



Team: 082

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

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

Commercia  
(*Complainant*)

VS

Aquitania  
(*Respondent*)

---

**SUBMISSION OF THE RESPONDENT**

*Table of Contents*

<i>Table of Contents</i>	I
<i>List of References</i>	II
<b>I. TREATIES AND CONVENTIONS</b>	II
<b>II. WTO APPELLATE BODY REPORTS</b>	II
<b>III. WTO PANEL REPORTS</b>	III
<b>IV. WTO REPORTS AND DOCUMENTS</b>	IV
<b>V. SECONDARY SOURCES, INCLUDING TREATISES, ARTICLES, AND WORKS OF PUBLICISTS.</b>	IV
<b>VI. SOURCE MATERIALS</b>	V
<i>List of Abbreviations</i>	VI
<i>Summary of Arguments</i>	1
<i>Statement of Facts</i>	3
<i>Legal Pleadings</i>	4
<b>I. THE PANEL SHOULD DECLINE JURISDICTION TO PERMIT THE CLAIMS TO BE RESOLVED UNDER OFTA.</b>	4
<b>II. AQUITANIA’S WATER DISTRIBUTION SERVICES ARE EXEMPT FROM GATS COMMITMENTS AS A SERVICE SUPPLIED IN THE EXERCISE OF GOVERNMENTAL AUTHORITY UNDER GATS ART. I:3(B).</b>	5
A. Aquitania’s water distribution services are not “supplied on a commercial basis.”	5
B. Aquitania’s water distribution services are not “supplied in competition with one or more service suppliers.”	6
<b>III. WSL 2011 IS CONSISTENT WITH GATS ARTS. XVI:1 AND XVI:2(A).</b>	7
A. Aquitania’s Schedule contains no market access commitments for water services.	7
B. WSL 2011 is consistent with Aquitania’s scheduled concession requirement for mode 3 market access in the Environmental Services sector.	10
<b>IV. WSL 2011 IS CONSISTENT WITH GATS ART. XVII.</b>	11
A. Aquitania’s scheduled national treatment commitment in the relevant sector and mode of supply is subject to a limitation that encompasses WSL 2011.	12
B. WSL 2011 does not apply to “like” foreign and domestic service suppliers providing “like” services.	12
C. WSL 2011 does not accord “less favorable treatment” to foreign service suppliers than their domestic counterparts.	14
<b>V. WSL 2011 IS JUSTIFIABLE UNDER GATS ARTS. XIV(A) AND XIV(B).</b>	14
A. WSL 2011 is necessary to maintain public order or public morals.	14
B. WSL 2011 is “necessary to protect human, animal or plant life or health.”	16
C. WSL 2011 is neither arbitrary nor unjustifiable.	17
<i>Request for Findings</i>	20

### *List of References*

#### I. Treaties and Conventions

1. Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) (Cited as “DSU”).
2. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (Cited as “GATS”).
3. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Preamble, 1867 U.N.T.S. 154 (1994) (Cited as “Marrakesh Agreement”).
4. Occidental Free Trade Agreement (*Identical to the North American Free Trade Agreement*), 32 I.L.M. 289 and 605 (1993) (Cited as “OFTA”).
5. Vienna Convention on the Law of Treaties, May 23, 1969, 115 U.N.T.S. 331 (Cited as “VCLT”).

#### II. WTO Appellate Body Reports

1. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreated Tyres*, WT/DS332/AB/R (December 3, 2007) (Cited as “ABR, *Brazil—Tyres*”).
2. Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (December 21, 2009) (Cited as “ABR, *China—Audiovisual Products*”).
3. Appellate Body Report, *European Communities—Customs Classifications of Frozen Boneless Chicken Cuts*, WT/DS269,286/AB/R (September 12, 2005) (Cited as “ABR, *EC—Chicken Cuts*”).
4. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (March 12, 2001) (Cited as “ABR, *EC—Asbestos*”).
5. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26,48/AB/R (January 16, 1998) (Cited as “ABR, *EC—Hormones*”).
6. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8,10,11/AB/R (October 4, 1996) (Cited as “ABR, *Japan—Taxes*”).

7. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161,169/AB/R (December 11, 2000) (Cited as “ABR, Korea—Beef”).
8. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (March 6, 2006) (Cited as “ABR, Mexico—Soft Drinks”).
9. Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (February 4, 2009) (Cited as “ABR, US—Continued Zoning”).
10. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005) (Cited as “ABR, US—Gambling”).
11. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (April 29, 1996) (Cited as “ABR, US—Gasoline”).
12. Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations,” Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW (January 14, 2002) (Cited as “ABR, US—FSCs”).

### III. WTO Panel Reports

1. Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (April 22, 2003) (Cited as “PR, Argentina—Poultry”).
2. Panel Report, *China—Certain Measures Affecting Electronic Payment Services*, WT/DS413/R (July 16, 2012) (Cited as “PR, China—EPS”).
3. Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (August 12, 2009) (Cited as “PR, China—Audiovisual Products”).
4. Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas (Ecuador)*, WT/DS27/RW2/ECU (April 7, 2008) (Cited as “PR, EC—Bananas III (Ecuador)”).
5. Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas (US)*, WT/DS27/R/USA (May 22, 1997) (Cited as “PR, EC—Bananas III (US)”).
6. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (November 10, 2004) (Cited as “PR, US—

*Gambling*”).

#### IV. WTO Reports and Documents

1. Provisional Central Product Classification, Statistical Papers, Series M No. 77, United Nations (1991) (Cited as “CPC”).
2. World Trade Organization, Secretariat. *Guide to the GATS: An Overview of Issues for Further Liberalization of Trade in Services*, Kluwer Law International (2001) (Cited as “Guide to GATS”).
3. GATS: Fact and Fiction, “Misunderstandings and Scare Stories: The WTO is not after your water” (Accessed 2013 and available at [http://www.wto.org/english/tratop\\_e/serv\\_e/gats\\_factfiction8\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gats_factfiction8_e.htm)) (Cited as “GATS Fact and Fiction”).
4. Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS), S/L/92, Adopted by the Council for Trade in Services (2001) (Cited as “GATS Scheduling Guidelines”).
5. WTO Secretariat, Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164 (1993) (Cited as “1993 Scheduling Guidelines”).
6. Former Director-General Pascal Lamy, World Trade Organization, Speech to the United Nations Institute for Training and Research, "Trade and Human Rights Go Hand in Hand" (September 2010) (Cited as “Lamy (2010)”).

