to overcome the presumption to which Antigua’s counterfactual is entitled.

D. “OTHER METHODOLOGICAL FLAWS”

111. In Section V.C of its submission to the Arbitrators, the United States lists certain “other methodological flaws” which it contests renders Antigua’s economic analysis incorrect.

1. The Use of Worldwide Gambling Revenue.

112. The United States believes that Antigua has overstated its level of nullification and impairment because its calculations are based upon Antigua’s global gaming revenue.¹³⁹ Antigua conservatively estimates that at least 80 percent of the historical revenue of Antiguan remote gaming operators was from customers in the United States. For some of the major operators this figure is estimated to have routinely exceeded 90 percent. Antigua’s economic consultant believes, however, that 100 percent of its trade loss in remote gambling is attributable to actions

¹³⁵ See, e.g., Arbitrators’ Report, *EC – Hormones (US)*, paras. 38 - 42.

¹³⁶ See Arbitrators’ Report, *EC – Bananas (US)*, para. 7.7.

¹³⁷ See the discussion at paragraphs 13 through 15 above.

¹³⁸ See US 22 Submission, para. 17 (“in this arbitration, any examination need to take into account the possibility of compliance under different approaches, not just the approach preferred by Antigua. As discussed, if the United States were to ensure that domestic service suppliers are also prohibited from supplying remote betting services on horseracing, the level of nullification and impairment for Antigua would be zero.”).

¹³⁹ *Id.*, para. 41.

of and efforts by the United States to impair the provision of cross-border gambling and betting services and thus it is appropriate to include the full revenues in the calculations.

2. Whether the Loss of Market Share is Attributable to United States Actions.

113. With respect to Antigua's decreasing share of the global remote gambling market, the United States does not believe that Antigua has a basis for attributing the loss of market share to United States actions. This is based upon its belief that other factors may have been more (or solely) responsible for the decline in Antiguan market share, including actions of the Antiguan government, new entries to the industry and (prospectively) the assumption that compliance by the United States with the DSB Rulings would open Antigua up to competition from United States suppliers of remote gambling services.¹⁴⁰

114. Antigua has no doubts that the decline in its industry is *completely* attributable to the actions of the United States government. Antigua has included with this Submission a time line showing material actions by the United States and other major events impacting the remote gaming industry in Antigua.¹⁴¹ Each of those events have had a material, adverse impact upon the Antiguan remote gaming industry. Some, such as the loss of access to payment systems such as PayPal, Neteller and credit cards had an immediate and discernable impact. Others have had more of a gradual impact, but all have been adverse.

115. Although it is always possible under a WTO-consistent regime that other entrants will access the United States market and compete with Antiguan operators, Antigua believes that—absent United States government actions—it stood in good position in the relatively near-term to retain at least 21 percent of the global gaming market. As Antigua observed in the Methodology Paper,¹⁴² Antigua was a very early entrant to the market. This translated into

¹⁴⁰ *Id.*, paras. 42 - 44.

¹⁴¹ ***Exhibit AB-13.***

¹⁴² Methodology Paper, fn. 12.

extraordinary market share—as high as 61 percent in 2000.¹⁴³ Antigua also believes it has significant competitive advantages attributable to (i) innovative product offerings; (ii) extensive experience in and knowledge of the American sports betting markets; and (iii) location in a time zone convenient to consumers in the United States. A further very significant advantage to Antiguan operators is the lack of taxation of remote gambling and betting service operators in Antigua, a crucial advantage in the remote betting industry where margins tend to be extremely narrow.¹⁴⁴

116. The competitiveness of the remote gambling and betting industry, Antigua believes, makes it less likely that new entrants from other jurisdictions—particularly high-cost and traditionally high-margin jurisdictions such as the United States—would be able to compete effectively, at least in the near term, against experienced, low-cost operators such as those in Antigua.

117. Antigua believes that the United States efforts to block access to its consumers affected Antigua much more severely than operators in other locations for a number of reasons. *First*, Antigua has always been predominantly “US facing,” meaning its products have been specially tailored to and directed at consumers in the United States.

