



Team: 055

**ELSA MOOT COURT COMPETITION ON WTO LAW
2013-2014**

**Aquitania – Measures Affecting Water
Distribution and Sewage Collection
Services**

United Kingdom of Commercialia
(Complainant)

VS

Federal Republic of Aquitania
(Respondent)

SUBMISSION OF THE RESPONDENT

Table of Contents

| | |
|--|------------|
| List of References | III |
| List of Abbreviations | IX |
| Summary of Arguments | 1 |
| Statement of Facts | 3 |
| Identification of the Measures at Issue | 4 |
| Legal Pleadings | 4 |
| Jurisdiction | 4 |
| I. Art. 2005:6 of the OFTA is a legal impediment excluding the Panel’s jurisdiction. | 4 |
| I.1. Art. 2005:6 of the OFTA prevents this Panel from exercising its jurisdiction. | 4 |
| I.2. OFTA has modified Comercia’s obligation under the DSU on the basis of Art. 30.4 and 41.1 (b) of the VCLT..... | 5 |
| II. Estoppel is a legal impediment that excludes this Panel’s jurisdiction. | 6 |
| 1. The water and sewage services in Nova Tertia are services subject to the carve-out of Art. I:3 (b) of the GATS and fall outside the scope of the GATS. | 6 |
| I. Water and sewage services are services supplied on a non-commercial basis. | 6 |
| II. Water and sewage services are services supplied in absence of competition. | 7 |
| 2. Aquitania’s GATS specific commitments do not cover water related services. | 8 |
| I. Aquitania’s Schedule is based on CPC prov. and W/120. | 8 |
| II. Aquitania’s Schedule does not cover water supply and sewage services..... | 9 |
| II.1 Water services are excluded from the Environmental Services sector. | 9 |
| II.2 Water services are excluded from the Distribution Services sector. | 9 |
| II.3 Water services are excluded from the Construction and Related Engineering Services sector..... | 10 |
| 3. The 2011 Law is consistent with Art. XVI and XVII of the GATS. | 10 |
| I. The 2011 Law is consistent with Art. XVI of the GATS. | 10 |
| II. The 2011 Law is consistent with Art. XVII of the GATS. | 11 |
| II.1 Aquitania’s commitments comply with the relevant services sector. | 12 |
| II.2 The services and service suppliers at stake are not like. | 12 |
| II.3 Aquitania doesn’t accord a less favorable treatment to foreign companies. | 13 |
| 4. The 2011 Law is justifiable under Art. XIV (a) and (b) of the GATS. | 13 |
| I. The 2011 Law falls within the scope of the Art. XIV (a). | 14 |

| | |
|--|-----------|
| II. The 2011 Law falls within the scope of the Art. XIV (b)..... | 14 |
| III. The 2011 Law is necessary to achieve its policy objective..... | 15 |
| III.1 The importance of the interests or values intended to protect by the 2011 Law.. | 15 |
| III.2 The contribution of the 2011 Law to the end pursued..... | 16 |
| III.3 Trade impact of the 2011 Law and alternative measures..... | 17 |
| IV. Chapeau clause of Art. XIV of the GATS..... | 18 |
| IV.1 The measure does not constitute a discrimination between countries where like conditions prevail. | 18 |
| IV.2 The measure is not an arbitrary or unjustifiable discrimination..... | 19 |
| IV.3 The measure is not a disguised restriction on international trade. | 19 |
| Request for Findings | 20 |

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List of Abbreviations

| Abbreviation | Full Form |
|---------------------|--|
| AB | Appellate Body |
| Art. | Article |
| CEDAW | Committee on the Elimination of Discrimination against Women |
| CEO | Chief Executive Officer |
| CPC prov. | Provisional Central Product Classification |
| DSB | Dispute Settlement Body |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade, 1994 |
| ICJ | International Court of Justice |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| NAFTA | North American Free Trade Agreement |
| OFTA | Occidental Free Trade Agreement |
| PCIJ | Permanent Court of International Justice |
| RTA | Regional Trade Agreement |
| US | United States of America |
| USO | Universal Service Obligation |
| VCLT | Vienna Convention on the Law of Treaties |
| W/120 | Services Sectoral Classification list W/120 |
| WHO | World Health Organization |
| WTO | World Trade Organization |

Summary of Arguments

Jurisdiction

- A WTO Panel has the authority to decline its jurisdiction when it is confronted with a legal impediment. Art. 2005:6 of the OFTA prevents this Panel from exercising its jurisdiction. Art. 2005:6 of the OFTA is also a valid *inter se* treaty modification pursuant to Art. 41 of the VCLT. Hence, Art. 2005:6 of the OFTA is a legal impediment for this Panel to exercise its jurisdiction.
- *Estoppel* applies to WTO proceedings as a principle of international law based on good faith. In the present case, it prevents Comercia from breaching its obligation under Chapter 20 of the OFTA. Therefore it is a legal impediment that brings this Panel to decline its jurisdiction.

1. The water supply and sewage collection and treatment in Nova Tertia are services subject to the carve out of Art. I:3 (b) of the GATS, and thus fall outside the scope of the GATS.

- In order to be qualified as service supplied in the ‘exercise of governmental authority’, two cumulative conditions must be met: the service must be supplied on a non-commercial basis and in absence of competition. The water supply and sewage collection and treatment in Nova Tertia meet these conditions and constitute traditionally an exercise of a public function. First, the fees charged by the supplier companies are significantly lower than the actual costs and the supplier administers no profit. Second, the network and infrastructure necessary to supply these services constitute a public property and create a natural monopoly in the sector; this excludes any possibility of competition.

2. Aquitania’s specific commitments do not cover water distribution.

- Aquitania followed the structure of CPC prov. and W/120 to schedule its commitments. Water distribution services are excluded from the scope of CPC Prov. and W/120. Aquitania’s Schedule does not cover water services since they are excluded from the CPC prov. and W/120. Alternatively, Aquitania also argues that water services are covered by other sectors of the Schedule, where Aquitania has undertaken no commitments. Thus, in the absence of such commitments, Art. XVI and XVII are not applicable, and Aquitania can maintain its measure.