#### V. Secondary Sources, including Treatises, Articles, and Works of Publicists.

1. Fernando Borraz, Nicolas González-Pampillón, & Marcelo Olarreaga, “Water Nationalization: network access, water quality and health outcomes”, Centre for Economic Policy Research Discussion Paper 8415 (2011) (Cited as “Borraz (2011)”).
2. Diana Mitlin & David Vivas Eugui, *Water, Development, and the GATS*, International Institute for Environment and Development (2003) (Cited as “Mitlin & Eugui (2003)”).
3. David Hall, Emanuele Lobina, & Violeta Corral, “Replacing failed private water contracts”, PSIRU (Public Services International Research Unit), University of Greenwich, London (2010) (Cited as “Hall & Corral (2010)”).
4. Joost Pauwelyn, *RIEN NE VA PLUS? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, Nellco Legal Scholarship Repository, Duke Law School (2005) (Cited as “Pauwelyn (2005)”).

5. Maria Zettel, *The GATS, Privatization and Water Services*, Maastricht Working Papers (2006) (Cited as "Zettel (2006)").
6. Markus Krajewski, *Public Services and Trade Liberalization: Mapping The Legal Framework*, 6 J. OF INT'L ECON. L. 341-367 (2003) (Cited as "Krajewski (2003)").
7. Markus Krajewski, *Public Services and the Scope of the General Agreement on Trade in Services (GATS)*, Center for International Environmental Law (CIEL) (2001) (Cited as "Krajewski (2001)").
8. Mireille Cossy, *Determining "Likeness" under the GATS: Squaring the circle?*, WTO Working Paper, (2006) (Cited as "Cossy (2006)").
9. *Oxford English Dictionary Online*, 2013 (Cited as "OED").
10. *Oxford English Dictionary*, Third Edition, June 2011 (Cited as "OED (2011)").
11. Panagiotis Delimatsis, *Don't Gamble with GATS—The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the US—Gambling Case*, 6 J. OF WORLD TRADE 40, 1059 (2006) (Cited as "Delimatsis (2006)").
12. Rolf Adlung, *Public Services and GATS*, 9 J. OF INT'L ECON. L. 455-485 (2006) (Cited as "Adlung (2006)").

#### VI. Source Materials

1. Markus Krajewski, *Aquitania- Measures Affecting Water Distribution and Sewage Collection Services*, ELSA Moot Court Competition (EMC2) on WTO Law, Case 2013-2014 (Cited as "Record").
2. Clarification Questions and Answers, General Answers, 12<sup>th</sup> EMC<sup>2</sup> (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
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
MERCOSUR	<i>Mercado Común del Sur</i>
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 SHOULD DECLINE JURISDICTION TO PERMIT THE CLAIMS TO BE RESOLVED UNDER OFTA.**

- The AB has recognized that certain legal impediments might compel a panel to decline jurisdiction where equivalent claims are brought in multiple fora. In this case, Commercia initiated dispute settlement procedures under OFTA prior to filing under DSU Art. 4.7. Because Commercia’s OFTA and GATS claims raise equivalent market access and national treatment concerns with respect to WSL 2011 and Commercia agreed to an exclusive forum clause in OFTA Art. 2005:6, the panel should exercise its discretion to decline to hear these claims.

**II. AQUITANIA’S WATER DISTRIBUTION SERVICES ARE EXEMPT FROM GATS COMMITMENTS AS A SERVICE SUPPLIED IN THE EXERCISE OF GOVERNMENTAL AUTHORITY UNDER GATS ART. I:3(B).**

- Because they are neither supplied “on a commercial basis” nor “in competition,” water distribution services are exempt from the coverage of Aquitania’s GATS commitments as an exercise of governmental authority under GATS Art. I:3(B).
- Aquitania’s water services are not “commercial” because they serve to fulfill a social purpose and are not profit-seeking enterprises. Similarly, they are not provided “in competition” because each market is served by a single supplier and the size of each market is fixed. Consequently, Aquitania’s GATS Arts. XVI and XVII commitments do not apply to water services.

**III. WSL 2011 IS CONSISTENT WITH GATS ARTS. XVI:1 AND XVI:2(A).**

- Commercia’s market access violation claims fail with regard to water services because Aquitania has not scheduled any market access commitments for water services. The ordinary meaning of the language of Aquitania’s Schedules confirm that water distribution is not encompassed in the “Environmental Services,” “Construction,” or “Distribution” sectors. Aquitania’s omission of water services is consistent with the practice of all WTO Members, none of whom have made market access commitments with respect to water.
- While Aquitania has scheduled sewage service commitments, WSL 2011 is fully consistent with Aquitania’s explicit reservation to regulate the establishment of mode 3

suppliers in the Environmental Services sector through the granting of concessions.

Because WSL 2011 merely elaborates on the conditions under which concessions will be granted, any market access effects of the measure are permissible.

#### **IV. WSL 2011 IS CONSISTENT WITH GATS ART. XVII.**

- GATS Art. XX:2 allows Members' scheduled market access reservations to provide "a condition or qualification to Art. XVII" commitments as well. As a result, any national treatment effects of WSL 2011 are encompassed by the concession requirement scheduled by Aquitania for Environmental Services mode 3 market access.
- WSL 2011 is not discriminatory under GATS Art. XVII because it does not apply to "like services and service suppliers." Because they have distinct regulatory concerns and incentives and provide qualitatively different services, public water and sewage services and suppliers are not like private water and sewage services and supplier within the meaning of GATS Art. XVII.
- WSL 2011 does not treat foreign service suppliers less favourably than their domestic counterparts. The law does not differentiate on the basis of origin on its face and it accords equal treatment in practice because neither domestic nor foreign private suppliers are eligible to obtain water and sewage concessions in Nova Tertia.

#### **V. WSL 2011 IS JUSTIFIABLE UNDER GATS ARTS. XIV(A) AND XIV(B).**

- WSL 2011 is necessary to maintain public order and morals under GATS Art. XIV(a) because public ownership promotes fulfillment of the USO and access to clean water and sanitation for Aquitania's poorest citizens.
- Similarly, WSL 2011 is necessary to protect human, animal, and plant life and health under GATS XIV(b) because public ownership is the only way to reduce the health and environmental hazards that result from sewage leaks.
- As a developing country with limited resources, there is no alternative to public control that would allow Aquitania to achieve the same level of protection. There has been no evidence of any arbitrary or discriminatory application of WSL 2011 under the GATS Art. XIV chapeau test.

