



Team: 082

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

**Aquitania – Measures Affecting Water
Distribution and Sewage Collection
Services (Complainant: Commercia)**

Commercia
(*Complainant*)

VS

Aquitania
(*Respondent*)

SUBMISSION OF THE COMPLAINANT

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I. Treaties and Conventions

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14. “Public-Private Partnerships for Urban Water Utilities,” WORLD BANK, Water P-Notes 55271, Issue 41 (2010) (Cited as “World Bank Water Notes”).

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2. Clarification Questions and Answers, General Answers, 12th EMC² (Cited as “Clarifications”).

List of Abbreviations

2003 Law	Water Distribution and Sewage Services Law of Nova Tertia
2004 Regulation	Water and Sewage Concession Regulation
AB	Appellate Body
Art./Arts.	Article/Articles
CEDAW	Convention on the Elimination of Discrimination Against Women
Ch.	Chapter
CRC	Convention on the Rights of the Child
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
<i>e.g.</i>	<i>exempli gratia</i> , for example
EC	European Communities
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade 1994
<i>Id.</i>	The same
NAFTA	North American Free Trade Agreement
OFTA	Occidental Free Trade Agreement
p./pp.	page/pages
para./paras.	paragraph/paragraphs
Sec.	Section/Sections
US	United States
USO	Universal Service Obligation
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WSL 2011	Nova Tertia Water and Sewage Law of 2011
WTO	World Trade Organization

Summary of Arguments

I. THE PANEL MUST HEAR THE CURRENT DISPUTE.

- Commercica properly initiated the dispute pursuant to GATS XXIII:1 by engaging in consultations with Aquitania and subsequently requesting the establishment of a panel under DSU Art. 6.
- Since the Panel has been properly established, this Panel is required by the DSU to hear disputes arising under the covered agreements, which includes GATS, regardless of the existence of any related claims or disputes under regional agreements.

II. WATER AND SEWAGE SERVICES ARE NOT “SUPPLIED IN THE EXERCISE OF GOVERNMENTAL AUTHORITY” AND ARE THEREFORE COVERED BY AQUITANIA’S GATS ARTS. XVI AND XVII COMMITMENTS.

- GATS Art. I:3(b) excludes only a narrow set of governmental services from coverage under GATS, and water and sewage services do not fall within this exception as they are neither “commercial” nor “supplied in competition.”
- The fact that water and sewage services supplied within Nova Tertia involve consumer fees and an opportunity for profit demonstrates that the services in question are commercial. The possibility of competition for the concession and the market for water and sewage services within Nova Tertia as a whole means the services are supplied in competition.

III. THE WSL 2011 VIOLATES GATS ARTS. XVI:1 AND XVI:2(A).

- The WSL is attributable to Aquitania as a measure adopted by a “regional sub-division” and affects trade in services by having the effect of an unscheduled zero quota.
- Aquitania essentially scheduled full market access commitments for water and sewage services in the “Sewage and related services” subsector of the “Environmental Services” sector in its Schedule, and WSL 2011 violates these commitments. The essentially complete commitment for mode 3 commercial presence was limited only by a concession requirement. This concession requirement cannot be read to allow a complete ban on market access as this conflicts with an ordinary reading of the terms of the Schedule and renders Aquitania’s full market access commitment meaningless.

IV. THE WSL 2011 VIOLATES GATS ART. XVII.

- Because it inscribed “None” in its schedule for Environmental Services, Aquitania made an unqualified commitment to national treatment for water and sewage services.

- The WSL 2011 discriminates against “like services and service suppliers” because public and private water and sewage service suppliers use the same network to provide identical services to an identical consumer base. The record shows that water and sewage services for the city of Tertialia were virtually identical under public and private operation.
- The fact that private and public service suppliers can in practice compete for the same concessions shows that the services are in competition and therefore “like” services.
- By making it impossible for foreign suppliers to participate in Nova Tertia’s water and sewage services market, the WSL 2011 accords them less favourable treatment. The “aims and effects” of the measure are not relevant to the GATS Art. XVII analysis.

V. THE WSL 2011 CANNOT BE JUSTIFIED UNDER EITHER GATS ARTS. XIV(A) OR XIV(B).

- The WSL 2011 does not contribute to public order under GATS Art. XIV(a) because there is no difference in compliance with the USO or related provincial laws and regulations under either private or public management. Similarly, the WSL 2011 does not contribute to the protection of human health because there is insufficient evidence establishing a nexus between the measure and the protection it purportedly seeks.
- Strengthening of regulatory standards for both public and private companies represents a reasonably available alternative that would be more effective at achieving public order and morals and human health and environmental protection goals than the outright ban on private providers imposed by the WSL 2011.
- The WSL 2011 fails the GATS Art. XIV chapeau requirements. The measure is discriminatory both on its face and in effect because it uniformly excludes private providers without a rational basis. The measure is arbitrary because the zero quota mechanism chosen bears no relationship to evidence in pursuing its professed policy objectives.
- Allowing Aquitania to repudiate its commitments through an unscheduled prohibition on private suppliers conflicts with the liberalizing and developmental goals of the GATS.