118. *Second*, Antigua has always also been predominantly sports betting oriented. Until the United States Supreme Court refused to hear the appeal in the *Cohen* case,¹⁴⁵ despite the 1998 reversal of the United States government’s position with respect to the applicability of the Federal Trio to cross-border gambling services provided from other countries, there had always been some uncertainty as to the legal strength of the United States position with respect to sports betting. The final decision in the *Cohen* case removed that uncertainty, and American legal experts more

¹⁴³ *Id.*, Backup to Exhibit AB-2.

¹⁴⁴ Antigua estimates the average margin of its operators to be between three to five percent in sports betting and 1.5 to 2.25 percent on non-sports offerings.

¹⁴⁵ *United States v. Cohen*, 260 F.3d 68 (2nd Cir. 2001), *cert. denied*, 536 U.S. 922 (2002).

or less uniformly agreed that the Wire Act covered sports betting services from countries such as Antigua.

119. On the other hand, at about the same time as the *Cohen* decision became final, the United States Fifth Circuit Court of Appeals rendered its decision in the *In re Mastercard International Inc.* matter,¹⁴⁶ in which the high-level court held that the Wire Act did not apply to remote gambling on things other than sporting events. This in turn, Antigua believes, spurred rapid growth in poker and other types of remote “casino” offerings which accounted for much of the post-2002 growth in global remote gambling.

120. Of course, in adopting a counterfactual and trying to predict future events, there will always be a material element of uncertainty. Antigua believes, however, that in a circumstance such as this it is more appropriate to base the counterfactual upon known, recent historical information rather than more speculative matters such as where new entrants might come from and what their impact on the market might be. In this respect Antigua notes that the arbitrators in *EC – Bananas (Ecuador)* refrained from this type of speculation and in determining the level of nullification and impairment assumed that Ecuador’s share of the EC’s banana market would “increase (at the expense of other suppliers) to the level of its *best-ever exports* during the past decade (...).”¹⁴⁷

121. In none of the other proceedings under Article 22 of the DSU have the arbitrators taken into consideration speculation regarding how the removal of a specific trade barrier by the responding party might alter or affect global trade in the applicable product or service. In the words of the United States, “[a]rbitrators in past proceedings have uniformly based their determinations on hard evidence and have refused to ‘accept claims that are too remote, too speculative, or not meaningfully quantified.’”¹⁴⁸

¹⁴⁶ *In re Mastercard International Inc.*, 313 F.3d 257 (5th Cir. 2002).

¹⁴⁷ Arbitrators’ Report, *EC – Bananas (Ecuador)*, para. 169 (emphasis added).

¹⁴⁸ US 22 Submission, para. 13 (footnote omitted).

3. Use of a Multiplier.

122. The United States objects to the use by Antigua of its “small island economy multiplier” in determining the level of nullification and impairment.¹⁴⁹ Although the United States contends that the result from the application of the multiplier itself cannot form part of the nullification and impairment, there is no *legal* basis for that conclusion. Antigua realises that in the arbitrations to date under Article 22 of the DSU there have been no cases where an arbitrator has expressly looked to a multiplier to assist in the determination of nullification or impairment. However, that does not mean that it is not allowable or appropriate under certain circumstances.¹⁵⁰

123. As thoughtfully discussed by the arbitrators in *EC – Bananas (US)*, the DSU expressly contemplates *indirect* impairment that might occur as a result of actions of a responding Member.¹⁵¹ Although the arbitrators ultimately decided that lost exports to third-parties should not be counted as part of the nullification or impairment, they did not preclude consideration of indirect impairment *per se*.

124. The “multiplier effect” is a well recognised and accepted feature of economic modelling. Multipliers are generally designed to approximate the indirect effect on an economy of specific events, and thus are not “speculative” in nature but are intended to provide a reasonable estimate of actual effects.¹⁵² As such, the application of a multiplier to the direct, specific trade losses incurred by Antigua as a result of the failure of the United States to comply with the DSB Rulings

¹⁴⁹ *Id.*, para. 45.

¹⁵⁰ In this respect Antigua refers to Article 21.8 of the DSU.

¹⁵¹ Arbitrators’ Report, *EC – Bananas (US)*, paras. 6.6 - 6.12 (referring to Article 3.3 of the DSU).