*Statement of Facts*

1. The Federal Republic of Aquitania is a developing country that has delegated to its provinces the competence to regulate water and sewage services. Aquitania views clean drinking water and sewage disposal as a fundamental value and a human right. As part of its national development strategy, Aquitania imposes a nationwide Universal Service Obligation (USO), mandating that water and sewage service suppliers serve all households and commercial entities under the same terms and prices, and without discrimination based on geographic location. As a result of provincial budget subsidies, customers pay below cost fees for such services.
2. Nova Tertia is one of the poorest provinces in Aquitania. From 1963 to 2005, its public network of water and sewage collection was operated by Aguas Tertias SA, a company entirely owned and operated by the provincial government. Aguas Tertias provided services to 70% of all households and 90% of commercial entities, meeting WHO standards for drinking water.
3. In 2003, Nova Tertia decided to partially privatize its water and sewage distribution network with the express goal of enhancing its service coverage and expanding infrastructure. The 2003 Law, implementing these changes, reaffirmed the USO and enabled the provincial government to grant concessions to public or private companies to operate the infrastructure. The 2004 Concession Regulation restricted consumer price increases to 35% of current prices, barring exceptional circumstances, and required consideration of vulnerable customers. Pursuant to the 2003 Law, Nova Tertia transferred the authority to grant concessions to its capital, Tertialia.
4. In 2005, Tertialia granted a water and sewage concession to Avanti SA, subject to the requirements of the 2003 Law and the 2004 Regulation. Avanti SA is a private company, wholly owned by a parent company in Comercia. Despite the USO, Avanti failed to expand service coverage or develop network expansion plans for purely commercial reasons. Moreover, within the first two years, Avanti imposed a 75% increase on charges while sewage leaks increased. Tertialia terminated its agreement with Avanti in 2009 because of the failure to comply with the 2003 Law and 2004 Regulation. Aguas Tertias resumed control, reducing consumer fees.
5. Based on this failed experience with privatization, Nova Tertia enacted WSL 2011, which provides that water and sewage services “will be operated by a public company which is owned and controlled in its entirety by the Provincial Government.” Comercia subsequently challenged the measure by filing a complaint first with OFTA and subsequently with the WTO.

### *Legal Pleadings*

#### **I. THE PANEL SHOULD DECLINE JURISDICTION TO PERMIT THE CLAIMS TO BE RESOLVED UNDER OFTA.**

1. With regard to the present dispute, Comercia affirmatively consented to OFTA's jurisdiction to the exclusion of WTO jurisdiction. On 2 May 2013, Comercia initiated dispute settlement procedures under OFTA Art. 2007, prior to requesting the establishment of a panel under Art. 4.7 of the DSU on 3 May 2013.<sup>1</sup> OFTA Art. 2005:6 holds that "[o]nce dispute settlement procedures have been initiated under [OFTA] Article 2007 or ... under the GATT, the forum selected shall be used to the exclusion of the other."<sup>2</sup> In *Mexico—Soft Drinks*, which involved parallel claims with the DSB and a NAFTA Tribunal, the AB noted that there "may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it."<sup>3</sup> The AB ultimately upheld DSB jurisdiction given the dissimilar subject matter of the parallel NAFTA claim.<sup>4</sup> However, the present case is unique from the situation in *Mexico—Soft Drinks* because Comercia's claims under OFTA and the DSU raise equivalent market access and national treatment concerns in connection to WSL 2011.<sup>5</sup> Unlike Mexico, Aquitania is fully asserting the forum exclusion clause here. Therefore, legal impediments to DSB jurisdiction exist in Comercia's agreement to the exclusive jurisdiction of OFTA.

2. This is consistent with the panel's discussion of the principle of estoppel in *Argentina—Poultry*. The panel considered whether estoppel might result from a "clear and unambiguous statement to the effect that ... [a party] would not subsequently resort to WTO dispute settlement proceedings."<sup>6</sup> Although the panel determined that Brazil's submission of a parallel claim to a MERCOSUR panel did not amount to a clear commitment to refrain from WTO dispute settlement, in the present case Comercia unambiguously and affirmatively consented to estoppel by agreeing to the exclusive provision in OFTA Art. 2005:6, and Aquitania relied on Comercia's commitment in good faith when ratifying the FTA.

---

<sup>1</sup> Record at 16-17.

<sup>2</sup> OFTA Ch. 20, Art. 2005.

<sup>3</sup> ABR, *Mexico—Soft Drinks* [54].

<sup>4</sup> *Id.*

<sup>5</sup> See Clarifications, General Answers.

<sup>6</sup> PR, *Argentina—Poultry* [7.38].

3. The AB has recognized that panels have the right “to determine the scope of their jurisdiction.”<sup>7</sup> In light of the importance of comity in the international legal system and the existence of legal impediments to its hearing this dispute, the Panel should exercise judicial economy by declining to hear Comercia’s claims.

**II. AQUITANIA’S WATER DISTRIBUTION SERVICES ARE EXEMPT FROM GATS COMMITMENTS AS A SERVICE SUPPLIED IN THE EXERCISE OF GOVERNMENTAL AUTHORITY UNDER GATS ART.**

**I:3(B).**

4. GATS commitments do not apply to “services supplied in the exercise of governmental authority,”<sup>8</sup> defined by the agreement as “any service which is supplied neither on a commercial basis, nor in competition with one or more service providers.”<sup>9</sup> Because no panel has elaborated on the scope of “governmental authority” under GATS,<sup>10</sup> its meaning should be read in light of the object and purpose of the provisions “in accordance with customary rules of interpretation of public international law.”<sup>11</sup> Because the water services affected by WSL 2011 are neither supplied on a commercial basis nor in competition, Aquitania’s GATS commitments do not apply to these services.

**A. Aquitania’s water distribution services are not “supplied on a commercial basis.”**

5. The ordinary meaning of “commercial” is “a mere matter of business; looking toward financial profit,”<sup>12</sup> and in the context of the GATS may be closely related to “commercial presence,” defined in GATS Art. XXVIII(d) as “any type of business or professional establishment.”<sup>13</sup> These uses suggest that “commercial” is characterized by the pursuit of profits in the course of business. This contrasts with public services such as policing, defense, and judicial courts<sup>14</sup> that do not involve financial gain because equal access to these services is essential for the functioning of society.

