



Team: 016C

ELSA MOOT COURT COMPETITION ON WTO LAW

2007-2008

Teleland - Measures Affecting Telecommunications Services

Digiland

(Complainant)

VS

Teleland

(Respondent)

SUBMISSION FOR COMPLAINANT

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Services Sectoral Classification List, MTN.GNS/W/120.

List of Abbreviations

AB	Appellate Body
AJCL	Asian Journal of Comparative Law
AoT	Annex on Telecommunication
Art.	Article
ATA	Amendment to the Telecommunications Act
BJIL	Brooklyn Journal of International Law
Ch.	Chapter
CLI	Competition Law Insight
CPC	Central Product Classification
CPP	calling-party-pays
DAS	Database Administrator Services
Doc.	Document
DPA	Data Protection Act
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
<i>e.g.</i>	<i>exempli gratia</i> , for example
EC	European Communities
ENT	Economic Needs Test
<i>et al.</i>	<i>et alia</i> , and others
<i>et seq.</i>	<i>et sequence</i> , and the following
FCLJ	Federal Communications Law Journal
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trades 1994
GIOECL	Glossary of Industrial Organisation, Economics and Competition Law
<i>i.e.</i>	<i>id est</i> , that is
IESE	Instituto de Estudios Superiores de la Empresa
ITU	International Telecommunication Union
JIEL	Journal of International Economic Law
JWT	Journal of World Trade
MOC	Ministry of Communications
No.	Number
p./pp.	page/pages

para./paras.	paragraph/paragraphs
PTTNS	Public Telecommunications Transport Networks and Services
RP	Reference Paper
RPP	receiving-party-pays
RUS	Regulation on Universal Services
Schedule	Schedule of Specific Commitments
Sec.	Section/Sections
SJLTA	Southwestern Journal of Law and Trade in the Americas
SSCL	Services Sectoral Classification List
SSNIP	Small but Significant and Nontransitory Increase in Price
TCC	Teleland Communications Commission
UN	United Nations
US	United States
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
vs	versus
WTO	World Trade Organization
WTR	World Trade Review

Statement of Facts

Digiland is a developed country with a high level of competition in fixed and mobile telephone markets. *Teleland* is a developing country and has undertaken specific commitments in telecommunications services and also committed to the Reference Paper (RP) on telecommunications regulatory principles. Both countries are WTO and ITU Members. *Teleland* follows a calling-party-pays regime, *Digiland* maintains a receiving-party-pays-regime. *Teleland* has three fixed network suppliers (TeleCom is the only one with an international gateway). There are only three mobile operators in *Teleland*, none of which have an international gateway. The mobile operators charge TeleCom a mobile termination rate for any telephone calls to their network which is eight times higher than termination rates to the fixed line network. In December 2006, the *Teleland* Communications Commission (TCC) issued the Regulation on Universal Services (RUS) including a surcharge on all incoming international telephone calls. The surcharge is added to the settlement rates charged to *Digiland* operators terminating telephone calls in *Teleland*. It is set at \$12 *Teleland* dollars per minute for terminating on a fixed network, and \$8 *Teleland* dollars per minute for terminating on mobile networks. The surcharge is allocated to a universal services program for building broadband access for social facilities in *Teleland*. Prior to 1 January 2007, an Amendment to the Telecommunications Act (ATA) of *Teleland* was passed which enables the TCC to open the mobile telecommunications services sector. Under the ATA the granting of additional licenses is "subject to availability of spectrum/frequency", and made "on the basis of an analysis of the relevant markets". The TCC has not yet issued a decision, and it has not commenced work to determine spectrum/frequency availability and therefore has made no decision on how many additional licenses it will issue if it decides to open the market further. Additionally, *Teleland* has not drafted rules to govern the granting of additional licenses for mobile telecommunications services. In February 2007, the TCC issued the Regulation on Number Portability that obliges *Teleland's* mobile operators to collectively enter into a contract with a database management company to administer Database Administrator Services (DAS) for exchanging wireless port requests. The database contains all information on subscribers who keep their existing number when changing the operators and other technically necessary data. The Ministry of Communications (MOC) must approve the proposed contract. *Teleland's* three mobile operators entered into a contract with DigiStar, a leading company for such DAS in *Digiland*. The MOC rejected the contract, justifying its decision with the principles of *Teleland's* Data Protection Act (DPA) according to which the physical location of DAS servers and its administrators must be within the territory of *Teleland* to protect privacy and personal data.

Due to the consultations failing to settle any of these issues, a WTO dispute resolution Panel pursuant to Art. 6 DSU has been established upon *Digiland's* request.

*Summary of Arguments***Claim I:**

- *Teleland* does not fulfil its commitments under Sec. 1.1 of its RP, because T-Global, T-Net and T-Mobility collectively constitute a major supplier and engage in anti-competitive practices. Additionally, *Teleland* does not maintain appropriate measures against this anti-competitive conduct, because *Teleland* acquiesces to the TCC's failure to issue new licenses and disseminate necessary information. The TCC's decision does not counteract possible market collusion as is evidenced by the parallel decrease of the rates which is highly indicative of price fixing.
- *Teleland* fails to fulfil its obligations under Sec. 2.1 and 2.2 RP, because the services at issue are international and therefore *Teleland's* commitments are applicable. Furthermore, *Teleland* fails to provide interconnections with cost-oriented rates and under reasonable terms and conditions. Finally, T-GlobalTone, T-Net and T-Mobility are major suppliers in the relevant market for the termination of cross-border switched telecommunications traffic in *Digiland*.
- *Teleland* violates Section 5(a) and (b) Annex on Telecommunications (AoT), by failing to provide *Digiland's* mobile operators access to and use of its public telecommunications transport network and services in a reasonable and non-discriminatory way.

Claim II:

- *Teleland's* RUS violates its national treatment obligation under Art. XVII GATS, because it grants less favourable treatment to *Digiland* service and services suppliers than to like domestic ones. First of all, *Teleland* is bound to Art. XVII GATS since it has undertaken specific commitments on national treatment. Art. XVII GATS applies because the RUS is a measure affecting service supply within the scope of Art. XVII GATS by reason that it affects the sale of the service. Furthermore, *Teleland* and *Digiland* services are like according to their classification, intrinsic characteristics, end-uses, and consumers' tastes and habits. The service suppliers are also like within the meaning of Art. XVII GATS. This is evidenced by the criterion of consumers' tastes. Moreover, *Teleland* treats *Digiland* services and services suppliers less favourably, because the RUS imposes a surcharge only on incoming international telephone calls and leaves *Teleland*-outbound telephone calls not affected and hence *Teleland* services and services suppliers are given greater competitive opportunities.
- *Teleland's* RUS violates Sec. 3 RP. *Teleland* made additional commitments on regulatory principles contained in its scheduled RP. With regard to Sec. 3 RP, *Teleland* violates its commitment, because the RUS is not administered in a non-discriminatory and competitively neutral manner, and is more burdensome than necessary.