3. The 2011 Law is consistent with Art. XVI and Art. XVII of the GATS.

- Should the Panel find that water distribution and sewage services fall under Environmental Services, Aquitania stipulates the formal condition of a ‘concession’ in its Schedules. This formal requirement must be implemented in conformity with domestic legislation, the conditions which are detailed in the 2011 Law and the 2004 Regulation. Moreover, the 2011 Law concerns only a fraction of the water and sewage market, leaving the possibility for private suppliers to operate a parallel market on a facilities-basis. In that sense, the 2011 Law is consistent with Art. XVI of the GATS.
- The 2011 Law is also consistent with Art. XVII of the GATS, as the “discrimination” and “likeness” conditions between service suppliers cannot be established. In that sense, the 2011 Law extends a treatment no less favorable to foreign suppliers than the one it extends to its own suppliers.

4. The 2011 Law is justifiable under Art. XIV (a) and (b) of the GATS.

- The 2011 Law intends to protect public interests of utmost importance. First, it aims to protect public morals and to maintain public order. Second, the measure also aims to protect human, animal and plant life and health. In order to reduce health risks associated with sewage leaks, it is necessary to regulate and prevent excessive price increases and to expand the existing network in conformity with the traditional USO principle, as well as to provide adequate quality and access to water and sanitation services to the entirety of its population. Moreover, Aquitania must respect its human rights obligations.
- These goals require public regulation and surveillance. No alternative measure can contribute to these objectives in the same degree. In addition, the 2011 Law is neither an arbitrary or unjustifiable discrimination between countries where like conditions prevail, nor a disguised restriction on trade.

Statement of Facts

1. The Federal Republic of Aquitania, a developing country, joined the WTO on 1 May 2005. The United Kingdom of Commercia is a developed country and founding Member of the WTO. Both Aquitania and Commercia signed a regional trade agreement (OFTA) in September 2003, which establishes a free trade zone between its contracting States.
2. Nova Tertia, one of the poorest provinces of Aquitania, has enacted its own water supply and sewage treatment regulatory framework. Between 2003 and 2004, the Province adopted the 2003 Law and the 2004 Regulation. These measures addressed issues such as minimum standards for drinking water and effluents released from treatment facilities, terms of the universal service obligation and price regulation, and set the conditions for the concession.
3. In May 2005, the city of Tertialia granted a concession to Avanti SA, a commercial company fully owned by Avanti Ltd., headquartered in Commercia.
4. In December 2007, Avanti SA imposed a 75% price increase on water supply and sewage treatment. Despite this price increase, serious leakage problems persisted. The leakage problems worsened since Avanti SA's admission to the market. The company failed to meet its commitments to improve water supply and sewage treatment. In addition, Avanti SA repeatedly ignored the city of Tertialia's request to develop plans for the expansion of the network, as stipulated in the 2004 Regulation. Thus, Avanti SA caused the termination of its concession contract on 15 April 2009.
5. In September 2011, following Avanti SA's failure to deliver services in conformity with national standards and in the wake of widespread popular discontent, the Province of Nova Tertia adopted the 2011 Law. This law aims to reduce leakage problems and to expand the existing network, all the while regulating the price and the quality of the services provided. To the present day, the 2011 Law allows concessions to be granted to public companies owned and controlled by the Provincial Government.
6. Aquitania was informed of Commercia's request for the establishment of the OFTA Free Trade Commission on 1 February 2013. The same month, Commercia entered into consultations with Aquitania regarding the Water and Sewage Law under the dispute settlement provisions of both the WTO and the OFTA. Finding that these consultations had failed, Commercia submitted the dispute before the OFTA Commission on 2 May. On 3 May, Commercia then requested the establishment of a WTO Panel. This Panel was established on 30 August 2013 in order to examine the matter referred to the DSB by Commercia in its Panel request.

Identification of the Measures at Issue

The Water and Sewage Law of September 2011 (the 2011 Law) amends paragraph (A) of Section Two of the Water Distribution and Sewage Services Law of Nova Tertia (the 2003 Law). The Water and Sewage Concession Regulation (the 2004 Regulation) complements the 2003 and 2011 Laws to the present day.

Legal Pleadings

Jurisdiction

This Panel should decline to exercise its jurisdiction because of a legal impediment.

1. In *Mexico – Soft Drinks*, the AB admitted that a WTO Panel has the implied power to decide on its own competence, including the authority to decline it when there are legal impediments¹. In the present case, there are two legal impediments that prevent this WTO Panel from exercising its jurisdiction, respectively Art. 2005:6 of the OFTA and the principle of *estoppel*. Thus, the Panel should use this authority to decline its jurisdiction.

I. Art. 2005:6 of the OFTA is a legal impediment excluding the Panel's jurisdiction.

I.1. Art. 2005:6 of the OFTA prevents this Panel from exercising its jurisdiction.

2. In *Argentina – Poultry Anti-Dumping Duties*, the Panel contemplated that a RTA *inter alia* clause excluding the jurisdiction of a WTO adjudicating body could form a legal impediment bringing such body to decline its jurisdiction². In that case, both parties were Members of both MERCOSUR and the WTO. The MERCOSUR agreement contains a clause in Art. 1 of the Protocol of Olivos, providing that once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement bodies, that party may not bring a subsequent case regarding the same subject-matter in the other forum. In that case, the Panel admitted that such a clause could form a legal impediment bringing a WTO Panel to decline its jurisdiction. It has, nevertheless, decided to exercise its jurisdiction because the Protocol of Olivos was not in force when the dispute was initiated. The AB upheld this view in *Mexico – Taxes on Soft Drinks*³.

3. In the case under consideration, Aquitania and Commercia are both Members of the WTO and the OFTA Agreements, the latter in force between Aquitania and Commercia since September 2003. Chapter 20 of the OFTA contains a clause in Art. 2005:6, providing that once the dispute settlement procedures have been initiated under OFTA or the WTO, the

¹ ABR, *Mexico – Taxes on Soft Drinks* [45]; see also PR, *India – Autos* [7.116]; ABR, *US – Antidumping Act of 1916* [54]; PCIJ, *Interpretation of the Greco-Turkish Agreement of 1 December 1926* [p.20].

² PR, *Argentina – Poultry Anti-Dumping Duties* [7.38].