---

<sup>7</sup> ABR, *Mexico—Soft Drinks* [45].

<sup>8</sup> GATS Art. I:3(b).

<sup>9</sup> GATS Art. I:3(c).

<sup>10</sup> Krajewski (2003), p. 350.

<sup>11</sup> DSU Art. 3.2; VCLT Art. 31.

<sup>12</sup> OED (2011).

<sup>13</sup> GATS Art. XXVIII:d.

<sup>14</sup> Adlung (2006), p. 15.

6. The provision of water to Aquitanian citizens is not a profit-centered enterprise. Aquitania views water distribution as a fundamental right of every member of society<sup>15</sup> and the province of Nova Tertia has historically provided this public service at below market prices.<sup>16</sup> WSL 2011 was adopted in part to respond to the conflict of interests that occurred when a private company seeking profit was enlisted to manage water services, leading to “price increases and dangerous under-investment in the [water and sewage] network and infrastructure.”<sup>17</sup> Because Nova Tertia’s water distribution services neither make a profit nor seek to, they are not “commercial” within the meaning of GATS Art. I:3(c).

**B. Aquitania’s water distribution services are not “supplied in competition with one or more service suppliers.”**

7. “Competition” is defined as “the striving of two or more for the same object; rivalry”<sup>18</sup> or, when related to commerce, as “rivalry in the market.”<sup>19</sup> Because WSL 2011 affirms the natural monopoly over public provision of water and sewage services,<sup>20</sup> the distribution of water is not “in competition” under either definition. The panel in *China—EPS* defines a monopoly as “a sole supplier authorized or established formally or in effect by a member.”<sup>21</sup> The management of water services by the provinces of Aquitania corresponds exactly with the AB’s definition of monopoly: Tertia’s water infrastructure is necessarily managed by a single operator and Nova Tertia’s grant of concessions for providing these services to a sole operator under both the 2003 Law and WSL 2011 demonstrate the absence of market competition for the right to provide these services.<sup>22</sup> Moreover, the AB in *EC—Hormones* considered *in dubio mitius* as a restrictive means of treaty interpretation.<sup>23</sup> Applying this principle of restrictive interpretation would “rule out a situation of ‘competition’ between a service supplier with universal service obligation and one without such an obligation.”<sup>24</sup>

---

<sup>15</sup> Record at 18.

<sup>16</sup> Record at 4. *See* Clarifications, General Answers.

<sup>17</sup> Record at 13.

<sup>18</sup> OED (2013).

<sup>19</sup> *Id.*

<sup>20</sup> *See* WSL 2011.

<sup>21</sup> PR, *China—EPS* [7.623].

<sup>22</sup> Record at 7, 8, 13.

<sup>23</sup> ABR, *EC—Hormones* [154].

<sup>24</sup> Krajewski (2001).

**III. WSL 2011 IS CONSISTENT WITH GATS ARTS. XVI:1 AND XVI:2(A).**

8. A measure only violates GATS Art. XVI:1 if it accords “less favourable treatment” to the “services and service suppliers of any other Member” “than that provided for under the terms, limitation and conditions ... specified in its Schedule.” GATS Art. XVI:2 provides an exhaustive list of measures that would constitute prohibited “less favourable treatment” in sectors in which market access commitments have been made, unless otherwise specified.<sup>25</sup> To establish a GATS Art. XVI violation, a complainant must therefore demonstrate that both (1) the respondent has undertaken relevant market access commitments in its Schedule, and (2) the challenged measure constitutes an impermissible and unscheduled limitation enumerated under GATS Art. XVI:2.<sup>26</sup>

**A. Aquitania’s Schedule contains no market access commitments for water services.**

9. Even if the Panel finds that water distribution services are not an exempted “exercise of governmental authority” under GATS Art. 1:3(b),<sup>27</sup> *Commercia’s* market access violation claim fails with regard to water services because Aquitania has not scheduled any water distribution market access commitments in any sector. GATS Art. XX:3 makes Members’ Schedules an “integral part” of the GATS such that they are also subject to interpretation “in accordance with customary rules ... of public international law” as provided by DSU Art. 3.2.<sup>28</sup> This has consistently been understood to mean interpretation pursuant to VCLT Arts. 31 and 32.<sup>29</sup> The AB has explained that VCLT Art. 31 analysis is a “holistic exercise”<sup>30</sup> that takes into account the “ordinary meaning” of treaty terms in their context and in light of the object and purpose of the treaty.<sup>31</sup>

10. The ordinary meaning of “Environmental Services” in Aquitania’s schedule does not encompass the collection, treatment and distribution of drinking water as argued by *Commercia*. The Oxford English Dictionary, for example, defines environmental as “concerned with or relating to the protection of the environment....”<sup>32</sup> The supply of drinking water to a population is not an activity concerned with “the protection of the environment.” While panels acknowledge

---

<sup>25</sup> PR, *US—Gambling* [149]; PR, *China—Audiovisual Products* [151].

<sup>26</sup> ABR, *US—Gambling* [214], PR *China—Audiovisual Products* [7.1353-7.1354].

<sup>27</sup> See *supra* Sec. II.

<sup>28</sup> ABR, *US—Gambling* [160].

<sup>29</sup> ABR, *US—Gasoline*, [p. 17]; see also ABR, *Japan—Taxes* [p. 10].

<sup>30</sup> ABR, *China—Audiovisual Products* [348] (citing ABR, *EC—Chicken Cuts* [176]); ABR, *US—Continued Zeroing* [268].

<sup>31</sup> ABR, *China—Audiovisual Products* [348].

<sup>32</sup> OED (2011).

the limitations of mechanical recourse to dictionary definitions,<sup>33</sup> recourse to the immediate context strengthens this understanding. Looking to Aquitania’s Schedule as immediate context—a move endorsed by the AB in *US—Gambling*<sup>34</sup>—it is clear that the unifying characteristic of the remaining subsectors under “Environmental Services,” namely sewage, refuse, and sanitation, is the removal and treatment of various forms of human waste. Water distribution is not a sensible fit.