Claim III:

- The ATA violates Art. XVI:1, XVI:2(a) and (c) GATS because it limits the number of mobile telecommunications services suppliers and related service operations. This is because *Teleland* in its Schedule has committed to grant full market access for mobile telecommunications services from 1 January 2007 on and has nevertheless failed to make good faith efforts to fulfil its commitments.
- In violation of Art. XVI:2(a) and (c) GATS, the ATA makes the issuance of licenses subject to an economic needs test (ENT). In addition, the ATA in conjunction with the TCC's failure to grant additional licenses constitutes a limitation on the number of service suppliers and service operations in the form of exclusive service supplier and in the form of numerical quotas.

Claim IV:

- *Teleland* violates Art. XVI:1 GATS, because *Teleland* accords less favourable treatment to *Digiland* than that provided for under the terms, limitations and conditions agreed in its Schedule. Additionally, *Teleland* violates Art. XVI:2(a) and (c) GATS that elaborates on measures mentioned under Art. XVI:1 GATS. The MOC's decision to reject the aspired contract between DigiStar and *Teleland's* mobile operators on DAS effectively limits the number of service suppliers and services as well as the number of service operations to zero and therefore it is a numerical quota within the scope of Art. XVI:2(a) and (c) GATS.
- *Teleland* violates Art. XVII GATS, because the MOC's decision accords less favourable treatment to *Digiland* services and service suppliers than to like domestic ones. Additional financial costs that were imposed on DigiStar to physically transfer DAS administrators into *Teleland* are unreasonable conditions for *Digiland* service suppliers and treat domestic service suppliers more favourably.
- The MOC's decision was not administered in a reasonable manner and therefore violates Art. VI:1 GATS, because it is not in accordance with a necessity based interpretation of the Data Protection Act (DPA).
- *Teleland* infringes its obligations under Art. VI:5 GATS, because it applies technical standards that nullify and impair their market access commitments in a manner that is in itself a restriction on the supply of the service. The quality of DAS is not influenced by the servers' physical location so the MOC's decision is not reasonable.
- The MOC's decision is not justified under Art. XIV GATS, because it is not necessary to protect privacy of individuals and does not meet the requirements of the chapeau.

Identification of the WTO Measures at Issue

Regarding the scheduled commitments, **Sec. 1.1 RP** requires the maintenance of preventive measures against anti-competitive practices of a major supplier. According to **Sec. 2 RP** and **Sec. 5 AoT**, interconnection to a major supplier, and access to and use of public telecommunications transport networks and services should respectively be ensured. **Sec. 3 RP** allows Members to maintain universal service obligations as long as they met certain criteria. **Art. XVI** and **XVII GATS** guarantee market access and national treatment. **Art. VI:1 GATS** sets up standards for the administration of measures of general application. **Art. VI:5 GATS** permits the establishment of requirements to ensure service quality. Measures not compliant with GATS disciplines may be justified under **Art. XIV GATS**.

Legal Pleadings

I. Teleland Violates its Obligations Under the RP and the GATS AoT

In failing to ensure interconnection to *Digiland's* basic telecommunications suppliers under cost-oriented rates and reasonable terms and conditions, *Teleland* violates its obligations under Sec. 1.1, 2.1 and 2.2 RP and under Sec. 5(a) and (b) GATS AoT.

1. Teleland Violates Sec. 1.1, 2.1 and 2.2 of the Scheduled RP

Teleland does not fulfil its commitment under Sec. 1.1 of its RP to cease the anti-competitive practices. Furthermore, according to Sec. 2.1 and 2.2 RP *Teleland* does not ensure interconnections with a major supplier as undertaken in its specific commitments.

a. Teleland Violates Sec. 1.1 of its Scheduled RP Commitments

Teleland violates the additional commitments of Sec. 1.1 RP, because: First, T-GlobalTone, T-Net and T-Mobility collectively constitute a major supplier; Second, they engage in anti-competitive practicing; And third, *Teleland* fails to maintain appropriate measures against this anti-competitive conduct.

i. T-GlobalTone, T-Net and T-Mobility are a Major Supplier

T-GlobalTone, T-Net and T-Mobility collectively constitute a major supplier, because they are able to materially affect the terms of participation in the relevant market for basic telecommunications services.

(1) Definition of the Relevant Market

The relevant market is the termination of cross-border telecommunications traffic in *Teleland*. The relevant market must be selected by the principles of the hypothetical monopoly¹, applying a so called SSNIP-test, in terms of substitution, looking at the alternatives available to consumers and their acceptability.² In the telephone call market, originating traffic and terminating traffic must be distinguished.³

¹ *Gual*, IESE Working Paper No. 517, 2003, p. 2.

² *Mexico-Telecoms*, Panel Report, para. 4.151.

Since the fixed-network facilities in *Teleland* are owned by TeleCom, *Digiland's* mobile network operators depend on a transmission of traffic through TeleCom's facilities to complete their cross-border telecommunications traffic in *Teleland*. As such, the originating segment of the telephone call taking place within *Digiland* cannot be considered substitutable for the terminating segment of the telephone call that concludes, through cross-border transmission, in *Teleland*. The relevant market for international telephone calls is the entire connection from *Digiland* to *Teleland's* mobile operators. The primary concern of a subscriber who wants to arrange an international telephone call is the transmission of his voice through the facilities of TeleCom and its affiliated mobile operators in *Teleland*, so these voice conveyances are the services at issue. *Teleland* consumers of international telephone calls do not have the means to substitute a domestic call for an international one to *Digiland*. This situation is analogous to what was held by the Panel in *Mexico-Telecoms*. The Panel there took the view that there is "no evidence that a domestic telecommunications service is substitutable for an international one, and that an outgoing telephone call is considered substitutable for an incoming one"⁴.

(2) Teleland Mobile Operators have Market Power

The mobile operators have market power in the relevant market through control over essential facilities and use of their market position. In respect of the RP's definition of "essential facilities", they are the only ones with a public mobile telecommunications transport network, which cannot feasibly be economically or technically substituted because the TCC has not opened the mobile market. Since *Teleland* operators convey all telephone calls through their technical infrastructure, they supply 100% of international mobile telephone calls. In enjoying a monopolistic position, the operators clearly have market power to influence the terms and conditions on the termination of telephone calls within the mobile network.

i. Teleland's Mobile Operators Engage in Anti-Competitive Practices

Teleland's three mobile operators are engaging in anti-competitive practices. Anti-competitive practices are business or government practices that restrain and/or abolish competition in an established market⁵, *inter alia* price fixing agreements. The level of the termination rates charged by the mobile operators is strongly indicative of coordination between the operators, since the mobile operators have highly similar termination rates. Additionally, the operators all reduced those rates over the past three years by 7-12%. This parallel decrease of the rates over a period of three years is also highly indicative of

³ *Mexico-Telecoms*, Panel Report, para. 7.152.