³ ABR, *Mexico – Taxes on Soft Drinks* [54].

forum selected by the complaining party shall be used to the exclusion of the other forum. Commercia submitted the dispute first to the OFTA Commission on 2 May 2013. It then submitted a request for the establishment of a WTO Panel on 3 May 2013. It is undisputed in this context that the first forum selected by Commercia was that under the OFTA.

4. Thus, Aquitania invokes Art. 2005:6 of the OFTA that applies to this dispute and gives exclusive jurisdiction to the OFTA dispute settlement body. It constitutes a legal impediment that prevents this WTO Panel from exercising its jurisdiction.

I.2. OFTA has modified Commercia's obligation under the DSU on the basis of Art. 30.4 and 41.1 (b) of the VCLT.

5. If the Panel finds otherwise, Aquitania submits that Art. 2005:6 of the OFTA has modified obligations under the DSU between Aquitania and Commercia on the basis of Art. 41 of the VCLT, and shall therefore be considered before this Panel.

6. Art. 41 of the VCLT applies to WTO proceedings as an expression of customary law⁴. It allows parties of a multilateral treaty to modify the obligations between each other if it is not prohibited by the treaty, and if (1) it does not affect the rights of third parties and (2) it is not incompatible with the object and purpose of the treaty. Art. 41.1 (b) of the VCLT is based on the principle of *lex posterior*, which is expressed in Art. 30.3 and 30.4 of the VCLT.

7. Commercia is a founding Member of the WTO since 1 January 1995. Commercia joined the OFTA on 1 January 2004. From Commercia's perspective, OFTA is *lex posterior* to the WTO Agreement. Art. 2005:6 of the OFTA has modified Commercia's obligations under the DSU by stating that it is not possible to initiate a same dispute before both OFTA and WTO.

8. Nothing in the WTO DSU Agreement explicitly prohibits an *inter se* modification of the DSU as such modification would be based on the intention of the Members concerned.

9. Furthermore, Art. 2005:6 of the OFTA respects the rights of third parties who remain free to initiate a dispute against OFTA Members under the covered WTO Agreements⁵.

10. Besides, the OFTA is compatible with the object and purpose of the WTO Agreement⁶. The OFTA follows the same goals as the WTO Agreement. Besides, WTO Members acknowledged the contribution of RTAs to the expansion of world trade⁷.

11. Art. 2005:6 of the OFTA satisfies all requirements of Art. 41.1 (b) of the VCLT. Thus it is a valid *inter se* modification of Art. 23 of the DSU that constitutes a legal impediment,

⁴ PR, *Korea – Government Procurement* [7.96]; PR, *Turkey – Textiles* [9.148]; PR, *EC – Poultry* [206]; PCIJ, *Mavromatis Concessions* [p.31]; ICJ, *North Sea Continental Shelf Case* [72]; Jenks, (1953), [445].

⁵ Pauwelyn, (2003), [456]; Hahn, (1996).

⁶ Marrakesh Agreement Preamble.

⁷ Understanding on the Interpretation of Article XXIV of GATT 1994; see also Article V of the GATS.

preventing this Panel from exercising its jurisdiction.

II. Estoppel is a legal impediment that excludes this Panel’s jurisdiction.

12. *Estoppel* is a general principle of international law based on good faith⁸ applying to the WTO dispute settlement⁹. In *Guatemala – Cement II*, *estoppel* was defined as “where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position”¹⁰. In *Argentina – Poultry Anti-Dumping Duties*, the Panel required three conditions to apply the principle: a statement of fact (1) which is clear and unambiguous, (2) which is voluntary, unconditional, and authorized, and (3) which is relied on in good faith either to the detriment of the party so relying on the statement or to the advantage of the party making the statement¹¹.

13. By ratifying Art. 2005:6 of the OFTA, Comercia made an unequivocal promise not to initiate the same dispute before a WTO Panel and an OFTA Panel. Besides, Comercia joined the OFTA voluntarily as a founding Member. Furthermore, Aquitania relied on Comercia not to initiate the same dispute twice. It must now face the prejudice of being involved in two parallel procedures, with a risk of contradicting decisions, which is contrary to the principle of predictability and security in the DSB proceedings¹². Therefore, Comercia is estopped from bringing this complaint before this WTO Panel, which constitutes a legal impediment that prevents this Panel to exercise its jurisdiction.

1. The water and sewage services in Nova Tertia are services subject to the carve-out of Art. I:3 (b) of the GATS and fall outside the scope of the GATS.

14. If the Panel decides to exercise its jurisdiction, Aquitania shall assert that the challenged measure is out of the scope of the GATS. According to Art. I:3 (b), in order to be excluded from the substantive scope of the GATS, a service exercised in governmental authority must meet two cumulative conditions: it must neither be supplied on a commercial basis nor in competition with one or more service suppliers. Water supply and sewage treatment in Nova Tertia meet these two conditions.

I. Water and sewage services are services supplied on a non-commercial basis.

15. In *Canada - Measures relating to the feed-in tariff program*, the AB assessed the notion of “commercial” by researching whether a transaction was oriented at generating a profit for

⁸ ICJ, *Nicaragua v. USA* [392], [415]; ICJ, *Cameroon v. Nigeria* [275], [303]; Brownlie (2003), [616]; MacGibbon, (1958), [458]; Guggenheim, (1954), [158]-[159].

⁹ PR, *India – Autos* [7.115].

¹⁰ PR, *Guatemala – Cement II* [8.23]; see also PR, *EC – Export Subsidies on Sugar* [7.61-7.62].

¹¹ PR, *Argentina – Poultry Anti-Dumping Duties* [7.37].

¹² ABR, *US – Stainless Steel* [161].

the seller¹³. The AB considered the seller's "profit-orientation" strategy as the main indicator for a commercial transaction, especially if such a strategy was pursued in the long-term. Moreover, Aquitania refers to the notion known in the relevant doctrine as "profit seeking activity", according to which a service is considered as provided commercially in situations in which the supplier seeks to make a profit¹⁴. Accordingly, the scope of the carve-out exemption of Art. I:3 (b) differs from one country to another, depending on national policies, and constitutional and administrative organization¹⁵.

16. Finally, according to the aforementioned doctrine and in light of the principle of effective treaty interpretation¹⁶, the notion of non-commercial must not be characterized by a total absence of fee. Such a definition would restrict Art. I:3 (b) of the GATS to services supplied exclusively on a free basis and would, in practice, deprive the Article of any useful purpose.