11. Reference to the remainder of Aquitania’s Schedule as interpretative context in accordance with the AB’s guidance in *China—Audiovisual Products*<sup>35</sup> further clarifies that “Sewage and related services” does not encompass water distribution. Rather, it encompasses related *sewage* services that would otherwise be excluded from this subsector, specifically “[c]onstruction, repair and alteration work of sewers.”<sup>36</sup> This reading is confirmed by reference to the WTO Secretariat Services Sectoral Classification List (W/120) and the CPC, which the AB has recognized as supplementary means of interpretation pursuant to VCLT Art. 32.<sup>37</sup> Aquitania relied on the W/120 and the CPC in drafting its Schedule, and such a reading is also consistent with the close relationship between construction and maintenance of sewers and the provision of sewage services in Aquitania.

12. Although Members are not required to rely on either the W/120 or CPC in drafting their Schedules, the AB has recognized the relevance of these documents for interpreting the Schedules of Members that did rely on them.<sup>38</sup> Aquitania’s reliance on the W/120 and CPC is evident because the list of sectors and subsectors in Sectors 3, 4, and 6 of Aquitania’s Schedule precisely match the sector/subsector breakdown in the W/120, diverging only where Aquitania made specific reference to corresponding CPC codes. The fact that the CPC expressly excludes “collection, purification and distribution services of water” from the coverage of the “Sewage services” subsector<sup>39</sup> strongly supports a reading of Aquitania’s Schedule in which these services are excluded from Sector 6.

---

<sup>33</sup> ABR, *US—Gambling* [164]; ABR, *China—Audiovisual Products* [348].

<sup>34</sup> ABR, *US—Gambling* [179].

<sup>35</sup> ABR, *China—Audiovisual Products* [358].

<sup>36</sup> CPC 51330.

<sup>37</sup> ABR, *US—Gambling* [196].

<sup>38</sup> *See, e.g., Id.* [179].

<sup>39</sup> CPC 94010.

13. Aquitania's provinces have historically required sewage service suppliers to play an active role in constructing and maintaining sewers in furtherance of the importance the country and its citizens place on fully realizing the USO. Aquitania's decision to expand the coverage of this subsector to include "related" services on its Schedule represents a pragmatic decision to include related although otherwise excluded *sewage* services from its scheduled commitments in this subsector, specifically "[c]onstruction, repair and alteration work of sewers" which the CPC otherwise classifies in subclass 51330.<sup>40</sup>

14. Furthermore, the services at issue clearly do not fall within Sector 3 (Construction and Related Engineering Services) or 4 (Distribution Services) of Aquitania's Schedule. While Sector 3 does include commitments relating to "[c]onstruction work on pipelines and on water and sewer mains"<sup>41</sup> the Panel's terms of reference refer specifically and exclusively to the "supply of water and sewage services (emphasis added),"<sup>42</sup> not to the construction of the underlying networks. Thus, any claim that would fall within Sector 3 is excluded by the terms of reference of the panel as "the terms of reference define the scope of the dispute."<sup>43</sup> Sector 4 commitments are equally inapplicable, as that sector encompasses "commission agents' services, wholesale trade services, retailing services, and franchising"—none of which are implicated in the terms of reference.<sup>44</sup>

15. In 2001, the WTO Secretariat clarified that "[t]he number of Members which have so far made GATS commitments on water distribution is zero,"<sup>45</sup> and Aquitania joined the rest of the WTO Membership in omitting water services from its scheduled commitments when it joined the WTO in 2005.<sup>46</sup> Given that water has historically been a highly regulated sector and is vital to the citizens of Aquitania, any commitment in such a sensitive area would have been explicitly noted in the Schedule, and no such notation is present.

---

<sup>40</sup> *Id.*

<sup>41</sup> CPC 51340.

<sup>42</sup> Record at 17.

<sup>43</sup> ABR, *US—Carbon Steel* [126].

<sup>44</sup> Guide to GATS, p. 194.

<sup>45</sup> GATS Fact and Fiction.

<sup>46</sup> Record at 1.

**B. WSL 2011 is consistent with Aquitania’s scheduled concession requirement for mode 3 market access in the Environmental Services sector.**

16. Even if the Panel finds both sewage and water services to be covered by Aquitania’s scheduled commitments in Sector 6, WSL 2011 is still consistent with Aquitania’s scheduled market access commitments because it has been “otherwise specified in [Aquitania’s] Schedule” in the form of a concession requirement for mode 3 market access. Specifically, Aquitania inscribed “None, except that a concession is required.” Because WSL 2011 merely elaborates on the conditions under which concessions will be granted, the measure falls within the scheduled limitation.

17. The purpose of scheduling such qualifications to GATS commitments is to allow a Member to maintain measures that would constitute GATS Art. XVI:2 violations if not scheduled.<sup>47</sup> Thus, the fact that the concession requirement can encompass conditions that would otherwise violate one or more GATS provisions is consistent with its very purpose. Because no further qualifying or limiting language was included on the Schedule to restrict the concession-granting criteria or process, Aquitania retains full discretion to regulate the assignment of such concessions.

18. The permissibility of scheduling a restriction that significantly restricts market access is supported by reference to the 1993 Scheduling Guidelines. The Guidelines specifically contemplated that Members could schedule measures that not only restrict the number of service suppliers, but have the effect of a zero quota.<sup>48</sup> The Guidelines gave the example of scheduling a nationality requirement, equivalent to a zero quota, as an example of scheduling an otherwise impermissible limitation on the number of service suppliers.<sup>49</sup> Here, Aquitania’s scheduled commitment was less trade restrictive than the hypothetical nationality requirement, as it maintained the possibility of granting the required concessions to foreign service suppliers.

19. This understanding of Aquitania’s scheduled concession requirement is consistent with the object and purpose of GATS as expressed in its preamble. Namely, GATS aims to accomplish the goal of progressive liberalization of trade in services while “[r]ecognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives” while further recognizing the “particular

---

<sup>47</sup> See generally 1993 Scheduling Guidelines.

<sup>48</sup> *Id.* at [6]; Pauwelyn (2005), p. 165.

<sup>49</sup> 1993 Scheduling Guidelines [6]; Pauwelyn (2005), p. 165.

need of developing countries to exercise this right.”<sup>50</sup>

20. Unlike in *US—Gambling*, where the US attempted to foreclose market access completely through domestic regulation after making *full* market access commitments in the relevant sector,<sup>51</sup> Aquitania explicitly reserved the right to regulate the establishment of commercial presence on its territory by foreign service suppliers in the Environmental Services sector through the granting of concessions. To find that such an unequivocal scheduled limitation is ineffective or ambiguous would be to disregard the clear language of Aquitania’s Schedule.