⁴ *Mexico-Telecoms*, Panel Report, para. 7.152; *Marsden*, CLI, 2004, p. 4.

⁵ *Mexico-Telecoms*, Panel Report, para. 7.230.

market collusion⁶ which significantly reduces competition. The *Teleland* situation only allows limited access at interconnections between the telecommunication service suppliers creates a *de facto* monopoly, which unduly affects terms of participation against *Digiland*.

iii Teleland Fails to Maintain Measures to Prevent Anti-Competitive Practices

Teleland fails to maintain measures to prevent anti-competitive behaviour in violation of Sec. 1.1 RP. This provision requires a Member to have regulations to prohibit joint refusals to engage in resale or provide interconnection. It also requires a Member to have measures in place to prevent anti-competitive cross-subsidization and misuse of information. Finally, measures must be in place to require timely disclosure of technical and commercial information⁷. Although *Teleland* issued the ATA, which enables the TCC to open the mobile market, *Teleland* does not counteract the collusive behaviour of the mobile operators. *Teleland* in acquiescing to the TCC's failure to issue new licenses and disseminate necessary information fails to maintain adequate measures to prevent anti-competitive practices.

b. Violation of Sec. 2.1 and 2.2 of Teleland's Scheduled RP Commitments

In the following, *Digiland* will demonstrate that *Teleland* fails to fulfil its obligations under Sec. 2.1 and 2.2 RP, because: First, T-GlobalTone, T-Net and T-Mobility are major suppliers in the relevant market and possess market power; Second, the services are international and hence *Teleland's* commitments are applicable; Third, *Teleland* has fails in its obligation to provide interconnection with cost-oriented rates; And fourth, *Teleland* fails to provide interconnections under reasonable terms and conditions.

i. T-GlobalTone, T-Net and T-Mobility are Major Suppliers

The three mobile operators are major suppliers in the relevant market for termination of cross-border switched telecommunications traffic in *Digiland* and also possess market power in the relevant market.

ii. Services are International and Teleland's Commitments Apply

The services at issue are international and hence *Teleland's* undertaken commitments are applicable to the services at issue. These services are supplied cross-border by *Digiland's* basic telecommunications suppliers. A cross-border supply of services does not require a supplier to operate the relevant "full circuit" of a service, that means that a supply of a service through mode 1 of Art. I:2 GATS can take place without the supplier being present on both sides of the border.⁸ *Digiland's* service suppliers offer a service and agreed to supply the service to a customer in *Teleland*. Hence, the customer in *Digiland* pays its supplier the price of an end-to-end service, regardless of whether the supplier contracts with, or uses the assets of, another firm to supply the service. The customer requests a complete connection

⁶ According to the adequate definition in the GIOECL, pp. 23, 24.

⁷ *Sherman*, FCLJ, 1998, Vol. 51 No. 1, p. 77.

⁸ *Mexico-Telecoms*, Panel Report, para. 7.32; see also *Sherman*, info, 2005, Vol. 7 No. 6, p. 18.

to its interlocutor. Thus, the service supplier must ensure that the entire connection will be provided. Therefore the interconnection is international and *Teleland's* commitments are applicable.

iii. Teleland Fails to Ensure Interconnection with Cost-oriented Rates and on Reasonable Terms and Conditions

First, *Teleland* fails in its obligation under Sec. 2.2 RP to ensure interconnection between *Teleland's* mobile operators and *Digiland's* suppliers at cost-oriented rates. "Interconnection" is the "physical linking of public communications networks used by the same [...] undertaking [...] to allow the users of one undertaking to communicate with users of another undertaking, or to access services provided by another undertaking."⁹ Interconnection must be granted between operators in a way that ensures an adequately extensive range of possibilities¹⁰. In addition, it must be ensured at any feasible point between the suppliers. For mobile network interconnections between *Teleland* and *Digiland*, the feasible points are at the border, hence *Teleland* fails to provide an adequate range of options for interconnection at crucial points of the infrastructure where communications cross from *Digiland* to *Teleland*. Furthermore, the conditions of interconnection with *Teleland's* mobile operators are not cost-oriented. As held in *Mexico-Telecoms*, cost-oriented rates "suggest rates that are brought into a defined relation to known costs or cost principles and would not need to equate exactly to cost, but should be founded on cost."¹¹ An established method to define cost-orientation is the "[c]omparison with termination rates on other international routes"¹². Consequently, the eight times higher charges for interconnection to the fixed-line network are highly indicative of charging that is not cost-oriented. Furthermore, the regulations of the ITU¹³ must be considered for the interpretation of "cost-oriented"¹⁴, wherein the ITU emphasized that a Member should utilize an appropriate costing methodology to ensure cost-oriented mechanisms. In light of this interpretation context, the charges for interconnections are not cost-oriented.

Second, *Teleland* fails to provide interconnections on reasonable terms and conditions as stated in Sec. 2.2 RP. "Reasonable" interconnections means *inter alia* interconnections on "as much as is appropriate or fair" or "moderate"¹⁵ conditions. The word "reasonable" implies a degree of flexibility that involves

⁹ *Mexico-Telecoms*, Panel Report, para. 7.111, with reference to EC Directive 2002/19, Ch. 1, Art. 2 b.

¹⁰ *Bronckers/Larouche*, Telecommunications Services, p. 1006.

¹¹ *Mexico-Telecoms*, Panel Report, para. 7.168; see also *Sidak/Singer*, FCLJ, 2004, Vol. 57 No. 1, p. 11; *Peng*, JWT, 2007, Vol. 41 No. 2, p. 314.

¹² *Mexico-Telecoms*, Panel Report, paras. 7.208-7.210.

¹³ ITU-T Recommendations D.140, Annex D.

¹⁴ *Mexico-Telecoms*, Panel Report, para. 7.153; see also *Sherman*, info, 2005, Vol. 7 No. 6, p. 24.

¹⁵ Compact Oxford English Dictionary of Current English.

a consideration of the circumstances of a particular case¹⁶. If a *Digiland* fixed-line operator wants to establish an international interconnection, he needs to lease the facilities of TeleCom in *Digiland* to convey the voice of a subscriber through the network of its affiliated fixed-line operator in *Teleland*. In the present case, the total lack of options to conclude alternative arrangements between the service suppliers and the above-cost rates for accessing the networks and the use of public telecommunications transport networks and services (PTTNS) are not reasonable.