17. Water distribution and sewage collection and treatment qualify traditionally and historically as a public function on the national level and in every fifteen of Aquitanian provinces¹⁷. The existing network used for the supply of water and sewage services is public property. Charged with the appointment of CEOs and the Board of Directors, the provincial authorities are implicated in management control, as well as in the regulation of prices and the realization of domestic public objectives, such as the USO.

18. Furthermore, while the fees in Nova Tertia are based on actual consumption, they are lower than the cost of providing these services. Because of these current price restrictions in Nova Tertia, the execution of this public function neither entails nor enables profit. Water supply and sewage collection and treatment in Nova Tertia are therefore services supplied on a non-commercial basis.

II. Water and sewage services are services supplied in absence of competition.

19. In *Japan – Taxes on Alcoholic Beverages*, the AB confirmed that according to Art. 31 of the VCLT, interpretation must be based above all upon the text of the treaty¹⁸. Provisions must thus be given their ordinary meaning. In that respect, the Panel in *Mexico – Measures Affecting Telecommunications Services* defined the notion of competition as "rivalry in the market, striving for custom between those who have the same commodities to dispose"¹⁹.

¹³ ABR, *Canada – Measures relating to the feed-in tariff program* [5.71].

¹⁴ See Cossy, (2005), p.117-142; Krajewski, (2003), p. 341-367.

¹⁵ Cossy (2005), p. 126.

¹⁶ ABR, *US – Gasoline* [23].

¹⁷ Fact Sheet, [3].

¹⁸ ABR, *Japan – Taxes on Alcoholic Beverages* [12].

¹⁹ PR. *Mexico – Telecoms* [7.230]; see also *The Shorter Oxford English Dictionary*, 3rd edition, Vol. II, p. 1645.

20. Yet Nova Tertia's given market is inherently non-competitive. Since the publicly owned network used in the supply of these services is the only infrastructure available, only one supplier is capable of providing services to the entirety of consumers in the city of Tertia. This natural monopoly over the State's resources and the operating network reduces the market to a unique supplier. It also obliges the provincial government to choose a single supplier in accordance with their efficiency and effectiveness and in respect of national public and social policies, all the while maintaining the industry as a governmental service.

21. Water supply and sewage collection and treatment in Nova Tertia are therefore services supplied on a non-commercial basis and in absence of competition.

2. Aquitania's GATS specific commitments do not cover water related services.

22. If the Panel finds otherwise, Aquitania submits that its GATS specific commitments do not cover water related services. Aquitania has followed the CPC prov. and W/120 in its Schedule. Water services are excluded from Aquitania's Schedule.

I. Aquitania's Schedule is based on CPC prov. and W/120.

23. W/120 is a service classification list based on the CPC prov., used in the GATS Schedules²⁰. In *US – Gambling*, the AB considered the 1993 Scheduling Guidelines²¹ and W/120 as “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion”²² within the meaning of Art. 32 of the VCLT. The 1993 Scheduling Guidelines is a document updated by the Council for Trade in Service in 2001²³, explaining to Members how commitments should be entered in Schedules. It provides that the classification of sectors should be based on CPC prov. and W/120. Hence, there is a presumption under the WTO system that a Member's GATS Schedule is based on the CPC prov. and W/120, unless otherwise indicated in the Schedule²⁴. A Member can use its own sectoral classification, but it has to do it in a sufficiently detailed way to avoid any ambiguity as to the scope of the commitment²⁵.

24. Aquitania's commitments have followed the same structure of classification and the same terminology as in W/120. Thus, Aquitania's specific commitments should be interpreted in the light of CPC prov. and W/120.

²⁰ ABR, *US – Gambling* [200].

²¹ Service Sectoral Classification List, Note by the Secretariat; MTN.GNS/W/164; S/L/92.

²² ABR, *US – Gambling* [196].

²³ MTN.GNS/W/164; S/L/92.

²⁴ ABR, *US – Gambling* [204]; PR in *US – Gambling* [6.106].

²⁵ 1993 Scheduling Guidelines, p.7.

II. Aquitania's Schedule does not cover water supply and sewage services.

II.1 Water services are excluded from the Environmental Services sector.

25. CPC prov. explicitly excludes from the Environmental Services (in its section 9401) the collection, purification and distribution services of water. It classifies water as a good and not as a service in "natural water" (subclass 18000)²⁶. This means that water related services are excluded from the Environmental Services sector²⁷.

26. Moreover, the European Union has made a WTO proposal in 2000 to revise the Environmental Services sector and include water distribution in this sector²⁸. This proposal was rejected by most WTO Members, which demonstrates a consensus to exclude water distribution from Environmental Services²⁹. Therefore, Aquitania's commitments on the Environmental Services sector under its GATS Schedule do not cover water services.

II.2 Water services are excluded from the Distribution Services sector.

27. Neither CPC prov. nor W/120 contain a distinct category for water distribution services. CPC prov. only contains an entry for "distribution services on a fee or contract basis of electricity, gaseous fuels and steam and hot water to household, industrial, commercial and other users" (subclass 88700). This entry concerns activities related to heating systems, but does not cover drinking water³⁰. To the present day, no WTO Members have undertaken commitments in the water distribution sector³¹.

28. More recent CPC revisions³² include new entries for water distribution services, but they are not used for the interpretation of Member Schedules. In CPC 1.1, there is a new entry for water distribution services through mains on a fee or contract basis (subclass 86330). The correspondence table indicates that this service is classed in the CPC prov. under services incidental to energy distribution (subclass 88700) in the Business Services section. Thus, if the Panel finds that water distribution is covered by W/120, it must be classified as follows: Business Services (sector 1 in W/120), Other Business Services (subsector F), Services Incidental to Energy Distribution Entry (sub subsector f), and not in Distribution Services (sector 4 in W/120). Therefore, water distribution is not covered by Aquitania's commitments

²⁶ CPC prov. 94010, explanatory note.

²⁷ Cossy, (2005), p.122.

²⁸ Council for Trade in Service - Special Session – Communication from the European Union and their Member States – GATS 2000: Environmental Services 22/12/2000, S/CSS/W/38.