#### **IV. WSL 2011 IS CONSISTENT WITH GATS ART. XVII.**

21. GATS Art. XVII states that “[i]n the sectors inscribed in its schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member ... treatment no less favourable than that it accords to its own like services and service suppliers.”<sup>52</sup> To determine inconsistency with GATS Art. XVII, the AB in *EC—Bananas III* and subsequent panels have applied a four-prong test. Under this test, Commercica must cumulatively establish that: (1) Aquitania has made a national treatment commitment in the relevant sector and mode of supply, subject to any limitations set out in its Schedule; (2) WSL 2011 “affects the supply of services”; (3) WSL 2011 applies to like foreign and domestic services and service suppliers; and (4) foreign service suppliers are accorded less favourable treatment than their domestic counterparts.<sup>53</sup>

22. While WSL 2011 may “affect[] the supply of services,” it does not violate Aquitania’s national treatment obligations under GATS Art. XVII because the other three elements of the test are not met. First, Aquitania’s scheduled concession requirement for market access provides “a condition or qualification to Art. XVII” via GATS Art. XX:2; even if it were discriminatory, WSL 2011 would fall within this limitation. Second, WSL 2011 does not violate GATS Art. XVII because it does not apply to “like services and service suppliers.” Third, WSL 2011 does not treat foreign service suppliers less favourably than their domestic counterparts.

---

<sup>50</sup> GATS, Preamble.

<sup>51</sup> ABR, *US—Gambling* [250].

<sup>52</sup> GATS Art. XVII:1.

<sup>53</sup> PR, *EC—Bananas III (U.S.)* [7.314], upheld by ABR, *EC—Bananas III* [244]; *see also* PR, *China—Audiovisual Products* [7.942, 7.956, 7.1272]; PR, *China—EPS* [7.641].

**A. Aquitania’s scheduled national treatment commitment in the relevant sector and mode of supply is subject to a limitation that encompasses WSL 2011.**

23. Under GATS Art. XVII:1, national treatment obligations are “subject to any conditions or qualifications set out” in the sectors inscribed in a Member’s schedule.<sup>54</sup> Assuming *arguendo* that WSL 2011 constitutes a *de facto* national treatment violation, refuted *infra*,<sup>55</sup> Aquitania’s concession requirement in its Environmental Services sector, mode 3 market access commitments is a “condition or qualification” to Aquitania’s national treatment commitments via GATS Art. XX:2, permitting Aquitania to maintain discriminatory measures that would otherwise be inconsistent with GATS Art. XVII.<sup>56</sup>

24. GATS Art. XX:2 states that when “[m]easures inconsistent with Art. XVI and XVII [are] inscribed in the column relating to Art. XVI ... the inscription [provides a] condition or qualification to Art. XVII as well.” This crossover condition also applies where, as in *China—EPS*, a Member’s scheduling of “None” in national treatment had potential to be inconsistent with its inscription of “Unbound” in market access commitments.<sup>57</sup> Similarly, although Aquitania scheduled “None” in its national treatment commitments,<sup>58</sup> the concession requirement it inscribed for market access also extends to measures that are otherwise inconsistent with GATS Art. XVII. WSL 2011 is properly inscribed in the market access column of Aquitania’s Schedule because it concerns a concession and provides a valid carve-out for both GATS Arts. XVI and XVII commitments in Environmental Services.

**B. WSL 2011 does not apply to “like” foreign and domestic service suppliers providing “like” services.**

25. Unlike GATT Art. III, which extends national treatment obligations only to “like products,” GATS Art. XVII:1 refers jointly to “like services and service suppliers.” The panel in *China—EPS* noted the relevance of the inclusion of “service suppliers” in the likeness analysis, explaining that “a separate inquiry into the ‘likeness’ of the suppliers may be called for” and should be determined on a case-by-case basis.<sup>59</sup>

---

<sup>54</sup> PR, *EC—Bananas III (Ecuador)* [7.305].

<sup>55</sup> *Infra* Sec. IV:B-C.

<sup>56</sup> Pauwelyn (2005); Delimatsis (2006).

<sup>57</sup> PR, *China—EPS* [7.655-7.657]; *see also* *China—Audiovisual Products* [7.921, 7.950] on interpretation of GATS XX:2.

<sup>58</sup> Record, Aquitania’s GATS Schedule.

<sup>59</sup> PR, *China—EPS* [7.705]; *see generally* Cossy (2006).

26. WSL 2011 does not apply to the provision of “like” services by “like” foreign and domestic service suppliers because the operational and regulatory concerns of private companies are fundamentally different from those of public entities owned by Nova Tertia’s Provincial Government. Private companies’ focus on “efficiency” could lead to underinvestment in water supplies to unprofitable geographic areas, disproportionately harming the poor.<sup>60</sup> Indeed, Avanti failed to comply with 2004 Regulation’s requirement of network expansion<sup>61</sup> on the grounds that such investments “would have no meaningful commercial basis” because the areas to be served were in “very poor neighborhoods.”<sup>62</sup> Moreover, private companies may show less concern for public welfare, as illustrated by Avanti’s refusal to comply with the USO and by its inadequate response to the increase in the leakage of sewage as compared to when Aguas Tertas, a public entity operated by the provincial government, was in managerial control.<sup>63</sup>

27. In contrast, a public service provider controlled by the government can avoid negative externalities and has the regulatory capacity to impose quality controls and promote infrastructure development in unprofitable areas. Unlike private companies, public suppliers can sustain unprofitable operations and provide more extensive service coverage.<sup>64</sup> Indeed, in adopting WSL 2011, the Nova Tertia Provincial Parliament reasoned that the supply of water and collection of sewage in “private hands lead[s] to price increases and dangerous underinvestment in the network and infrastructure.... These challenges are better met by a public company closely controlled by the Provincial Government.”<sup>65</sup> Through the presence of Aguas Tertas, a public company owned and operated by the provincial government, Nova Tertia was not only able to provide better performance with less sewage leakage, but was able to charge lower service fees, financing the services provisions through the provincial budget.<sup>66</sup>

28. The panel in *China—EPS* also noted that a “likeness” determination can look to the competitive relationship of the pertinent services.<sup>67</sup> As argued above, because Nova Tertia’s

---

<sup>60</sup> Mitlin & Eugui (2003).

<sup>61</sup> Record at 4, 8.

<sup>62</sup> *Id.* at 11.

<sup>63</sup> *Id.* at 10-12.

<sup>64</sup> *Id.* at 4.