2. *Teleland* Violates Sec. 5(a) and (b) GATS AoT

Teleland violates Sec. 5(a) and (b) GATS AoT by failing to provide access to and use of its public telecommunications transport network and services in a reasonable, non-discriminatory way.

a. *Teleland* Violates Sec. 5(a) GATS AoT

Teleland fails to ensure access to and use of PTTNS on reasonable and non-discriminatory terms and conditions for the supply of a service included in its Schedule and therefore violates Sec. 5(a) GATS AoT. The ordinary meaning of “terms” suggests that it “would include pricing elements, including rates charged for access to and use of PTTNS”¹⁷, thus this specification is clearly part of *Teleland*’s RP commitments. The importance of pricing-related measures for access and use indicates that the word “conditions” must also include pricing elements, such as conditions that relate to or affect the rate or price.¹⁸ Hence, *Teleland* has to ensure that no rates were imposed “other than as necessary” to fulfil the RP obligations under Sec. 5(e)(i) and (iii) RP. TeleCom is the only operator with an international gateway. Thus, *Digiland*’s service suppliers must interconnect with TeleCom’s network in order to provide their scheduled services to its final destination in *Teleland*. *Digiland* operators have no options to negotiate alternative arrangements with other suppliers for terminating telephone calls into *Teleland*. Also, *Teleland* has not fulfilled the burden of proof¹⁹ in proving the necessity of its mobile settlement rates.

b. *Teleland* Violates Sec. 5(b) GATS AoT

Teleland violates its obligations under Sec. 5(b) GATS AoT to ensure access and use of any public telecommunications transport network or service offered to *Digiland*’s service suppliers in *Teleland*. *Teleland* fails to ensure that non-facilities-based, commercially present suppliers have access to and use of the public mobile telecommunications transport network to supply private leased circuits. The above are all explicitly committed to in *Teleland*’s Schedule. According to Sec. 2(ii) GATS AoT and the Schedule, *Teleland* has not granted market access for mobile services through mode 3 for foreign suppliers by

¹⁶ *Mexico–Telecoms*, Panel Report, para. 7.328; see also *Sherman*, info, 2005, Vol. 7 No. 6, p. 27.

¹⁷ *Mexico–Telecoms*, Panel Report, para. 7.325.

¹⁸ *Mexico–Telecoms*, Panel Report, para. 7.326.

¹⁹ *Grando*, JIEL, 2006, Vol. 9 No. 3, p. 618 *et seq.*; *Matsushita/Iino*, AJCL, 2006, Vol. 1 No. 1, p. 9.

establishing joint venture enterprises and providing mobile private leased services. The Panel must read the Schedule to include the supply of mobile private leased circuits by *Digiland* suppliers over their own networks since the undertaken commitments are binding. Thus, *Teleland* violates Sec. 5(b) GATS AoT, since the market has not been opened by the TCC. Furthermore, the regulation of licensing is not necessary to protect the technical integrity of public telecommunications services.

II. Teleland's RUS Violates Art. XVII GATS and Sec. 3 RP

The RUS is inconsistent with *Teleland's* national treatment obligation under Art. XVII GATS and violates its commitments under Sec. 3 RP.

1. Teleland Violates Art. XVII GATS

The national treatment obligation is violated, because: First, Art. XVII GATS is applicable; Second, foreign and domestic services and service suppliers are like; And third, *Teleland* accords less favourable treatment to foreign services and service suppliers than to like domestic ones.

a. Art. XVII GATS is Applicable

Art. XVII GATS applies since *Teleland* has undertaken a national treatment commitment. The relevant entry in *Teleland's* Schedule reads "None". Likewise no exceptions from national treatment are listed. Furthermore, the RUS is a measure affecting service supply within the scope of Art. XVII GATS which applies to "all measures affecting the supply of services". The term "affecting" comprehends a measure that "has an effect on"²⁰, indicating a broad scope of application.²¹ Consequently, Art. XVII GATS covers all measures with an effect on service supply. The opposing narrow interpretation would permit Members to evade their non-discrimination obligations by simply drafting measures that provide a competitive advantage to domestic services and service suppliers, but that do not directly regulate the service provision as such.²² The RUS imposes a surcharge on incoming international telephone calls. Thus, it affects the sale of the service, which under Art. XXVIII(b) GATS is covered by the supply of a service.

b. Teleland and Digiland Services and Service Suppliers are Like

Digiland submits that: First, Art. XVII GATS sets up an alternative likeness requirement; Second, *Teleland* and *Digiland* services are like; Third, even if the Panel were to consider a cumulative approach, *Teleland* and *Digiland* service suppliers must also be considered like; And fourth, the aims and effects of a measure cannot be taken into consideration to determine likeness of services.

²⁰ Compact Oxford English Dictionary of Current English.

²¹ *EC-Bananas*, AB Report, para. 220.

²² *Zdouc*, JIEL, 1999, Vol. 2 No. 2, p. 319.

i. Likeness Requirements in Art. XVII GATS are Alternative

The combined reference to “services and service suppliers” in Art. XVII GATS sets up an alternative not cumulative requirement.²³ Art. XVII GATS protects foreign services as well as their providers against discrimination.²⁴ A cumulative requirement would have the effect of limiting the scope of the national treatment obligation, as less favourable treatment of like services would only be caught by Art. XVII GATS when the services are supplied by like suppliers. Thus, less favourable treatment of either like services or like services suppliers must suffice for a violation of Art. XVII GATS. Consequently, Art. XVII GATS calls for a disjunctive likeness test of the services and service suppliers – i.e. incoming and outgoing international telephone calls supplied from and to *Teleland* and their providers.

ii. Digiland and Teleland Services are Like

Digiland and *Teleland* services are like. This is supported by an examination of the criteria established by the Working Party on *Border Tax Adjustments*²⁵ which has been consistently referred to in GATT/WTO jurisprudence.²⁶ These criteria also apply to the GATS context, because the concept of national treatment in the GATT and in the GATS is identical.²⁷ Both Art. III:4 GATT and Art. XVII GATS protect competition and prevent discrimination of foreign products or services respectively. The *Border Tax Adjustments* criteria have been referred to in previous disputes for the determination of likeness of services.²⁸ Established opinion among WTO scholars also supports the application of this likeness test.²⁹ Accordingly, likeness must be assessed by a test focused on classification, intrinsic characteristics, end-uses and consumer tastes and habits regarding the services. The *Border Tax Adjustments* likeness test is not a closed treaty-mandated list of criteria, but rather follows a holistic and indicative approach.³⁰ *Digiland* will demonstrate that all of the criteria evidence likeness of *Digiland* and *Teleland* services.

²³ *Krajewski*, p. 107, *Nicolaidis/Trachtman*, p. 254.