Statement of Facts

1. Aquitania is a federal state that delegates authority to regulate water distribution and sewage services to its provinces. Aquitania's nationwide Universal Service Obligation (USO) requires water and sewage service suppliers to serve all households and commercial entities on the same terms and prices regardless of geography. Through provincial budget subsidies, customers pay consumption fees that are below the actual costs of the services.
2. Between 1963 and 2005, the Province of Nova Tertia's water and sewage system was operated by Aguas Tertias SA, a company operated and wholly-owned by the provincial government and organized under the Aquitanian commercial code. Aguas Tertias provided these services under a concession granted by Nova Tertia's provincial government.
3. Aguas Tertias provided these services to only 70% of households and 90% of commercial entities in Nova Tertia. The company's sewage services were frequently interrupted and its outdated pipe network experienced recurring sewage leaks.
4. Nova Tertia's government responded to these problems by allowing partial privatization of water and sewage services under the Water Distribution and Sewage Services Law of Nova Tertia of 2003 (2003 Law). This law permitted the provincial government to grant concessions to both public and private companies via public tender. In 2004, Nova Tertia issued a regulation implementing the 2003 Law that enabled concession holders to collect fees from customers and gradually increase tariffs as necessary in order to fulfill the USO. Shortly afterward, Nova Tertia transferred authority to grant concessions to Tertialia, its capital city.
5. In May 2005, Tertialia granted a concession to Avanti SA, a private wholly-owned Aquitania subsidiary of a company headquartered in Comercia. Avanti exercised its authority under the 2004 Regulation to increase tariffs and invest in Tertialia's pipe network to reduce leaks.
6. Faced with increasing public dissatisfaction with Avanti's management of water and sewage services, Tertialia terminated Avanti's contract in October 2008 and Aguas Tertias subsequently resumed services. Sewage leaks continued despite the change in management.
7. In 2011, Nova Tertia enacted the Water and Sewage Law (WSL 2011), excluding all private companies from providing water distribution and sewage services. The law requires such services to be provided by a "public company which is owned and controlled in its entirety by the Provincial Government."

Identification of WTO Measure at Issue

Measure 1: Prohibition on private companies receiving concessions for water distribution and sewage collection services in Nova Tertia province (WSL 2011).

Legal Pleadings

I. THE PANEL IS REQUIRED TO HEAR THE CURRENT DISPUTE.

A. Commercia properly initiated this dispute under the DSU pursuant to GATS Art. XXIII:1.

1. Pursuant to DSU Art. 4.3, Commercia sought consultations with Aquitania in February 2013, claiming that the WSL 2011 violated Aquitania's obligations under GATS Arts. XVI:1, XVI:2(a), and XVII.¹ Because Aquitania failed to engage in consultations within the required 30 days,² Commercia proceeded to request establishment of a DSB panel which was formed in accordance with DSU Art. 6 on 30 August 2013.³

2. Aquitania claims Commercia's filing of the dispute under both OFTA and the DSU should preclude WTO jurisdiction, relying on OFTA Article 2005(6): "...the forum selected shall be used to the exclusion of the other."⁴ However, OFTA has no inherent preference for jurisdiction, acknowledging that disputes "arising under both this Agreement and the GATT, any agreement negotiated thereunder, or any successor agreement [GATS], may be settled in either forum at the discretion of the complaining Party."⁵

B. DSB Panels are required to hear Members' disputes.

3. The DSU affirmatively requires that panels "*should*" objectively hear matters before them,⁶ and members "shall have recourse to, and abide by, the rules and procedures of this understanding."⁷ The AB in *Mexico—HFCS* interpreted these DSU provisions to mean that "panels are *required* to address issues that are put before them by the parties to a dispute" (emphasis added).⁸ Even when complaints are filed in multiple fora, the AB in *Mexico—Soft Drinks* found that these provisions "make it clear that a WTO Member that considers that any of its WTO benefits have been nullified or impaired as a result of a measure adopted by

¹ Record at 13.

² See GATS Art. XXII:1, referencing DSU Art. 4.3.

³ Record at 15, 16.

⁴ OFTA Ch. 20, Art. 2005.

⁵ OFTA Ch. 20, Art. 2005:1.

⁶ DSU Art. 11.

⁷ DSU Art. 23:1.

⁸ ABR, *Mexico—HFCS* [36].

another Member has the right to bring the case before the WTO.”⁹ Therefore, the panel is required to hear the dispute regardless of Aquitania’s preference for jurisdiction under OFTA.

II. WATER AND SEWAGE SERVICES ARE NOT “SUPPLIED IN THE EXERCISE OF GOVERNMENTAL AUTHORITY” AND ARE THEREFORE COVERED BY AQUITANIA’S GATS ART. XVI AND XVII COMMITMENTS.

4. Nova Tertia’s water distribution and sewage services do not fall under the governmental authority exception in GATS I:3(b), which states that GATS applies to all services “except services supplied in the exercise of governmental authority.”¹⁰ If a service is supplied either “on a commercial basis” or “in competition with one or more service providers,” then the governmental authority exception does not apply.¹¹ Because Aquitania’s water distribution and sewage services are both “commercial” and “in competition” with other service providers, they do not meet the exception and Aquitania’s full range of substantive GATS commitments apply.