<sup>65</sup> *Id.* at 13.

<sup>66</sup> *Id.* at 4.

<sup>67</sup> PR, *China—EPS* [7.702].

public network can only be operated by one company at a time, foreign and domestic service suppliers are not engaged in competition.<sup>68</sup>

**C. WSL 2011 does not accord “less favorable treatment” to foreign service suppliers than their domestic counterparts.**

29. GATS Art. XVII: 3 states that “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.” WSL 2011 does not accord “less favourable treatment” to foreign service suppliers because it does not modify the conditions of competition in favour of domestic services or service suppliers. WSL 2011 is neither *de jure* nor *de facto* discriminatory. WSL 2011 is facially neutral because it does not differentiate on the basis of origin and accords equal treatment to domestic and foreign private service suppliers by excluding both from the market.<sup>69</sup> WSL 2011 similarly prohibits service supply by Aquitanian public service providers other than those entirely owned and controlled by the province of Nova Tertia. In this sense, WSL 2011 is even-handed in its treatment of public suppliers from other provinces and all private service suppliers, as none can provide services in Nova Tertia.

**V. WSL 2011 IS JUSTIFIABLE UNDER GATS ARTS. XIV(A) AND XIV(B).**

30. Even if the Panel finds that WSL 2011 is inconsistent with Aquitania’s GATS commitments, the measure falls squarely within Aquitania’s GATS Art. XIV right to derogate from these commitments when necessary to achieve important policy goals. When a Member invokes GATS Art. XIV, a panel considers first whether the challenged measure falls within the scope of the exception and then whether the measure satisfies GATS Art. XIV’s chapeau requirements.<sup>70</sup> The AB has stated that decisions related to the GATT Art. XX General Exceptions are relevant for GATS Art XIV analysis.<sup>71</sup>

**A. WSL 2011 is necessary to maintain public order or public morals.**

31. GATS Art. XIV(a) permits members to enact measures “necessary to maintain public order or public morals.”<sup>72</sup> The Footnote to GATS Art. XIV explains that public order refers to

---

<sup>68</sup> See *supra* Sec. II:B.

<sup>69</sup> Record at 13.

<sup>70</sup> ABR, *US—Gambling* [291-292].

<sup>71</sup> *Id.* at [291].

<sup>72</sup> GATS Art. XVII.

“fundamental interests of society,”<sup>73</sup> and has been interpreted to include “its standards of law, security and morality.”<sup>74</sup> To determine whether a measure is “necessary” under GATS Art. XIV(a), the Panel should apply the weighing and balancing test described by the AB in *U.S.—Gambling*, considering (1) the importance of interests or values that the measure is intended to protect; (2) the extent to which the measure contributes to the realization of those ends; and (3) the trade impact of the measure.<sup>75</sup> The measure should be compared to reasonably available less restrictive alternatives,<sup>76</sup> and once a responding party has made a prima facie showing that GATS Art. XIV applies,<sup>77</sup> the burden shifts to the complainant to rebut the defense.<sup>78</sup>

32. Aquitania has a strong interest in ensuring that water is provided to all citizens, especially in its most impoverished regions. Aquitania’s USO articulates a commitment to universal water access, and the 2003 Law and its implementation through the 2004 Regulation evince this same commitment to the goals of the USO.<sup>79</sup> In addition to these domestic laws, Aquitania’s adherence to international treaties promoting water and sanitation as human rights<sup>80</sup> and the mobilization of over 50,000 citizens of Nova Tertia in support of the right to water<sup>81</sup> all demonstrate that this is a fundamental interest of Aquitanian state and society. This interest is especially strong in Nova Tertia, an impoverished province where a substantial proportion of citizens would likely not be able to afford water service at market rates.<sup>82</sup>

33. Applying the second of the *US—Gambling* factors, public operation of water services contributes significantly to ensuring access to water through price control and socially-conscious investment. That a public operator restored low consumer rates immediately upon resuming management demonstrates the contribution of WSL 2011 to these ends.<sup>83</sup> Even if the public ownership requirement has some effect on trade under the third factor, the AB in *Brazil—Tyres* observed that trade-restrictive measures, up to and including a total ban, may nonetheless be

---

<sup>73</sup> GATS Art. XIV(a), footnote 5.

<sup>74</sup> PR, *US—Gambling* [6.467].

<sup>75</sup> PR, *US—Gambling* [6.542].

<sup>76</sup> ABR, *US—Gambling* [309].

<sup>77</sup> *Id.* at [323].

<sup>78</sup> *Id.* at [360].

<sup>79</sup> *See* Record at 7-8.

<sup>80</sup> *Id.* at Note to 18.

<sup>81</sup> *See Id.* at 11; Clarifications at 28.

<sup>82</sup> Record at 5.

<sup>83</sup> *Id.* at 12.

permissible under a General Exception where the measure's contribution to a Member's legitimate interest is established.<sup>84</sup>

34. A party invoking a GATS Art. XIV defense "is under no obligation" to identify and refute the existence of alternatives in "order to establish ... that its measure is 'necessary'."<sup>85</sup> Nonetheless, Comercia cannot demonstrate the existence of alternatives "that would preserve for [Aquitania] its right to achieve its desired level of protection" of public order and morals under Art. XIV(a).<sup>86</sup> The necessity of public control over water and sanitation was made apparent when the 2003 Law and 2004 Regulation failed to compel a private operator to work toward realizing the USO.<sup>87</sup> The private provider breached its contract, imposed an unjustified rate increase of 75% while failing to convert additional revenues into extended or improved service,<sup>88</sup> and failed to meet the USO due to lack of commercial viability despite persistent effort by the provincial government to procure compliance with these legal and contractual obligations.<sup>89</sup> Even if Aquitania could achieve its desired level of protection through extraordinary oversight and subsidy of a private operator, this alternative would not be reasonably available as the "prohibitive costs [and] substantial technical burden"<sup>90</sup> required would be too great for an impoverished province like Nova Tertia.

**B. WSL 2011 is "necessary to protect human, animal or plant life or health."**

35. The restoration of public control over water services is also permissible under GATS Art. XIV(b) as a measure "necessary to protect human, animal or plant life or health."<sup>91</sup> There can be little dispute that potable water is a requirement for human health and that lack of effective sewage treatment poses hazards to the health of flora and fauna. The USO, the preamble to the 2003 Law, and Aquitania's membership in international conventions that define water and sanitation as human rights show that this has consistently been a policy priority for Aquitania.<sup>92</sup> Returning water distribution to public management contributes to these ends by ensuring that investments are made in extending and repairing the system that delivers these vital services to

---

<sup>84</sup> ABR, *Brazil—Tyres* [149]; *see, e.g.*, PR, *US—Gambling* [6.495, 6.505-507].