²⁹ Communication from Switzerland, S/CSS/W/76, [6]; See the debates in the Council for Trade Special Sessions S/CSS/M7 [115], S/CSS/M/12 [235]; S/CSS/M/13 [261].

³⁰ Cossy, (2005), *ibid.*; Krajewski, (2003), p.6.

³¹ GATS: Fact and Fiction – Misunderstandings and scare stories: The WTO is not after your water.

³² Central Product Classification – Version 1.0; Central Product Classification – Version 1.1; Central Product Classification – Version 2.0.

in the Distribution Services sector. Aquitania has undertaken no commitments in the Business Services sector, which is the only sector that could potentially cover water distribution.

II.3 Water services are excluded from the Construction and Related Engineering Services sector.

29. CPC prov. establishes a category for engineering design services for the construction of civil engineering works (subclass 86724). This subsector includes engineering services for the construction of water supply and sanitation works such as water distribution systems, water, sewage, industrial and solid waste treatment plants³³. The corresponding sector in W/120 is the Business Services (sector 1) in Professional Services (subsector A), Engineering Services (sub subsector e) and not Construction and Related Engineering Services (sector 3).

30. Hence, Aquitania's commitments in Construction and Related Engineering Services (sector 3) are irrelevant, because this sector does not cover water related services. The Business Services sector (sector 1) is the only sector that could potentially cover water related engineering services. Aquitania has undertaken no commitments in this sector.

31. Thus, in the absence of such commitments, Art. XVI and XVII of the GATS are not applicable, and Aquitania can maintain its measure.

3. The 2011 Law is consistent with Art. XVI and XVII of the GATS.

I. The 2011 Law is consistent with Art. XVI of the GATS.

32. Should the Panel find that water and sewage services fall under Environmental Services, Aquitania submits that it has not granted unlimited market access in this sector.

33. According to Art. XVI:1 of the GATS, a Member shall "accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule".

34. In regard to Environmental Services, Aquitania's Schedule stipulates the requirement of a concession. There is no consensus on the definition of "concession" in WTO law, nor in general international public law. According to the AB jurisprudence, a Panel may start with the dictionary definitions of the terms³⁴. In that respect, the English Oxford Dictionary defines the notion of "concession" as the right to use "property for a specified purpose, granted by a government (...)"³⁵. This reveals the inherently sovereign aspect of the concession instrument: a governmental decision in view of a specified purpose, concerning public property.

³³ CPC Prov. 86724, explanatory note.

³⁴ ABR, *US – Gambling* [164]; PR, *China – Electronic Payment Services* [7.80].

³⁵ The Concise Oxford Dictionary, p. 275.

35. In the present case, Aquitania inscribed a formal condition in the Environmental Sector of its Schedule. This requirement is a procedural condition, executed by a governmental act due to its purely administrative character. This administrative decision is subject to national legislation. The formal conditions required to obtain that concession are detailed in domestic regulations. In the present case, the 2011 Law and the 2004 Regulation detail requirements in direct reference to Aquitania's Schedule, and must therefore be consulted and respected in order to obtain the concession. In that sense, the 2011 Law offers a treatment no less favorable than the requirement stated in Aquitania's Schedule.

36. Furthermore, in *Mexico – Telecoms*, the Panel stated that a measure may prohibit market access for the supply of the services on a non-facilities basis, when a service requires the use of public infrastructure³⁶. According to the Panel, this does not mean that the measure at hand closes market access for the supply of services on a facilities-basis. Private operators were thus allowed to install private infrastructure to operate the market.

37. In the present case, water distribution and sewage collection and treatment services imply the use of public infrastructure. The network required for the supply of these services was initially built and is, to the present day, entirely owned by the government of the city of Tertialia. The requirement of the concession is an instrument that allows certain entities to operate the public network. Such entities must abide to national legislation, as well as Aquitania's welfare and social policies. However, the concession requirement does not hinder private operators from constructing their own infrastructure. In fact, both the requirement of the concession and the 2011 Law regulate merely a part of the market. The rest of the market is open to private operators. The 2011 Law therefore allows private suppliers to create a parallel water distribution and sewage collection network, suitable to their commercial needs.

38. In that sense, the 2011 Law is consistent with Art. XVI of the GATS.

II. The 2011 Law is consistent with Art. XVII of the GATS.

39. Additionally, Aquitania argues that the 2011 Law is consistent with the national treatment obligation under Art. XVII of the GATS. To determine whether a measure is consistent with the national treatment obligation of Art. XVII:1 of the GATS, it must be examined: (1) whether, and to what extent, a national treatment commitment was made in respect to the relevant sector and whether the measure at issue is a measure by a Member affecting trade in services; (2) whether the foreign and domestic services or services suppliers are “like services” or “like service suppliers”; and (3) whether the foreign services or service

³⁶ PR. *Mexico – Telecoms* [7.91].

suppliers are granted “treatment no less favorable”³⁷.

II.1 Aquitania’s commitments comply with the relevant services sector.

40. Art. XX:2 of the GATS states that any limitation entered into the market access column also restricts national treatment. The Panel in *China – Publications and Audiovisual Products* held that if a limitation affects market access and national treatment, it is to be inscribed only in the market access column³⁸. In this case, the inscription will be considered to provide a condition or qualification to Art. XVII of the GATS as well.

41. Aquitania’s Schedule indicates the requirement of a concession for national treatment, identical to the inscription in the market access column. All companies, foreign or domestic, need to meet the conditions of the concession, as detailed in the 2011 Law.

II.2 The services and service suppliers at stake are not like.

42. The services and service suppliers at stake, namely public and private companies providing water distribution and sewage services, are not like. First, the “Border Tax Adjustment Working Party”³⁹ likeness test, consistently referred to in WTO jurisprudence⁴⁰ should be conducted to determine whether the services at stake are like. This likeness test infers that the more criteria are met, the more probable it is to establish likeness⁴¹. The *consumers’ tastes* and *price difference* criteria, referred to in the Border Tax Adjustments, demonstrate that, in the present case, public and private operators of services are not like.

43. The criterion of *consumers’ tastes* examines the substitutability of a product or service in the eyes of customers⁴². In the present case, citizens of Tertiaia are increasingly concerned about environmental dangers⁴³, rejecting the activity of private companies and calling for State intervention. Public sentiment demonstrates a preference for public suppliers.