²⁴ *Zdouc*, JIEL, 1999, Vol. 2 No. 2, p. 324.

²⁵ *Border Tax Adjustments*, Working Party Report, BISD 18S/97, para. 18.

²⁶ *Korea–Alcohol*, AB Report, para. 137; *Japan–Alcohol*, AB Report, para. 20-21; *EC–Asbestos*, AB Report, para. 85; *Canada–Periodicals*, Panel Report, para. 5.18.

²⁷ *Senti/Conlan*, p. 93.

²⁸ *EC–Bananas III*, Panel Report, para. 7.322, findings not appealed before AB; *US–Gambling*, Panel Report, para. 3.151, finding not appealed before AB.

²⁹ *Mattoo*, JWT, 1997, Vol. 31 No. 1, p. 25; *Cossy*, WTO Staff Working Paper ERSD-2006-08, p. 23.

³⁰ *EC–Asbestos*, AB Report, para. 102.

(1) Classification of Services Evidences Likeness

Both services at stake are basic telecommunication services under the SSCL.³¹ They fall under the same category of “voice telephone services *7521”. Therefore, from the perspective of SSCL Classification, *Digiland* and *Teleland* services must be considered like.

(2) Intrinsic Characteristics of Services Are Like

With regard to their intrinsic characteristics, the services are like. In line with this criterion, the process of service provision must be considered. In the present case, the procedure of terminating the telephone call is the same, regardless of whether it is an incoming or an outgoing one. The fact that *Digiland* maintains a RPP mobile telephone regime while *Teleland* follows a CPP regime does not rebut the likeness of the services. Under the RPP regime, operators charge their own subscribers for termination services, whereas under the CPP regime originating operators are charged. Hence, the regimes are merely accounting systems. The service is the same regardless of who pays. The accounting regimes do not relate to the characteristics of the services and thus do not interfere with determining likeness.

(3) End-Uses of Services are Like

In respect of the criterion of end-use, the services are like. The concept of end-use assesses the ability of the services to perform the same particular function.³² In the present case, the end-use of the services is identical because regardless of the telephone call being an incoming or outgoing one, the function of the service is the same – the connection of calling and receiving party.

(4) Consumers’ Tastes and Habits Concerning Services are Like

Consumers’ tastes and habits regarding *Digiland* and *Teleland* services are like. This criterion examines the extent to which consumers perceive and treat the services as alternative means of performing particular functions in order to satisfy a particular want or demand.³³ A telephone call serves the purpose of connecting the consumer with a second party. In terms of the exchange of data, an incoming telephone call is equal to an outgoing one. Due to the nature of interconnection, which necessarily involves two parties, both calling and receiving party must be considered as consumers of the service. It is of little relevance, who initiates the telephone call. Hence, consumers treat *Digiland* and *Teleland* services as alternative means of interconnection. *Teleland* cannot argue that consumers’ tastes and habits regarding the services are not like on the grounds that the Panel in *Mexico–Telecoms* stated that there is “no evidence [...] that an outgoing call is considered substitutable for an incoming one”.³⁴ This is because

³¹ Services Sectoral Classification List, MTN.GNS/W/120.

³² *EC–Asbestos*, AB Report, para. 117.

³³ *Border Tax Adjustments*, Working Party Report, BISD 18S/97, para. 18.

³⁴ *Mexico–Telecoms*, Panel Report, para. 7.152.

this narrow approach would limit the scope of Art. XVII GATS or even nullify the national treatment obligation, because it implies that there could never be a like domestic service to an incoming international call. *Even if* the Panel finds that the criterion of consumers' tastes indicates that *Teleland* and *Digiland* services were not like, *Digiland* highlights that, as noted above, the likeness test established in *Border Tax Adjustments* follows a holistic approach. Therefore consumers' tastes alone cannot be considered a determining factor in assessing likeness since all other criteria – intrinsic characteristics, classification and end-uses – are also equally relevant evidence for the likeness of *Digiland* and *Teleland* services.

iii. Digiland and Teleland Service Suppliers Are Like

Even if the Panel were to consider that a cumulative likeness test is required by Art. XVII GATS, *Digiland* submits that service suppliers must be held as like as well. There is neither judicial nor scholastic consensus on the extent to which suppliers' characteristics can usefully be considered in a determination of likeness. However, *Digiland* submits that the criterion of consumers' tastes would be most suitable to compare service suppliers. The likeness of service suppliers cannot be assessed completely abstract and independent from the services provided. A likeness test focussing only on supplier-related characteristics such as skills, size of the company, number of employees, type of assets, technological equipment, and know-how would result in an exceedingly narrow likeness definition of services suppliers. Furthermore, it is questionable where to draw the line between, for instance, a big and a small firm. Applying these supplier-related criteria would thereby arbitrarily limit the scope of Art. XVII GATS.³⁵ Therefore, one must look at consumers' tastes regarding *Teleland* and *Digiland* operators. The consumers seek interconnection with a second party and do not distinguish between *Teleland* and *Digiland* operators to fulfil this need. Additionally, it was held by the Panel and AB in *EC-Bananas III* and in *Canada-Autos*, that service suppliers are considered as "like" if they provide the same service.³⁶ As demonstrated above, *Digiland* and *Teleland* operators provide the same telecommunications services.

iv. Aims and Effects are Not an Appropriate Factor for Consideration

Digiland submits that the aims and the effects of a measure cannot be taken into consideration to distinguish services and service suppliers. This is because the text of Art. XVII GATS does not contain a reference to the concept of "so as to afford protection", which was the basis for formulating the original aim and effect test in the context of Art. III:1 GATT.³⁷ Additionally, the AB in *EC-Bananas III* rejected the aims and effects test when it held that there is "no specific authority [...] in Art. XVII GATS for the proposition that the 'aims and effects' of a measure are in any way relevant in determining whether

³⁵ *Cossy*, WTO Staff Working Paper ERSD-2006-08, p. 21; *Zdouc*, JIEL, 1999, Vol. 2 No. 2, p. 333.

³⁶ *EC-Bananas III*, Panel Report, para. 7.322; *Canada-Autos*, Panel Report, para. 10.248.