5. No panel or AB decisions have defined “governmental authority” in light of GATS; therefore, an ordinary meaning analysis pursuant to VCLT Art. 31 is appropriate.¹² The Oxford English Dictionary defines “commercial” as “engaged in commerce; trading”¹³ and defines “commerce” as “exchange of product; buying and selling together.”¹⁴ These broad definitions cover nearly all services and leave only a narrow exception for certain governmental services.¹⁵ Even postal services and governmental health services are not generally considered to fall within the narrow exception.¹⁶ The narrowness of this exception is further shown by looking to other uses of the term “commercial” within the context of GATS. GATS Art. XXVIII(d) defines “commercial presence” as including a “juridical person,”¹⁷ and further defines a juridical person as a legal entity “for profit or otherwise, and whether privately or governmentally owned.”¹⁸ Therefore, “commercial” in GATS I:3(c) broadly requires buying and selling, but does not necessarily require a profit.

⁹ ABR, *Mexico—Soft Drinks* [41].

¹⁰ GATS Art. 1:3(b).

¹¹ GATS Art. I:3(c).

¹² Krajewski, (2003), p. 350.

¹³ OED (2013).

¹⁴ *Id.*

¹⁵ Lang (2004), p. 817; *see also* Krajewski (2003).

¹⁶ *See generally* Krajewski (2003).

¹⁷ GATS Art. XXVIII(d)(1).

¹⁸ GATS Art. XXVIII(1).

6. Nova Tertia's water and sewage services are commercial for multiple reasons. First, the services are commercial as residents must *buy* water with fees based on actual consumption.¹⁹ Second, in receiving these fees, a concessionaire under the WSL 2011 is necessarily a *seller* of the water and sewage services, even if such fees are subsidized. Third, Nova Tertia itself viewed water and sewage services as commercial in nature, protecting the finances of companies by including a flexible price increase mechanism in the 2004 Regulation.²⁰ Furthermore, Aguas Tertias, the sole provider of water and sewage services in Nova Tertia for over 40 years, was organized as a commercial company under the Commercial Code of Aquitania, despite being owned and operated entirely by the government.²¹ Even if Aguas Tertias does not make a profit, the contextual definition of "commercial," including "juridical person," is not restricted to profit-centered enterprises.

7. Nova Tertia's water and sewage services are also "in competition" within the meaning of GATS I:3(c). The AB in *US—Cotton Yarn* noted that the ordinary meaning of "competitive" "has a wider connotation than 'actually competing' and includes also the notion of a potential to compete."²² Even under the restrictive provisions of the WSL 2011, public companies are competing against each other for Nova Tertia's concessions to provide water and sewage services. Simply because companies are competing "for the market" instead of "in the market" does not remove the underlying competition.²³

III. THE WSL 2011 VIOLATES GATS ARTS. XVI:1 AND XVI:2(A).

8. GATS Art. XVI:1 provides that "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." GATS Art. XVI:2 further outlines measures—including measures maintained or adopted "on the basis of a regional subdivision"—that are impermissible if undertaken in a sector where market access commitments are made, unless such measures have been scheduled. The list of impermissible measures includes "limitations on the number of service suppliers whether in the form of quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test."²⁴

¹⁹ Record at 4.

²⁰ *Id.* at 7.

²¹ *Id.* at 5.

²² ABR, *US—Cotton Yarn* [96].

²³ Wolff & Palaniappan (2004), p. 2.

²⁴ GATS Art. XVI:2(a).

9. Sector 6 (“Environmental Services”) of Aquitania’s Schedule includes specific market access commitments for both water and sewage services. The WSL 2011 imposes radically less favourable treatment than provided for on Aquitania’s Schedule by foreclosing all opportunities for foreign suppliers of water and sewage services in an entire province, thereby impermissibly limiting the number of service suppliers in violation of GATS Art. XVI:2(a). The WSL 2011 cannot be saved by recourse to the scheduled concession requirement as such a reading would swallow the rule and undercut the purpose of GATS to liberalize trade in services under conditions of transparency.

A. The WSL 2011 is a measure affecting trade in services under GATS Art. I:1.

10. The AB in *Canada—Autos* stated that for any substantive GATS obligations to apply, a complainant must first demonstrate that a challenged measure “affects trade in services” within the meaning of GATS Art. I:1.²⁵ In *EC—Bananas III*, the AB noted that “[t]he ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on,’ which indicates a broad scope of application.”²⁶ By restricting the provision of water and sewage services to “a public company ... owned and controlled in its entirety by the Provincial Government,”²⁷ the WSL 2011 unambiguously excludes all foreign companies from providing water and sewage services in Nova Tertia. As a result, the WSL 2011 “affects the supply of services” in the most radical way.

11. GATS Art. I:3 makes clear that measures taken by “central, regional or local governments and authorities” are also covered measures, and the panel in *China—EPS* further ruled that GATS Art. XVI commitments apply equally to measures that are applicable or enforced in only part of a Member’s territory.²⁸ Thus, although the WSL 2011 was enacted by the Provincial Parliament and applies only in Nova Tertia,²⁹ it is still a measure affecting trade in services subject to GATS Art. XVI commitments.

B. Aquitania has undertaken essentially full market access commitments for both water and sewage services.

12. The collection, purification, treatment, and distribution of drinking water and the collection and treatment of sewage are both covered by Aquitania’s commitments in Sector 6

²⁵ ABR, *Canada—Autos* [152].