44. In *Philippines – Taxes on Distilled Spirits*⁴⁴, the AB recognized the relevance of the price in the determination of whether products are like, and assessed the expendable income of the supplier. In the present case, the price difference is striking: while foreign suppliers, such as Avanti SA, provided services at a profit, public domestic companies strived to provide services to the same consumers at fees and prices significantly lower than the actual costs of providing these services. Thus, foreign suppliers and domestic suppliers are not like.

³⁷ PR, *EC – Bananas III* [7.314 I]; PR, *China – Publications and Audiovisual Products* [7.1403].

³⁸ PR, *China – Publications and Audiovisual Products* [7.921].

³⁹ Border Tax Adjustments, BISD 18S/97 [18].

⁴⁰ ABR, *US – Gambling* [C-65]; ABR, *Korea-Alcohol* [137]; ABR, *Japan-Alcohol* [20-21]; ABR, *EC-Asbestos* [85]; PR, *Canada – Periodicals* [5.18]; PR, *US – Gambling* [3.151]; PR, *EC – Bananas III* [7.322].

⁴¹ ABR, *EC – Asbestos* [102].

⁴² Cossy, (2006), p. 22.

⁴³ Fact sheet [11].

⁴⁴ ABR, *Philippines – Taxes on Distilled Spirits* [228].

45. Should the Panel find the services or service suppliers to be like, this is not sufficient to establish likeness within the meaning of Art. XVII of the GATS, since the determination of likeness must be based on a cumulative test. The wording of Art. XVII of the GATS refers to both the service *and* its supplier. Yet suppliers are considered as like suppliers once they supply like services⁴⁵. Private economic agents without governmental assistance do not usually provide a public good, because the non-exclusive and non-rival character of a public good does not promise adequate returns⁴⁶. In supplying water and sewage services private companies are oriented towards profit, while public companies are exercising a service of public interest. Hence, service suppliers are unlike.

II.3 Aquitania doesn't accord a less favorable treatment to foreign companies.

46. Under the 2011 Law, private foreign companies are subjected to the same conditions as domestic companies, and are therefore accorded a treatment no less favorable than to national private companies. The 2011 Law admits the selection for the market access in order to focus on the quality of the supplied service and not on its provenance.

47. In addition, Aquitania complies with its obligation under the Aims and Effects Test⁴⁷, which elaborates whether a regulatory distinction has a *bona fide* aim and whether it creates a domestic protectionist effect. It thus shifts the main focus of determining a violation of Art. XVII of the GATS from the likeness test to the measure at stake, since the protection of domestic production is a mandatory requirement for an infringement of the National Treatment obligation. However, in the present case, the 2011 Law has neither the aim to protect domestic suppliers, nor does it have this effect, as it subjects both national and foreign private companies to identical formal conditions. It does not promote profit for domestic suppliers. Besides, the 2011 Law aims, in good faith, to promote the fundamental right to water, human health and environmental protection, and not to favor domestic suppliers.

48. Therefore, in that sense, the 2011 Law is consistent with Art. XVII of the GATS.

4. The 2011 Law is justifiable under Art. XIV (a) and (b) of the GATS.

49. Should the Panel find otherwise, Aquitania submits that the 2011 Law is justified under the two-tier analysis of Art. XIV of the GATS. The adopted measure falls, first, within the scope of Art. XIV (a) as well as, second, within the scope of Art. XIV (b). Third, the 2011 Law is necessary to fulfill its objective and has no less restrictive and reasonably available alternative. The 2011 Law is, fourth, consistent with the requirements of the introductory text

⁴⁵ PR, *Canada – Autos* [10.248].

⁴⁶ Krajewski, (2004).

⁴⁷ PR, *US – Malt* [5.74].

of Art. XIV of the GATS.

I. The 2011 Law falls within the scope of the Art. XIV (a).

50. The 2011 Law falls under the scope of Art. XIV (a) of the GATS since the measure aims to protect public morals and order. In *US - Gambling*, the AB defined the notions of public morals and public order. In that respect, public morals were defined as “standards of right and wrong conduct maintained by or on behalf of a community or nation”, while public order was defined as “fundamental interests of a society, as reflected in public policy and law”, relating to standards of law, security and morality⁴⁸. Members should be given scope to define and apply these concepts “according to their own systems and scales of values”⁴⁹.

51. The USO principle is a traditional value of Aquitanian society, reflected in the fundamental standards of Aquitanian law and public policy, as show the 2003 and 2011 Laws. Its objective is twofold: first, to promote the availability of quality services at reasonable and affordable rates; second, to increase and guarantee access and availability of such services to all resident consumers, including those in low income and rural areas.

52. In addition, Aquitania’s measure reflects authentic social preoccupations, given the prevailing popular sentiment and political climate. The primary preoccupation is public order and security. In fact, a correlation between price increase of water services and social turmoil has been established in numerous cases. Indeed, opposition to liberalization and its detrimental effects on fees and water affordability are said to lead to water shortages, unaffordable water charges, endemic poverty, and disease outbreaks and, in some cases, to fierce and violent social upheaval⁵⁰. The 2011 Law renders the price of water distribution and sewage services affordable. Therefore, the 2011 Law is a justified reaction to a genuine and sufficiently serious menace to public morals and order and contributes to their protection.

II. The 2011 Law falls within the scope of the Art. XIV (b).

53. The 2011 Law falls under the scope of Art. XIV (b) of the GATS since the measure aims at protecting plant and human life, and health. The WHO defines health as “a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity”⁵¹. Moreover, the AB acknowledged that the objective of preserving human life and

⁴⁸ PR on *US – Gambling* [6.467].

⁴⁹ *Ibidem*.

⁵⁰ See *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3); *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/19); *Biwater Gauff (Tanzania) Ltd. V United Republic of Tanzania* (ICSID Case No. ARB/05/22).

⁵¹ Preamble to the Constitution of the WHO as adopted by the International Health Conference, New York, 19-22 June, 1946.

health “is both vital and important in the highest degree⁵²”, and that “few interests are more ‘vital’ and ‘important’ than protecting human beings from health risks”⁵³. Furthermore, it recognized the right of WTO Members to set up ambitious environmental policy goals, even if their achievement is not directly measurable or quantifiable in the short run⁵⁴.