³⁷ *Hudec*, The International Lawyer, 1998, Vol. 32 No. 3, p. 629.

that measure is inconsistent with those provisions.”³⁸ Even if the Panel were to apply the aims and effects test, this analysis would affirm that *Teleland* acts in breach of its national treatment obligation under Art. XVII GATS. Pursuant to the aims and effects approach, a regulation violates Art. XVII GATS, if it distinguishes between foreign and domestic services and has the aim and effect of affording protection to domestic services.³⁹ A measure has the *aim* of affording protection if it, as its desired outcome and not merely an incidental effect, results in a change of competitive opportunities in favour of domestic products. It is considered to have a protectionist *effect*, if it accords “greater competitive opportunities”⁴⁰ to domestic services than to foreign services. The RUS imposes a surcharge only on incoming international calls and thus discriminates on the basis of origin of the service. Also, *Digiland* suppliers do not benefit from the universal service fund and thereby effectively subsidise their competitors. *Teleland*’s suppliers are thereby given greater competitive opportunities.

c. Teleland grants Less Favourable Treatment to like Digiland Services

Teleland treats *Digiland* services less favourably. Pursuant to Art. XVII:3 GATS, formally identical or formally different treatment is less favourable if it adversely modifies the conditions of competition for *Digiland* telecommunications services or service suppliers. Thus, the national treatment obligation pertains to both *de jure* and *de facto* discrimination.⁴¹ The RUS treats *Teleland* and *Digiland* services and service suppliers differently. *Digiland* operators are charged a surcharge on international calls placed in *Teleland* while *Teleland* suppliers do not have to pay a surcharge for *Teleland*-outbound international telephone calls. Thus, the RUS discriminates on the basis of services’ origin. *Teleland* cannot argue that foreign suppliers are *in effect* treated no less favourable simply because *Teleland* operators also have USOs including a contribution of 1% of their annual revenues. *Digiland* operators are charged call by call, whereas the universal service contribution of *Teleland* operators is relative to their revenues. This leads to less favourable conditions of competition.

2. Teleland Violates its Obligations under Sec. 3 RP

The RUS violates Sec. 3 RP. This is because, first, the RP is applicable as *Teleland* explicitly committed to it in its Schedule in the additional commitment column. Second, the surcharge imposed on *Digiland*’s operators is more burdensome than necessary. The necessity determination involves “a process of weighing and balancing a series of factors” *inter alia* the importance of interests and values asserted by

³⁸ *EC–Bananas III*, AB Report, para. 241; see also *Japan–Alcohol*, Panel Report, paras. 6.21 *et seq.*

³⁹ *Cossy*, WTO Staff Working Paper ERSD-2006-08, p. 24.

⁴⁰ *US–Taxes on Automobiles*, Panel Report, para. 5.10.

⁴¹ *EC–Bananas III*, AB Report, paras. 231-234, 244 *et seq.*; *Mattoo*, JWT, 1997, Vol. 31 No. 1, p. 110; *Matsushita/Schoenbaum/Mavroidis*, p. 666; *Trebilcock/Howse*, p. 288.

the measure, its impact on trade and alternative, less burdensome measures.⁴² Further, the necessity standard requires alternative measures that are less burdensome.⁴³ The fact that *Teleland* applies a \$12 surcharge for telephone calls placed on a fixed network, while a surcharge of \$8 is charged for telephone calls placed on mobile networks evidences that the \$12 is more burdensome than necessary. *Teleland* has not provided any legitimate basis for this distinction. Third, the RUS is discriminatory given that the surcharge is only imposed on incoming international telephone calls and not on *Teleland*-outbound international calls. Foreign operators largely finance the “Universal *Teleland* Project” while *Teleland* operators contribute merely a small portion to the funding of this project. Additionally, the USO is not administered in a competitively neutral manner, since the surcharge causes foreign operators a competitive disadvantage. *Digiland* operators are not able to benefit from the universal service fund. Through the surcharge they are required to effectively subsidise their competitors. Thereby, the USO is not competitively neutral.

III. The ATA Violates Art. XVI:1, XVI:2(a) and XVI:2(c) GATS

The ATA violates Art. XVI GATS, because: First, *Teleland* has committed to grant full market access from 1 January 2007 on; Second, *Teleland* nevertheless maintains the types of measures listed in subparas. (a) and (c) of Art. XVI:2 GATS. And third, *Digiland* submits that even if parts of the ATA are interpreted as discretionary, they nevertheless violate Art. XVI GATS.

1. Teleland has Committed to Grant Full Market Access from 1 January 2007 on

Teleland has committed to grant full market access in the mobile services sector from 1 January 2007 on. *Teleland*'s Schedule entry on market access in the basic telecommunications sector regarding supply through mode 3 reads “None”. Based on text and context, the term “none” means that a Member undertakes a full market access commitment.⁴⁴ Furthermore, *Teleland* stated in its Schedule that “[n]o limitation on number of services suppliers will exist on 1 January 2007.” Thereby, *Teleland* committed to not limit the number of service suppliers after 1 January 2007. *Teleland* cannot argue that the term “on 1 January 2007” can be interpreted in a way that would extend the phase of implementation. As a matter of fact, the implementation period expired on 1 January 2007. There is no ambiguity in the chosen words that can be interpreted in a way that would lead to an extension of the implementation period. Any interpretation that allows for non-compliance with the GATS rules would decrease the credibility, security and predictability of the multilateral trading system.⁴⁵ Therefore, *Teleland* is prohibited

⁴² *US–Gambling*, AB Report, paras. 305 *et seq.*

⁴³ *US–Section 337*, Panel Report, para. 5.26; *Park*, SJLTA, 2006, Vol. 12 No. 2, p. 511.

⁴⁴ *Matsushita/Iino*, AJCL, 2006, Vol. 1 No. 1, p. 14.

⁴⁵ *Mercurio*, JWT, 2004, Vol. 38 No. 5, p. 839.

from limiting the number of services suppliers from 1 January 2007 on.

2. Violation of Market Access Commitments under Art. XVI:1, XVI:2(a) and (c) GATS

a. Limitation of the Number of Service Suppliers in Violation of Art. XVI:2(a) GATS

Teleland limits the number of service suppliers and thereby violates Art. XVI:2(a) GATS.

i. The Implementation of an Economic Needs Test Violates Art. XVI:2(a) GATS

The ATA subjects issuance of licenses to an ENT, in violation of Art. XVI:2(a) GATS. Although no definition of the term ENT exists in the GATS, the AB in *US–Gambling* stated that it is not clear that limitations on the number of suppliers in the form of an ENT must take a particular form. Thus, this type of limitation suggests that the words “in the form of” must not be interpreted as “prescribing a rigid mechanical formula”.⁴⁶ This indicates a broad interpretation of the ENT. Turning to the interpretation of the phrase “analysis of the relevant market” in the ATA, *Digiland* submits that an analysis of the mobile telecommunications services market will include an evaluation of demand for and supply of these services. It would also include whether there is additional demand for the service supply, in other words, if there is any more need for it. Accordingly, *Teleland’s* issuance of new licenses being “subject to availability of spectrum/frequency” is in effect an ENT. *Teleland* cannot argue that the ATA constitutes a temporal limitation that is, as the Panel found in *Mexico–Telecoms*⁴⁷, not within the scope of Art. XVI:2(a) GATS. This is because in contrast to the *Mexico–Telecoms* case, the ATA does not stipulate a temporal qualification. Rather, it states that licenses will be issued when the corresponding regulations are issued and makes the issuance of additional licenses subject to an analysis of the relevant market.