²⁶ ABR, *EC—Bananas III* [220]; see also ABR, *Canada—Autos* [158] (reaffirming ABR, *EC—Bananas III* [220]); PR, *EC—Bananas III (US)* [7.280].

²⁷ Record at 13.

²⁸ PR, *China—EPS* [7.611].

²⁹ Record at 13.

under the subsector “Sewage and related services.”³⁰ Aquitania has effectively made the broadest possible commitments for such services by scheduling “None, except that a concession is required” for market access through commercial presence (mode 3).³¹

13. Panels and the AB have consistently interpreted Members’ Schedules and commitments pursuant to VCLT Art. 31 by looking at the “ordinary meaning” of contested terms as interpreted in light of their context as well as the object and purpose of the treaty.³² As a preliminary matter, the plain text of Aquitania’s Schedule unequivocally indicates that sewage services are covered. While water services are not explicitly mentioned in Aquitania’s Schedule, under conventional means of treaty interpretation, they too are covered by Aquitania’s inclusive language under Environmental Services. Specifically, water and sewage services in Aquitania are related and therefore covered by the commitments for “Sewage *and related* services.” The Oxford English Dictionary defines “related” as “having relation to, or relationship with, something else.”³³ In Aquitania, sewage and water services are inextricably linked. Although water and sewage networks utilize discrete infrastructure,³⁴ the government of Aquitania and its provincial governments clearly consider the two related, as laws are passed jointly regulating the two services, and concessions, when granted, cover the provision of both services together.³⁵ Thus, Aquitania’s scheduled commitments under “Sewage and related services” should be read to encompass water services in addition to sewage services.

14. The structure of the GATS as context confirms this reading. In contrast to the narrow language of the Services Sectoral Classification List (W/120), which only identifies “Sewage Services” under subsector 6(A),³⁶ Aquitania’s schedule adopts expansive language that includes “related services.” The absence of a specific textual reference to “water” does not establish that water services are not covered by Aquitania’s scheduled commitments. In *US—Gambling*, the AB found “gambling and betting services” to be covered by the US’s commitments regarding “sporting services” despite the fact that specific language regarding “gambling and betting” was absent from the US Schedule.³⁷ Because the GATS covers all services except those supplied in the exercise of government authority, the water services at

³⁰ Record, Aquitania’s GATS Schedule.

³¹ *Id.*

³² PR, *China—EPS* [7.520]; PR, *China—Audiovisual Products*[4.217].

³³ OED (2013).

³⁴ Clarifications at 30.

³⁵ *See, e.g.*, Record at 7-9.

³⁶ Services Sectoral Classification List.

³⁷ ABR, *US—Gambling* [213].

issue are not *a priori* excluded from a Member's commitments, and given the inclusive language of Aquitania's Schedule as it relates to Environmental and Sewage services, water services most naturally fall into Sector 6.

15. Even if such services are found to fall within Sector 3 ("Construction and Related Engineering Services") or Sector 4 ("Distribution Services"), the WSL 2011 still constitutes an impermissible GATS Art. XVI:2(a) violation, as the scheduled limitations on market access for those sectors only address the form of entry, requiring joint ventures.³⁸ This provides an exception to GATS Art. XVI:2(e), which otherwise prohibits joint venture restrictions. The WSL 2011, however, constitutes an impermissible limitation on the *number* of service suppliers under GATS Art. XVI:2(a), and no such numerical limitation has been scheduled in any of the Sectors.³⁹

C. The WSL 2011 breaches GATS Art. XVI:2(a).

16. The WSL 2011 forecloses market access to foreign water and sewage service suppliers in Nova Tertia in contravention of GATS Art. XVI:2(a). GATS Art. XVI:2 provides an enumerated list of measures—including measures maintained or adopted "on the basis of a regional subdivision"—that are impermissible unless otherwise scheduled. Such impermissible measures include "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test."⁴⁰

17. In *US—Gambling*, the AB recognized that the language of a challenged measure need not specifically refer to a zero quota to have the effect of imposing a zero quota and thereby violate GATS Art. XVI:2(a).⁴¹ The WSL 2011 has the effect of imposing a zero quota as it completely forecloses the opportunity for foreign service suppliers to supply water and sewage services in Nova Tertia by requiring that such services be supplied by a "public company which is owned and controlled in its entirety by the Provincial Government."⁴²

18. For commercial presence (mode 3) market access restrictions for Environmental Services, Aquitania scheduled "None"—indicating full market access—"except that a concession is required."⁴³ The AB has recognized that a commitment of "none" signifies "full market

³⁸ Record, Aquitania's GATS Schedule.

³⁹ *Id.*

⁴⁰ GATS Art. XVI:2(a).

⁴¹ ABR, *US—Gambling* [232, 238].

⁴² Record at 13.

⁴³ *Id.* at Aquitania's GATS Schedule.

access” commitments.⁴⁴ Given the goal of promoting transparency in scheduling and commitments, “none” should be read broadly as a Member’s commitment to refrain from imposing trade restrictions.⁴⁵ Thus, Aquitania’s scheduled concession requirement should be interpreted narrowly so as not to negate the otherwise full market access commitments made by Aquitania and relied upon by other Members during GATS negotiations. Interpreting such a scheduled commitment as reserving the right to impose any type of requirement for the receipt of concessions in the Environmental Services sector would render that commitment essentially meaningless.