54. Beside water distribution, the 2011 Law’s provisions concern sewage collection and treatment. The discharge of untreated wastewater into the environment affects human health in several ways: by polluting drinking water; through entry into the food chain, for example via fruits, vegetables or fish and shellfish; bathing, recreational and other contact with contaminated waters; by providing breeding sites for flies and insects that spread diseases.

55. The primary goals of the Aquitanian local municipalities are to expand the water and sanitation systems in order to increase population coverage, to improve sewage treatment in order to reduce water pollution and to provide better quality of service. Securing safe, accessible and adequate water and sanitation services for all is one of the leading challenges of sustainable development that the Aquitanian government faces. Recent human rights instruments explicitly recognize water as a human right⁵⁵, considering that without water, other human rights become meaningless. The right to water can also be inferred from other rights, such as the right to life, food and health⁵⁶.

56. The 2011 Law takes a step closer to the achievement of these goals.

III. The 2011 Law is necessary to achieve its policy objective.

57. In *US – Gambling*, the AB elaborated three elements to the necessity test, analyzing: (1) the importance of the interests or values that the measure is intended to protect; (2) the extent to which the measure contributes to the realization of the end pursued; and (3), the trade impact of the challenged measure, taking into consideration reasonably available alternatives. The AB also stated that the jurisprudence developed under Art. XX of the GATT is relevant for the analysis of Art. XIV of the GATS⁵⁷.

III.1 The importance of the interests or values intended to protect by the 2011 Law.

58. According to the AB in *Korea – Beef*, “necessary” is not limited to that which is indispensable⁵⁸. However, the more important the interests pursued, the easier it is to accept a measure’s necessity. A process of weighing and balancing of factors is hence required.

⁵² ABR, *EC – Asbestos* [172]; PR, *US – Clove cigarettes* [7.6].

⁵³ ABR, *Brazil – Retreated Tyres* [144].

⁵⁴ ABR, *Brazil – Retreated Tyres* [151].

⁵⁵ Art. 24 CRC; Art. 14 CEDAW.

⁵⁶ Art. 6 ICCPR, as well as Art. 12 and 11 ICESCR, respectively.

⁵⁷ ABR, *US – Gambling* [291].

⁵⁸ ABR, *Korea – Beef* [164].

59. Aquitania has concurrent human right obligations under international law and should promote and protect human rights during the negotiation and implementation of international trade liberalization rules⁵⁹. In fact, according to the CESCR, “an adequate amount of safe water is necessary to prevent death from dehydration, reduce the risk of water-related disease and provide for consumption, cooking, personal and domestic requirements”⁶⁰.

60. The price increases threaten the basic human right to water and sanitation and endanger the pursuit of public policy objectives, such as poverty reduction, equity and consumer protection. Water privatization, almost everywhere else where it has been applied, has meant more expensive and lower quality water for poorer communities, or even - as in Puerto Rico - no water at all for the poor. Many examples of negative effects of water privatization - higher prices, lower quality, even absent service for those unable to pay the new prices - have been well documented, not only in developing countries like Bolivia, Argentina and Puerto Rico, but in developed countries as well⁶¹. Also, dangerous under-investment in the network and infrastructure can endanger human health and the environment.

61. The 2011 Law intends to protect public interests of utmost importance. Firstly, it aims at providing an adequate level of protection to Nova Tertia, the poorest of Aquitania’s regions, most prone to economic and social instability. Secondly, the 2011 Law affects Aquitania’s fundamental values, namely by maintaining the USO as a standard of national law. Thirdly, it addresses the imminent threat of public disorder. Lastly, it aims to protect public health and to ensure Aquitanian population the right to adequate access to water and sanitation. In that sense, the 2011 Law promotes significant principles of tradition, security and morality, as well as the crucial interest of public health. The 2011 Law aims to protect interests of vital importance and is necessary for their achievement.

III.2 The contribution of the 2011 Law to the end pursued.

62. In analyzing the contribution of the measure, the AB admitted in *Brazil – Retreated Tyres* the possibility of justifying a measure, the contribution of which was not “immediately observable”⁶². A measure may therefore have long-term effects, and may require the benefit of time. This is the case particularly in regards to health and environmental problems⁶³.

63. The 2011 Law aims at harmonizing welfare objectives with their effective execution at

⁵⁹ Report by the High Commissioner on Human Rights, *Liberalisation of Trade in Services and Human Rights*, E/CN.4/Sub.2/2002/9 (18 June 2002).

⁶⁰ Committee on Economic, Social and Cultural Rights, *The right to water: Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights*, General Comment no 15 (E/C.12/2002/11).

⁶¹ Cortina de Cardenas, (2011); Conseil d’Etat (France) 10 September 1997.

⁶² ABR, *Brazil - Retreated Tyres* [151].

⁶³ Idem.

minimum economic costs. It does so through efficient price regulation and the maintenance of the USO, and by attributing the services to a company supervised by the government. The effects of price regulation are direct and immediate. In consequence, consumers enjoy affordable prices, reduced in addition for the elderly and persons with disabilities. On the other hand, the effects on the eradication of health risks associated with water and sewage services require the benefit of time. In regards to these risks, a mere stretch of two years is not sufficient to establish proof of concrete results. On the contrary, the complex health and environmental issues tackled in the 2011 Law are a long-term objective.

III.3 Trade impact of the 2011 Law and alternative measures.

64. In *US – Gambling*, the Panel stated that in assessing the impact of the challenged measure, it has to take into account reasonably available alternatives⁶⁴. Moreover, according to the AB in *Korea – Beef*, members are free to choose the desired level of protection and cannot be required to use alternative measures providing lower levels of protection⁶⁵.

65. The 2011 Law affects a fraction of the water and sewage market. It only concerns services that require the use of the public network, leaving therefore the remaining sector of the market open for private suppliers to operate on a facilities-basis. Moreover, the market sectors concerned are excluded from the GATS, or at least restricted by existing commitments, and have never offered unconditional market access to foreign suppliers. In that sense, the 2011 Law does not significantly undermine Aquitania's GATS obligations.