ii. The Establishment of Exclusive Service Suppliers Violates Art. XVI:2(a) GATS

Furthermore, the ATA in conjunction with *Teleland’s* failure to draft rules for the allocation of additional licenses violates Art. XVI:2(a) GATS because it establishes three exclusive service suppliers. Art. VIII:5 GATS defines “exclusive service suppliers” as where a Member, *formally or in effect*, establishes a small number of suppliers. Following this definition, the reference, in Art. XVI:2(a) GATS, to limitations on the number of service supplier “in the form of exclusive service suppliers” must be read to include limitations that are in form or in effect exclusive service suppliers.⁴⁸ The ATA may not explicitly specify that there be only three exclusive service suppliers but it has this *effect*. The TCC has made no decision on how many additional licenses it will issue, if any at all, nor has *Teleland* commenced determining spectrum/frequency availability. Thus, only three suppliers are in effect exclusively licensed.

⁴⁶ *US–Gambling*, AB Report, paras. 230-231.

⁴⁷ *Mexico–Telecoms*, Panel Report, para. 7.358.

⁴⁸ *US–Gambling*, AB Report, para. 230.

iii. The Numerical Quota on Service Providers Violates Art. XVI:2(a) GATS

Teleland maintains a limitation of the number of service suppliers in the form of numerical quota and thereby violates Art. XVI:2(a) GATS. The ATA in conjunction with *Teleland's* failure to draft rules to govern the allocation of additional licenses has the effect of a zero quota on the number of service suppliers. The AB in *US–Gambling* found that limitations amounting to a zero quota are quantitative limitations that violate Art. XVI:2(a) GATS. As the AB there held, a measure that amounts to a zero quota is a limitation that is quantitative in nature and therefore falls under Art. XVI:2(a) GATS.⁴⁹ *Teleland's* licensing requirement itself does not violate Art. XVI GATS. However, *Teleland* has failed to regulate the allocation of additional licenses; thereby *Digiland* service providers are prevented from supplying services in *Teleland*. Thus, *Teleland's* measures constitute a limitation amounting to a zero quota.

b. Teleland Limits the Number of Service Operations in Violation of Art. XVI:2(c) GATS

The ATA in conjunction with *Teleland's* failure to draft rules for the allocation of additional licenses amounts to a zero quota on service operations or service output. This is analogous to the circumstances in *US–Gambling* where the AB held that a measure prohibiting one or more means of delivery of that service is a limitation on the total number of service operations or on the total quantity of service output in the form of quotas, because it “results in a ‘zero quota’ on one or more or all means of delivery.”⁵⁰ As such, it falls within the scope of Art. XVI:2(c) GATS. Further, *Digiland* submits that *Teleland* has made no good faith efforts to fulfil its market access commitments. The general international law principle of good faith applies to all WTO rules.⁵¹ It enjoins *inter alia* that whenever the assertion of a right “impinges on the field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably.”⁵² *Teleland* has failed and continues to fail in drafting rules to govern the allocation of additional licenses for mobile telecommunications services and has not even commenced work to determine spectrum/frequency availability, necessary to decide on the granting of additional licenses. Thus, *Teleland* has failed to make good faith efforts to fulfil its obligations under Art. XVI GATS.

3. Art. XVI GATS is Violated Even if Parts of the ATA are Interpreted as Discretionary

Teleland cannot argue that because parts of the ATA may be interpreted as discretionary law, it does not violate Art. XVI GATS. This is because discretionary legislation can *per se* constitute a violation of WTO law. As the Panel in *US–Section 301* held, the enactment of a discretionary law violates WTO obligations if the WTO provision itself prohibits legislation with discretionary elements. And, if that is

⁴⁹ *US–Gambling*, AB Report, paras. 238 *et seq.*; *Delimatsis*, JWT, 2006, Vol. 40 No. 6, p. 1067.

⁵⁰ *US–Gambling*, AB Report, para. 241.

⁵¹ *Petersmann*, JIEL, 1998, Vol. 1 No. 2, p. 190.

⁵² *US–Cotton Yarn*, AB Report, para. 81.

the case, the very fact of having such discretion in the legislation could, in effect, preclude WTO consistency.⁵³ This finding is based on the WTO's object and purpose, which according to the customary rules of treaty interpretation set out in Art. 31 VCLT have to be taken into account when analysing WTO provisions⁵⁴. The WTO's central objective is to provide legal security and predictability.⁵⁵ In light of that, the mere possibility for a Member's governmental authorities to act WTO-consistent is not sufficient to ensure legal certainty.⁵⁶ In the present case, the ATA enables the TCC to decide "the number of additional licenses to extend, if any [...]"⁵⁷. The wording "if any" demonstrates that the TCC has discretion not to give out any additional licenses. In its Schedule however, *Teleland* states that no limitation on the number of service suppliers will exist on 1 January 2007. By giving the TCC discretion not to grant further licenses, *Teleland* violates its specific commitment made under Art. XVI GATS to unconditionally open the mobile telecommunications market. Excluding the ATA from a valid examination of its WTO-compliance would undermine the fundamental objectives of the GATS by allowing *Teleland* to evade its market access commitments.

IV. Teleland Violates Art. XVI:1, XVI:2(a) and (c), XVII, VI:1 and VI:5 GATS

Digiland submits that the MOC's rejection of the contract between *Teleland's* three mobile operators and DigiStar violates: First, Art. XVI:1 and XVI:2(a), XVI:2(c) GATS; Second, Art. XVII GATS; Third, Art. VI:1, VI:5 GATS; And fourth, all of these violations are not justified under Art. XIV GATS.

1. Teleland's MOC Decision Violates Art. XVI:1 and Art. XVI:2(a), XVI:2(c) GATS

The MOC's decision violates Art. XVI:1 GATS, because *Teleland* accords less favourable treatment to *Digiland* than that provided for in its Schedule. The commitments are identified with the term "None" for cross-border supply of computer and related services. Therefore, *Teleland* committed to grant full market access. Thus, *Teleland* is bound to abolish the types of arrangements listed in Art. XVI:2 GATS. *Teleland* acts in breach of its commitments under Art. XVI:2(a) and (c) GATS, because the MOC's decision to reject the conclusion of the proposed contract between DigiStar and the mobile operators constitutes a limitation on the number of service suppliers and service operations. The conducted measure is comparable with *US-Gambling*, wherein it was held that "a prohibition on the supply of certain services effectively 'limits to zero' the number of service suppliers and number of [related] service opera-

⁵³ *US-Section 301*, Panel Report, para. 7.54; see also *Wang*, Perspectives, 2001, Vol. 3 No. 3, para. III 2.