19. The AB further recognized in *US—Gambling* that if a Member wanted to maintain a full prohibition on market access, that Member would not have scheduled such a sector or subsector and therefore would not need to schedule any limitation or measure pursuant to GATS Art. XVI:2.⁴⁶ A Member’s schedule should only contain descriptions of bound commitments, and “[a]ny additional information for transparency purposes should not be entered in the schedule.”⁴⁷ If Aquitania wished to be able to condition market access on any criteria it later developed and to have full discretion in changing or altering those criteria over time, it would have been proper to inscribe an “Unbound” commitment, not a commitment of “None.”

20. Aquitania’s suggested interpretation of its scheduled commitments would essentially transform a bound commitment into an unbound one in contravention of one of the fundamental goals of GATS: expansion of trade in services “under conditions of transparency and progressive liberalization.”⁴⁸ The WSL 2011 is the equivalent of an unscheduled zero quota adopted and maintained on the basis of a regional subdivision, and is therefore an impermissible violation of GATS Art. XVI:2(a).

IV. THE WSL 2011 VIOLATES GATS ART. XVII.

21. The WSL 2011 violates GATS Art. XVII, which states that “[i]n the sectors inscribed in its schedule, and subject to any conditions and qualifications ... therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.”⁴⁹ The WSL 2011 accords less favourable treatment to

⁴⁴ ABR, *US—Gambling* [215].

⁴⁵ GATS, Preamble.

⁴⁶ ABR, *US—Gambling* [234] (quoting PR, *US—Gambling* [6.331]).

⁴⁷ 1993 Scheduling Guidelines.

⁴⁸ GATS, Preamble.

⁴⁹ GATS Art. XVII:1.

foreign service suppliers by limiting the provision of water and sewage services to “a public company which is owned and controlled in its entirety by the Provincial Government” in Nova Tertia.⁵⁰

22. The AB in *EC—Bananas III* and subsequent panels have applied a four-prong test to assess whether a Member’s measure is inconsistent with GATS Art. XVII. To prove a violation, Comercia must cumulatively establish that (1) Aquitania made a commitment on national treatment in the relevant sector and mode of supply, subject to any conditions and qualifications set out in its Schedule; (2) the contested measure “affects the supply of services” in the relevant sector and mode of supply; (3) the measure applies to “like” foreign and domestic services and service suppliers; and (4) foreign service suppliers are accorded less favourable treatment than their domestic counterparts.⁵¹ The WSL 2011 cumulatively meets all four elements, and therefore violates Aquitania’s GATS Art. XVII national treatment obligations.

A. Aquitania has made full national treatment commitments for sewage and water services.

23. Aquitania scheduled full national treatment commitments by inscribing “None” in the Environmental Services sector, mode 3.⁵² GATS XX:2 states that “[m]easures inconsistent with Articles XVI and XVII shall be inscribed in column relating to Article XVI. ... [T]he inscription will be considered to provide a condition or qualification to Article XVII as well.”⁵³ Even assuming, *arguendo*, that Aquitania’s Environmental Services sector, mode 3 inscription of “None, except that a concession is required” in its market access commitment may provide a “condition or qualification” to Aquitania’s GATS Art. XVII commitments via Art. XX:2, the concession requirement does not differentiate between granting concessions to domestic and foreign companies and cannot sensibly be found to limit Aquitania’s national treatment obligations.

B. The WSL 2011 “affects the supply of services.”

24. As discussed above, the WSL 2011 “affects the supply of services” by effectively prohibiting any private—and by extension, any foreign—company from engaging in the

⁵⁰ Record at 13, WSL 2011, Sec. 2(A).

⁵¹ PR, *EC—Bananas III (US)* [7.314], upheld by ABR, *EC—Bananas III* [244]; see also PR, *China—Audiovisual Products* [7.944, 7.956, 7.1272]; PR, *China—EPS* [7.641].

⁵² See *supra* Section II:B.

⁵³ PR, *China—EPS* [7.654-56]; *China—Audiovisual Products* [7.921, 7.950]; see also Pauwelyn (2005); Delimatsis (2006).

supply of water and sewage services in an entire province of Aquitania.⁵⁴

C. The WSL 2011 applies to “like services and service suppliers.”

1. The WSL 2011 applies to “like services.”

25. The panel in *China—EPS* determined that “like” services means “essentially or generally the same” services and that a showing of “exactly the same” services is not necessary.⁵⁵ The WSL 2011 plainly applies to “like services” under this test because the same water and sewage services would be provided by a private firm as by a public company.

26. While the particularities of business management and levels of efficiency might have varied, public Aguas Tercias and private Avanti supplied nearly indistinguishable water and sewage services over the same network to the same constituents. Public Aguas Tercias was able to reach about 70% of all households and 90% of all commercial entities in the province,⁵⁶ and these coverage percentages did not diminish when Avanti operated the public network.⁵⁷ The quality of water supplied by Avanti met the same WHO standards as those under Aguas Tercias,⁵⁸ and Avanti provided special treatment of the elderly and the disabled as required by the 2004 Regulation.⁵⁹ Moreover, the publicly-owned company operating the networks from 2011 on was unable to improve on the privately-owned company’s former performance with respect to reducing the sewage leakage problems or expanding the network.⁶⁰ Since a public company operated by the Provincial Government and a private company would provide the same services over the identical infrastructure, they provide “like” services.