<sup>85</sup> ABR, *US—Gambling* [142].

<sup>86</sup> ABR, *US—Gambling* [308]; *see also* ABR, *EC—Asbestos* [172-174], ABR, *Korea—Beef* [180].

<sup>87</sup> Record at 12.

<sup>88</sup> *Id.* at 10.

<sup>89</sup> *Id.* at 11.

<sup>90</sup> ABR, *Brazil—Tyres* [156] (citing ABR, *US—Gambling* [308]).

<sup>91</sup> GATS Art. XIV(b).

<sup>92</sup> Record at 4, 7, and Note to 18. *See, e.g.*, CEDAW Art XIV(2); CRC Art. 24(c).

underserved communities. This connection is affirmed by independent studies showing that sewage leaks increased during the years the network was under private operation,<sup>93</sup> further threatening human, plant, and animal life and health. While the measure necessarily has an impact on trade, it is narrowly tailored in that it only applies to the province where these sewage problems have occurred. Again, the existence of some effect on trade is permissible where a measure's contribution to a Member's protected interest is firmly established.<sup>94</sup>

36. *Commercia* cannot demonstrate the existence of a reasonably available alternative that would provide the same level of protection. History has shown that the government has limited ability to influence water services when management of the network is not directly in public hands, as evinced by the inability of the provincial or municipal governments in *Nova Tertia* to obtain desired improvements in sanitation and service during the period when the network was privately operated.<sup>95</sup> This problem was not an isolated phenomenon: Globally, studies have shown that attempts to improve water and sanitation services through privatization over the last two decades have frequently backfired,<sup>96</sup> and recent literature suggests that returning water services to public management can lead to improvements in sanitation, water quality, and water-related child mortality rates, the very public health goals that the *USO* and *WSL 2011* are designed to advance.<sup>97</sup> As one of the poorest provinces in a developing country, *Nova Tertia* lacks the budgetary resources to subsidize water consumption at the rates charged by a private company, and the problem of limited fiscal capacity is even more pressing for deeply impoverished regions such as *Nova Tertia*.<sup>98</sup>

### **C. *WSL 2011* is neither arbitrary nor unjustifiable.**

37. The chapeau of *GATS Art. XIV* prohibits Members from applying measures “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services,” with a focus on the measure's application.<sup>99</sup> Establishing discriminatory treatment requires looking to patterns of

---

<sup>93</sup> Record at 10.

<sup>94</sup> PR, *US—Gambling* [6.495, 6.505-507].

<sup>95</sup> Record at 9-12.

<sup>96</sup> Hall & Corral (2010).

<sup>97</sup> See Borraz (2011).

<sup>98</sup> Record at 5-6; see also ABR, *Brazil—Tyres* [156] (citing ABR, *US—Gambling* [308]).

<sup>99</sup> ABR, *US—Gambling* [348-351, 339].

enforcement, not just isolated instances of differential treatment.<sup>100</sup> Since there is no showing that any private company, whether foreign or domestic, has been affected by WSL 2011, a claim of patterns of discrimination cannot be supported. Avanti was expelled for contractual breaches and regulatory noncompliance, not by any operation of WSL 2011.<sup>101</sup>

38. For the identically-worded prohibition on “arbitrary and unjustifiable discrimination” in the GATT Art. XX chapeau, the AB in *Brazil—Tyres* explained that the “analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence.”<sup>102</sup> Aquitania has consistently maintained that “drinking water and the collection and treatment of sewage are essential services provided to all citizens ... in fulfillment of the human right to water and sanitation”<sup>103</sup> and the Provincial Parliament expressly enacted WSL 2011 to protect these legitimate interests.<sup>104</sup> Unlike Brazil's unjustifiably differentiated rules for tire imports,<sup>105</sup> Aquitania's prohibition applies uniformly to all foreign private providers and is based on legitimate interests, not tied to any protectionist intent.

39. Likewise, WSL 2011 is not arbitrary because the decision was based on the evidence of Nova Tertia's own experience with Avanti that re-instating public management would prevent the “price increases and dangerous under-investment” in infrastructure<sup>106</sup> which private operators refused to address during the period of their concession,<sup>107</sup> and is supported by extensive scholarship.<sup>108</sup> The fact that consumer prices for water were lower during previous periods of public ownership and were restored to that level immediately afterward suggests that the measure in fact achieves these ends.<sup>109</sup>

40. The importance placed on development and human rights within the WTO system is evident. The substantive obligation of GATS are prefaced with the explicit goals of “promoting ... the

---

<sup>100</sup> *Id.* at [356].

<sup>101</sup> Record at 12.

<sup>102</sup> ABR, *Brazil—Tyres* [226].

<sup>103</sup> Record at 7; 2003 Law Sec. 1(A).

<sup>104</sup> Record at 13.

<sup>105</sup> ABR, *Brazil—Tyres* [225-227].

<sup>106</sup> Record at 13.

<sup>107</sup> *Id.* at 10, 11.

<sup>108</sup> *See supra* Sec. V:B.

<sup>109</sup> Record at 12.

development of developing countries” and “giving due respect to national policy objectives,”<sup>110</sup> and former WTO Director-General Pascal Lamy has noted that “[t]rade and human rights go hand in hand.”<sup>111</sup> The need to afford Members sufficient space to employ measures necessary to promote equal access to drinking water for their citizens is but one critical step toward realizing these fundamental goals.<sup>112</sup> Informed by these objectives, panels should accord deference to policies such as WSL 2011, enacted by governments in developing nations working to fulfill the promise of universal human rights and welfare for all citizens.

---

<sup>110</sup> GATS, Preamble.

<sup>111</sup> Lamy (2010).

<sup>112</sup> Zettel (2006), p. 13.

***Request for Findings***

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

- i. Exercise its discretion to decline jurisdiction over the Complainant's claims in this case.
- ii. Find that WSL 2011 does not breach GATS Arts. XVI:1 and XVI:2(a).
- iii. Find that WSL 2011 does not breach GATS Art. XVII.
- iv. Find that WSL 2011 is justified under GATS Arts. XIV(a) and XIV(b).