⁵⁴ Compare *US-Gasoline*, AB Report, paras. 16-17, *Japan-Alcohol*, AB Report, paras. 10-12; *Palmer/Macroidis*, Dispute Settlement in the World Trade Organization, p. 80.

⁵⁵ *US-Section 301*, Panel Report, para. 4.30, see also *Pauwelyn*, p. 24.

⁵⁶ *US-Section 301*, Panel Report, para. 7.22, see also *Bhuiyan*, JIEL, 2002, Vol. 5 No. 3, p. 596.

⁵⁷ Para. 8 of the case.

tions”⁵⁸. In light of that, *Digiland* submits that the requirement to locate the server within *Teleland* results in a zero quota for cross-border supply, which *Teleland* has made specific commitments on. Due to the MOC’s decision, DigiStar is illegitimately obstructed from providing DAS cross-border.

2. *Teleland Violates Art. XVII GATS*

Teleland violates Art. XVII GATS, because the decision of the MOC based on the DPA accords less favourable treatment to *Digiland* services and service suppliers than to like domestic ones. In respect of computer and related services, *Teleland* has committed to grant treatment no less favourable to *Digiland* services than to like domestic ones. The DAS and their suppliers in *Teleland* and *Digiland* are like. *Digiland* services are supplied cross-border whereas *Teleland* services are supplied through commercial presence. However, the services being supplied through different modes does not rebut the presumption of them being like, since the concept of “likeness across modes” has been established in previous WTO disputes.⁵⁹ Furthermore, suppliers located in *Digiland* that supply services into the territory of *Teleland* are discriminated against, if service administrators must be physically transferred to *Teleland*. This requirement imposes unnecessary additional costs for DigiStar. This must be contrasted with the lack of such equivalent additional financial costs for potential domestic *Teleland* DAS suppliers.

3. *Violation of Art. VI:1 and VI:5 GATS*

In casum the Panel does not apply Art. XVI, XVII GATS, *Digiland* submits that first; *Teleland* fails to ensure that the MOC’s decision was administered in a reasonable manner in violation of Art. VI:1 GATS. Second, *Teleland* infringes its obligations under Art. VI:5 GATS, because it applies technical standards that nullify and impair their market access commitments in a manner that is in itself a restriction on the supply of the service, as codified through Art. VI:5(a)(i) in conjunction with Art. VI:4(c) GATS.

Teleland has undertaken specific commitments on DAS, falling in the scope of “Other Computer Services” under the classification number “849” of the CPC. As a result of interpreting the Communication Services in the Schedule, *Teleland* scheduled its commitments using the UN CPC system. Thus, *Teleland*’s listed numbers must be understood in connection to the UN CPC system. Hence, by inscribing the number “849”, *Teleland* made specific commitments on “Other Computer Services” and thus commitments on DAS. The MOC’s decision is not reasonable. *Teleland*’s MOC demands the physical location of servers and administrators for DAS to be in *Teleland*. On this account *Teleland* stipulates that DigiStar must provide its services and administrators exclusively through commercial presence and not cross-border. That is an unreasonable demand, because DigiStar cannot provide its service in the preferred mode. DigiStar is unable to obtain an authorisation to supply services in a cross-border mode or even request such an authorisation. For this reason, *Teleland* infringes Art. VI:1 GATS. Moreover,

⁵⁸ *US–Gambling*, AB Report, para. 216.

⁵⁹ *Canada–Autos*, Panel Report, para. 10.307; *US–Gambling*, Panel Report, para. 3.150.

Teleland violates Art. VI:5 GATS with its requirement of a physical location of the DAS servers and its related personnel in *Teleland*. That is a technical standard that nullifies the option for offering the DAS in the preferred cross-border mode. A technical standard if so is a “requirement which may apply both to the characteristics or definition of the service itself and to the manner in which it is performed”⁶⁰. The request of *Teleland* for physical location and therefore the requested modalities of the generated service violate Art. VI:5 GATS. That is a measure used in comparative evaluation to fix a method of service provision and hence a technical standard. Additionally, those restrictions are “in themselves a restriction on the supply of the service”, as a result of barriers instated by *Teleland*’s MOC.

4. No Justification under Art. XIV GATS

The MOC’s decision is not justified under Art. XIV GATS. Art. XIV GATS contemplates a “two-tier analysis” of a measure that a Member seeks to justify under that provision.⁶¹ First, applying this analysis, the MOC’s decision is not necessary to protect privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts. To determine whether a measure is “necessary” a series of factors have to be considered.⁶² Although the MOC’s decision may contribute somewhat to the protection of privacy, there are less trade restrictive measures available for *Teleland* than the allocation of the database administrators and their servers within *Teleland*. There exist safeguards to protect the personal data contained in the database against abuse, that can be maintained in *Digiland* at an equal level of safety, e.g. protecting hardware against physical attacks by non-authorized persons and protect the servers from computer-based breaking and entering. These safeguards are technically feasible and are a reasonable alternative to a zero quota on cross-border supply. The total prevention of mode 1 supply is a severe and undue restriction on trade, hence the MOC’s decision is not necessary within the meaning of Art. XIV GATS. Second, the MOC’s decision does not meet the requirements of the *chapeau*, because it is applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination, since it is not in accordance with a necessity based interpretation of the DPA. It is also discriminatory, because this interpretation applies to foreign suppliers more than domestic ones. Domestic suppliers have a natural advantage, because they are already located in *Teleland*. Furthermore, it must be emphasised that the burden of proof to demonstrate that a server location in *Teleland* is improving data security for its inhabitants, who use the service, is on *Teleland*’s side.

⁶⁰ *Pauwelyn*, WTR, 2005, Vol. 4 No. 2, p. 154; *Terry*, The Professional Lawyer, 2003, Vol. 83, p. 100.

⁶¹ *US–Gambling*, AB Report, para. 292, see also *Dogans*, BJIL, 2007, Vol. 32 No. 3, pp. 1143 *et seq.*

⁶² *US–Gambling*, AB Report, paras. 305 *et seq.*; first exposed in *Korea–Beef*, AB Report, para. 164.

Request for Findings

Digiland asks the Panel to recommend that the DSB requests that *Teleland* bring its measures and provisions which are inconsistent with Art. VI:1, VI:5, XVI:1, XVI:2(a), XVI:2(c), XVII GATS and not justified under Art. XIV GATS, as well as the measures which are inconsistent with Sec. 1.1, 2.1, 2.2 and 3 of its RP commitments and Sec. 5(a) and 5(b) GATS AoT, into conformity with its WTO obligations.