2. The WSL 2011 applies to “like” foreign and domestic service suppliers.

27. GATS Art. XVII:1 contains a joint reference to “like services and service suppliers.” The panel in *China—EPS* stated that evaluation of the extent to which consideration of “like services” and “like service suppliers” overlaps should be made on a case-by-case basis.⁶¹ Where it is determined that services are “like,” however, there is a presumption that the “service suppliers” are “like” as well, as found by the panels in *EC—Bananas III*⁶² and

⁵⁴ See *supra* Sec. III:A.

⁵⁵ PR, *China—EPS* [7.699].

⁵⁶ Record at 6.

⁵⁷ Clarifications at 66.

⁵⁸ *Id.*

⁵⁹ *Id.* at 4.

⁶⁰ *Id.* at 63, 88.

⁶¹ PR, *China—EPS* [7.701]. Cossy (2006).

⁶² PR, *EC—Bananas III (US)* [7.322].

China—EPS.⁶³ Because the WSL 2011 affects “like” services, it affects “like service suppliers,” whether they are foreign private companies or domestic public companies.

28. Even if the panel does not adopt the presumption of “like” service suppliers, the WSL 2011 actually affects “like service suppliers.” The panel in *China—EPS* suggested that a likeness determination could be made based on competitive relationship of the pertinent services.⁶⁴ As demonstrated above, a competitive relationship clearly exists because private and public companies would be in direct competition for water and sewage concessions in the absence of the WSL 2011.⁶⁵ It is self-evident that if there was no potential for public and private suppliers to compete over water and sewage contracts in Nova Tertia, there would be no reason to pass the WSL 2011 to exclude private suppliers from the market.

D. The WSL 2011 accords foreign suppliers less favourable treatment than their domestic counterparts.

29. GATS Art. XVII:3 states that “formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.” In evaluating China’s measures prohibiting foreign-invested enterprises from engaging in the wholesale of imported reading materials while permitting wholly Chinese-owned enterprises to engage in the supply of this service, the panel in *China—Audiovisual Products* stated that “such treatment modifies conditions of competition in the most radical way, by eliminating all competition by the foreign service supplier with respect to the service at issue.”⁶⁶ Likewise, by mandating that only a domestic public company can engage in the water distribution and sewage collection services, the WSL 2011 eliminates all possibility for competition by non-Nova Tertian companies and, by extension, eliminates the possibility of competition by foreign service suppliers. The WSL 2011 makes it impossible for foreign suppliers to participate in Nova Tertia’s market, and thus accords them *de facto* less favourable treatment.

30. Finally, the stated regulatory purpose of the WSL 2011, that the public’s need for water and sewage services is “better met by a public company,”⁶⁷ is both irrelevant to the less favourable treatment determination and lacking any supporting evidence in the record. In *EC—Bananas III*, the AB clarified that the “aims and effects” of a measure are not “relevant

⁶³ PR, *China—EPS* [7.705].

⁶⁴ *Id.* at [7.702].

⁶⁵ See *supra* Sec. II:D.

⁶⁶ PR, *China—Audiovisual Products* [7.979].

⁶⁷ Record at 13.

in determining whether or not that system modifies the conditions of competition between service suppliers” of domestic and foreign origin.⁶⁸ Therefore, the panel should not consider any stated rationale for the WSL 2011 in the GATS Art. XVII analysis. Because the WSL 2011 accords less favourable treatment to like foreign service suppliers, it violates Aquitania’s national treatment obligations under GATS Art. XVII.

V. THE WSL 2011 CANNOT BE JUSTIFIED UNDER EITHER GATS ARTS. XIV(A) OR XIV(B).

31. When a GATS Art. XIV defense is raised, the Member invoking it bears the burden of showing that the challenged measure falls within the scope of one or more exceptions⁶⁹ and that the measure satisfies the requirements of the chapeau of GATS Art. XIV.⁷⁰

A. The WSL 2011 is not necessary to maintain public order or public morals under GATS Art. XIV(a).

32. To determine whether a measure is necessary under GATS Art. XIV(a), a panel looks to the three-factor test applied by the AB in *US—Gambling*, which considers (1) the “‘relative importance’ of the interests or values furthered by the challenged measure,” (2) the “contribution of the measure to the realization of the ends pursued,” and (3) “the restrictive impact of the measure on international commerce.”⁷¹ The “necessity” test in GATS Art. XIV(a) represents a stricter standard than the “relating to” or “involving” tests contained in many GATT Art. XX exceptions, and Aquitania must demonstrate that the measure is “significantly closer to ... ‘indispensable’ than ... simply ‘making a contribution to’” the end pursued.⁷² A panel is not bound by “a Member’s characterization of the measure’s objectives and ... effectiveness” in making its independent, objective assessment of the measure.⁷³

33. GATS Art. XIV(a) permits members to maintain otherwise GATS-inconsistent measures when they are “necessary to maintain public order or public morals.”⁷⁴ Public order is implicated “when a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”⁷⁵ Public morals “denote standards of right and wrong conduct maintained by or on behalf of a community or nation.”⁷⁶

⁶⁸ ABR, *EC—Bananas III* [241].