¹⁵² Wikipedia, Multiplier (economics) [http://en.wikipedia.org/wiki/Multiplier_%28economics%29].

is clearly distinguishable from the circumstances in *EC – Bananas (US)*,¹⁵³ *EC – Hormones (US)*¹⁵⁴ and *US – 1916 Act*.¹⁵⁵

E. THE UNITED STATES POSITION WITH RESPECT TO ARTICLE 22.3 OF THE DSU

125. As a preliminary matter, to the extent that the United States’ argument with respect to the application of the principles and procedures of Article 22.3 of the GATS is predicated upon its unfathomable US \$500,000 estimate of the level of nullification or impairment, the discussion in Section VII of the US 22 Submission is fatally impaired. Aside from that, the United States does not come close to establishing that Antigua has a practicable *and* effective remedy in the suspension of concessions or other obligations under the GATS. At best, the United States speculates in its submission that because Antigua imports some services, it may well be able to extract some concessions under the GATS.¹⁵⁶

126. Antigua agrees with the United States that “differences in sizes in economies cannot provide a *carte blanche* permission to deviate from the general principles set out in Article 22.3” of the DSU.¹⁵⁷ But, as Antigua demonstrated in the Request as well as in this Submission, Antigua has *not* deviated from the general principles set out in Article 22.3 of the DSU, but rather followed them.¹⁵⁸

F. “ENSURING EQUIVALENCY”

127. In paragraph 63 of the US 22 Submission, the United States demands that the Arbitrators “require Antigua to specify how it will ensure that the level of suspension of concessions does not

¹⁵³ Arbitrators’ Report, *EC – Bananas (US)*, para. 6.12 (lost exports to other countries and lost exports of related products).

¹⁵⁴ Arbitrators’ Report, *EC – Hormones (US)*, paras. 76 - 76 (exports that might have been attainable had the United States been able to engage in a marketing campaign).

¹⁵⁵ Arbitrators’ Report, *US – 1916 Act*, para. 5.72 (trade loss attributable to an unquantifiable “chilling effect”).

¹⁵⁶ US 22 Submission, paras. 60 - 61.

¹⁵⁷ *Id.*, para. 62.

¹⁵⁸ See the discussion at paragraphs 48 through 70 above.

exceed the level of nullification and impairment” determined by the Arbitrators. The United States gives no authority or support for this request, and Antigua believes that the imposition of such a “requirement” by the Arbitrators is not within the terms of reference of the Arbitrators under Article 22.7 of the DSU.

128. 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 authorised by the DSB,¹⁵⁹ nor is it the role of the arbitrators to so determine.¹⁶⁰

129. Like any other Member of the WTO, Antigua is expected to and will observe its obligations under the WTO agreements, including under Article 22 of the DSU, in putting into effect the suspension of concessions or other obligations following authorisation from the DSB. In the unlikely event that the United States disagrees with level of suspension, it has a remedy under the DSU.

VI. CONCLUSION

130. Antigua is not, nor has it been throughout the course of this dispute, unmindful of the difficulties faced by the United States in honouring its commitment in respect of cross-border gambling and betting services. As Antigua observed at the beginning of this Submission, it sincerely regrets that this dispute has progressed to this stage. However, at the end of the day the responsibility lies squarely on the shoulders of the United States. Antigua wishes to impress upon the Arbitrators the frustration experienced by Antigua not just by the relentless and oppressive efforts of the United States to extinguish the remote gaming industry in Antigua, but in the context of this dispute by the failure and refusal of the United States to work cooperatively with Antigua towards compromise or settlement.

131. Antigua has always openly encouraged engagement with the United States in an effort to

¹⁵⁹ Arbitrators’ Report, *US – 1916 Act*, paras. 3.10 - 3.13.

¹⁶⁰ Arbitrators’ Report, *EC – Hormones (US)*, paras. 14 - 19.

come to a mutual resolution of this dispute and although the United States is almost always willing to schedule a meeting, it steadfastly refuses to negotiate. Antigua's primary purpose in putting forth its request for the suspension of concessions or other obligations under Article 22 of the DSU is most assuredly not to reap the benefits, if any, of a suspension of intellectual property rights against American business interests. It is, rather, in the hope that the United States will ultimately realise that a mutually agreeable solution to our dispute is not only possible but the right thing to do.

132. For all of the reasons stated in this Submission, Antigua requests authorisation from the DSB for the suspension of concessions or other obligations with respect to the United States in the aggregate annual amount of US \$3.443 billion in respect of the covered agreements and sectors as specified in the Request and this Submission.