66. Moreover, to reach Aquitania's goals, substantial and followed investments into the operating network are required. This is explained by the fact that private companies are not willing to undertake significant investments in order to reduce environmental dangers associated with sewage leaks, without a perspective of profit. Referring to health services alone, the 2000 World Health Report cautioned that "few countries (with either high or low income) have developed adequate strategies to regulate the private financing and provision of health services", noting that "the harm caused by market abuses is difficult to remedy after the fact"⁶⁶. Incidentally, the statistics of financial investment in the collection and treatment of sewage field show that the impact of private companies is minor (for instance, only 8% of investments were financed by private sector in Bolivia between 1992 and 2000⁶⁷).

67. In light of such observations, a coherent conformity between public welfare policies and

⁶⁴ PR, *US – Gambling* [6.477].

⁶⁵ ABR, *Korea – Beef* [176].

⁶⁶ WHO World health report 2000: health systems: improving performance. Geneva: WHO, 2000.

⁶⁷ Bolivian government, Ministro de Vivienda Y Servicios Basicos, *Plan Nacional de Saneamiento Basico 2001-2010*, 2001.

their effective execution must be established through public ownership and State surveillance and regulation. Only such a measure is sufficient to contribute to the ends pursued. No alternative measure can offer the same level of investment and commitment to the improvement of the existing networks and the reduction of environmental and health risks.

68. In addition, it was established in *EC – Asbestos* that capacities of countries and technical difficulties associated with implementing alternative measures have to be taken into account⁶⁸. As a developing country, Aquitania is inevitably limited in its regulatory capacity and must find efficient solutions at minimum economic costs. Yet, the high costs of alternative measures limit their disposal capacity. The 2011 Law seems to be the most adequate means, ultimately accompanied by a comprehensive program of tax regulation.

IV. Chapeau clause of Art. XIV of the GATS.

69. Aquitania submits that the 2011 Law satisfies the requirements of the Chapeau clause of Art. XIV of the GATS. The 2011 Law does not, first, discriminate between countries where like conditions prevail, nor, second, is it arbitrary or unjustifiable; third, the measure cannot be qualified as a disguised restriction on international trade.

IV.1 The measure does not constitute a discrimination between countries where like conditions prevail.

70. An inconsistency implies “discrimination between countries where like conditions prevail”. The requirement of “like conditions”, interpreted in light of its ordinary and literal meaning, requires the responding party to extend equal opportunities to and amongst exporting countries. In *US – Gasoline*, the AB concluded that the discrimination condition does not fall under the same standards as the analysis of a substantive clause (such as Art. XXVII of the GATS), at the risk of depriving the exception clause of its practical use⁶⁹. A more supple analysis of the nature of the discrimination is hence required⁷⁰.

71. In the present case, the provisions of the 2011 Law entail no facial discrimination between foreign suppliers. In practice, all foreign suppliers enjoy equal opportunity of market access, and absolutely no favored treatment is extended to particular countries. Furthermore, no discrimination between domestic and foreign suppliers can be established. All private service suppliers, whether domestic or foreign, are subjected to identical conditions of market access, as detailed in the 2011 Law. Therefore, taking into account the relative flexibility of the AB’s analysis, the 2011 Law should not be considered as discriminatory.

⁶⁸ PR, *EC – Asbestos* [8.207].

⁶⁹ ABR, *US – Gasoline* [23].

⁷⁰ ABR, *US – Shrimp* [150].

IV.2 The measure is not an arbitrary or unjustifiable discrimination.

72. Should the Panel find otherwise, Aquitania submits that the 2011 Law is not arbitrary or unjustifiable. The “arbitrary discrimination” and “unjustifiable discrimination” requirements have often been examined in tandem⁷¹. In *Brazil - Retreated Tyres*, the AB stressed the requirement of a “defensible” and “acceptable” argument demonstrating a “rational connection” between the application of the measure and the policy objective pursued⁷². Moreover, the degree of the contribution of the measure to its objective should be considered.

73. In the present case, the application of the 2011 Law does not, neither quantitatively nor qualitatively, affect trade conditions in an arbitrary manner. Indeed, the 2011 Law justifiably restricts the use of Aquitania’s natural resources and its publicly owned network. In addition, the social and human rights objective of the adopted measure can clearly be ascertained. The measure is, additionally, consistent with the fundamental WTO objective of sustainable development⁷³. More precisely, the 2011 Law results in affordable prices and more effective regulation of associated health and environmental risks. In that sense, the 2011 Law can only be qualified as a reasonable response to Aquitania’s human rights and environmental policies.

IV.3 The measure is not a disguised restriction on international trade.

74. In *US – Gasoline*, the AB states that the fundamental purpose of this criterion is to avoid abuse of the exceptions of the Agreement⁷⁴. In *EC – Asbestos*, the Panel stated that the requirement could be revealed by a State’s protectionist intent⁷⁵. However, the requirements of an “arbitrary and unjustifiable discrimination” may also be taken into account⁷⁶.

75. Aquitania submits that the measure was neither adopted with the intent nor was it objectively suitable to impose a disguised restriction on international trade. The 2011 Law targets a service of public interest without increasing profit for domestic industry.

76. Furthermore, there exists no contradiction between Aquitania’s policies in the pursuit of its human rights obligations. Aquitania has shown to be consistent in the maintenance of the traditional USO and in the regulation of prices. The 2011 Law is therefore neither capricious nor random in character, but a foreseeable policy and respectful of the principle of good faith.

⁷¹ ABR, *US – Shrimp* [134] and [144]; ABR, *Brazil – Retreated Tyres* [215].

⁷² ABR, *Brazil – Retreated Tyres* [230].

⁷³ See Preamble of the Agreement Establishing the WTO.

⁷⁴ ABR, *US – Gasoline* [23].

⁷⁵ PR, *EC – Asbestos* [8.236].

⁷⁶ ABR, *US – Gasoline* [25].

Request for Findings

Aquitania requests the Panel to find that there are legal impediments to its jurisdiction to hear Commercia's substantive complaints.

In the alternative, Aquitania requests the Panel to advise the DSB to find that the 2011 Law falls outside the scope of the GATS in conformity with Art. I:3 (b).

In the alternative, Aquitania requests the Panel to find the 2011 Law and its enforcement in full compliance with Art. XVI and XVII of the GATS or, in the alternative, as justified under the exception of Art. XIV (a) and (b) of the GATS.