⁶⁹ ABR, *US—Gambling* [360].

⁷⁰ *Id.* at [291-292].

⁷¹ *Id.* at [306-310].

⁷² ABR, *US—Gambling* [310].

⁷³ *Id.* at [304].

⁷⁴ GATS Art. XIV(a).

⁷⁵ GATS Art. XIV(a), footnote 5.

⁷⁶ ABR, *US—Gambling* [296] (quoting PR, *US—Gambling* [6.465]).

34. The 2011 WSL is not necessary to protect public order or public morals under *US—Gambling*, because the second two factors are not met. While compliance with the national USO may represent an important public order or public moral interest, it is irrelevant because Aquitania fails to show that the WSL 2011 contributes to the fulfillment of this law. Although prices have been lower under Aguas Tercias’ management, there is no evidence that public operation actually promotes the realization of universal service that defines the USO. To the contrary, during the decades of public operation of the Nova Tertia water and sewage networks, only 70% of households were served by the public company, the same percentage as under private management, and service interruptions were a recurring problem.⁷⁷ With regard to the third factor, outlawing private ownership entirely has a highly “restrictive impact” on trade that cannot be justified. A contract dispute with a single operator does not provide sufficient grounds to prohibit all foreign companies in the name of promoting the USO and broader public access to water.⁷⁸

B. The WSL 2011 is not “necessary to protect human, animal or plant life or health.”

35. GATS Art. XIV(b) permits Members to adopt and enforce GATS-inconsistent measures that are “necessary to protect human, animal or plant life or health.”⁷⁹ While no panel has yet considered the meaning of human, animal and plant health in the context of GATS Art. XIV(b), the Panel may look to GATT Art. XX jurisprudence for guidance,⁸⁰ particularly cases interpreting the similar GATT Art. XX(b) provision for measures “necessary to protect human health and the environment.”

36. Aquitania fails to present a *prima facie* case that the WSL 2011’s public ownership requirement satisfies the *US—Gambling* necessity factors. Although a WTO Member may set the health and environmental objectives it seeks and the level of protection it wants to obtain under GATT XX(b),⁸¹ there must be a sufficient nexus between the measure and the protection desired.⁸² In *Brazil—Tyres*, the AB upheld the Panel’s rigorous questioning of whether the connection between Brazil’s import ban and the environmental protection sought was “logically sound and supported by sufficient evidence.”⁸³ Similarly, Aquitania must demonstrate the causal links that would connect its policy of public ownership to a reduction

⁷⁷ Record at 6, Clarifications at 66.

⁷⁸ See Record at 10-12.

⁷⁹ GATS Art. XIV(b).

⁸⁰ ABR, *US—Gambling* [291].

⁸¹ ABR, *Brazil—Tyres* [140] (citing ABR, *EC—Asbestos* [168]).

⁸² *Id.* at [170].

⁸³ *Id.* [149].

in hazards to human, animal and plant health. Aquitania's claims that legitimate human, animal, and plant health concerns will be furthered by excluding private companies are undermined by the public operators' poor record of network maintenance⁸⁴ and the continuation of sewage leaks after the public company resumed operation.⁸⁵ A short-term variation in the measured rate of sewage leakage does not on its own demonstrate any causal link between these hazards and the nature of the operating company.⁸⁶ Indeed, the fact that investment in maintenance actually increased in 2008 suggests these variations are attributable to other causes, such as the low level of investment under decades of public ownership.⁸⁷ While "[n]either the public nor private sector has a monopoly on good management,"⁸⁸ the "poor performance ... of publicly-owned water monopolies" has often been the cause of inadequate access to clean and safe water for a substantial part of the population in developing countries around the globe.⁸⁹ Combined with its highly restrictive effect on trade, this disjunction between the WSL 2011 and its stated intent to protect "human health and the environment"⁹⁰ fails to satisfy the necessity prong of GATS Art. XIV(b).

C. A less trade-restrictive alternative is reasonably available with respect to both GATS Arts. XIV(a) and XIV(b).

37. Disproving the necessity of a measure under GATS Art. XIV requires showing the existence of an alternative which is "reasonably available" and achieves the same level of protection.⁹¹ As with GATT Art. XX, whether an alternative is reasonably available is determined by considering (1) the extent to which the alternative contributes to the end pursued, (2) the difficulty of its implementation, and (3) the trade impact of the alternative measure.⁹² Strengthened regulation of private operators combined with appropriate consumer subsidies represents a less trade-restrictive alternative to the WSL 2011.

38. A combination of regulation and subsidies with participation by private companies is more likely to contribute to Aquitania's professed Arts. XIV(a) and XIV(b) objectives than the public management requirement contained in the WSL 2011. The fact that Aguas Tercias did not make adequate infrastructure investments over several decades demonstrates that

⁸⁴ Record at 4, 6.

⁸⁵ Clarifications at 88.

⁸⁶ Record at 10.

⁸⁷ *Id.* at 6, 10.

⁸⁸ Wolff & Palaniappan, (2004), p. 131.

⁸⁹ Borraz (2011).

⁹⁰ Record at 13.

⁹¹ ABR, *US—Gambling* [309].

⁹² PR, *Canada—Wheat and Grain Exports* [6.223–6.224] (citing ABR, *EC—Asbestos* [170-172]).

public management alone does not guarantee appropriate investment in sanitation or service expansion.⁹³ In contrast, a World Bank survey of public-private partnerships in urban water services suggested that private management under these conditions is associated with improvements in quality and efficiency.⁹⁴ Consumer subsidies promote efficient delivery while encouraging competition among suppliers can prevent inefficient monopolies and ensure economic prices.⁹⁵ Though overall tariff increases may be “necessary for the financial sustainability of the water services, regardless of the option chosen for managing the utility [i.e., public or private],”⁹⁶ Aquitania may use consumer or supplier subsidies to offset any increases without the need to bar private operators.

39. These regulatory and subsidy options are reasonably available to Nova Tertia. The 2003 Law and the 2004 Regulation demonstrate that detailed regulation of private operators is possible,⁹⁷ and the AB has suggested that administrative difficulty alone does not make a measure unavailable.⁹⁸ The fact that Nova Tertia previously financed water for consumers below-cost⁹⁹ and its plans to raise taxes for future infrastructure investments¹⁰⁰ show that the province is capable of subsidizing water services. Because allowing private companies to continue to bid for concessions is indisputably less trade-restrictive than excluding them, this alternative would be greatly preferred under the objectives of the GATS.

D. The 2011 WSL constitutes an arbitrary and discriminatory restriction on trade.

40. Even if the Panel finds that Aquitania can satisfy its burden under either GATS Arts. XIV(a) or XIV(b), the WSL 2011 fails the Art. XIV chapeau test because it leads to arbitrary and unjustifiable discrimination between countries where like conditions prevail. As the AB explained in *US—Gambling*, the chapeau ensures that the Art. XIV exceptions are not exercised so as “to frustrate the rights accorded other Members by the substantive rules of the GATS.”¹⁰¹ Referring to the identical chapeau language of GATT Art. XX, the AB has noted that the respondent party’s burden of demonstrating that the chapeau has been satisfied is “a heavier task than that involved in showing than an [enumerated] exception ... encompasses

⁹³ Record at 6.

⁹⁴ Marin (2009).

⁹⁵ See, e.g., Gomez-Lobo (2001).

⁹⁶ Marin (2009).

⁹⁷ Record at 7-8.

⁹⁸ ABR, *EC—Asbestos* [169-170].

⁹⁹ Record at 4; Clarifications at 31.

¹⁰⁰ Record at 13.

¹⁰¹ ABR, *US—Gambling* [339].

the measure at issue.”¹⁰²

41. As explained by the AB interpreting GATT Art. XX in *US—Shrimp*, a measure fails the chapeau if either the “operating provisions of the measure prescribe the arbitrary or unjustifiable activity [or] where a measure ... is actually applied in an arbitrary or unjustifiable manner.”¹⁰³ The WSL 2011 is discriminatory on its face because it only permits domestic publicly-owned companies to remain in the market. Furthermore, the WSL 2011 is arbitrary as applied because the law effectively narrows market eligibility to a single domestic company, excluding known foreign-owned competitors. The use of nationality and public-ownership as determinative criteria bears no rational relationship with the professed GATS Art. XIV policy objectives. As in *US—Shrimp*, the chapeau test requires a balance to be struck between “the *right* of a Member to invoke an exception ... and the *duty* of that same Member to respect the treaty rights of the other Members.”¹⁰⁴ Aquitania’s participation in international treaties with respect to water rights and environmental protection¹⁰⁵ does not give it license to regulate without due regard to its WTO commitment to avoid discriminatory or arbitrary action. Treaties such as CEDAW expressly disclaim any limitation on the signatory’s obligations under other treaties.¹⁰⁶

42. In evaluating a measure under GATS Art. XIV, the panel should consider “not only whether the measure on its own undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multi-lateral trading system.”¹⁰⁷ Allowing Members to renege on their GATS commitments through measures like the WSL 2011 will undermine the fundamental goals of the WTO. As the Panel in *US—Shrimp* noted, while “environmental considerations are important for the interpretation of the WTO Agreement, ... the central focus of that agreement remains the promotion of economic development through” trade liberalization.¹⁰⁸ In the long term, excluding foreign private operators from competing in water and sewage management services inhibits “the strengthening of [developing countries’] domestic services capacity and [their] efficiency and competitiveness” as envisioned in the GATS,¹⁰⁹ eroding economic development in a vulnerable region.

¹⁰² ABR, *US—Gasoline* [pp. 22-23].

¹⁰³ ABR, *US—Shrimp* [160].

¹⁰⁴ *Id.* at [156].

¹⁰⁵ Record at Note to 18; *see, e.g.*, CEDAW Art XIV(2); CRC, Art. 24(c).

¹⁰⁶ CEDAW Art. 23(b).

¹⁰⁷ PR, *US—Shrimp* [7.44].

¹⁰⁸ *Id.* at [7.42].

¹⁰⁹ GATS, Preamble.

Request for Findings

For the above stated reasons, Commercia requests the panel to:

- i. Find that the WSL 2011 breaches GATS Arts. XVI:1 and XVI:2(a), since the prohibition on private company operation of water and sewage concessions is an unscheduled limitation market access.
- ii. Find that the WSL 2011 breaches GATS Art. XVII, since the prohibition of foreign company operation of water and sewage concessions violates Aquitania's scheduled national treatment commitments.