



Team: 016R

ELSA MOOT COURT COMPETITION ON WTO LAW

2007-2008

Teleland - Measures Affecting Telecommunications Services

Digiland

(Complainant)

VS

Teleland

(Respondent)

SUBMISSION FOR RESPONDENT

*Table of Contents***A. GENERAL**

Table of Contents	I
List of References	III
I. TREATIES.....	III
II. CASES	III
1. WTO Appellate Body Reports	III
2. WTO Panel Reports.....	IV
3. GATT Reports	IV
4. Other Cases	V
III. TREATISES, RESTATEMENTS, DIGESTS	V
IV. ARTICLES AND CONTRIBUTIONS	V
V. MATERIALS	VIII
List of Abbreviations.....	IX

B. SUBSTANTIVE

Statement of the Facts	1
Summary of Arguments	2
Identification of the WTO Measures at Issue.....	4
Legal Pleadings	4
I. TELELAND COMPLIES WITH ITS SCHEDULED RP COMMITMENTS AND OBLIGATIONS UNDER THE AoT	4
1. Full Conformity with Telelands' Scheduled RP Commitments.....	4
a. Full Compliance with Sec. 2.1 and 2.2 RP	4
i. No Commitment of Teleland to Ensure Interconnection Under the RP.....	4
ii. T-GlobalTone, T-Net and T-Mobility Not a Major Supplier within Sec. 2.1 and 2.2 RP	5
iii. Interconnection with Cost-Oriented Rates and Reasonable Terms and Conditions	6
b. Full Compliance with Sec. 1.1 RP.....	6
i. No Anti-Competitive Practices of a Major Supplier	6
ii. Teleland Maintains Appropriate Measures to Prevent Anti-Competitive Practices	7
2. No Violation of the GATS Annex on Telecommunications (AoT).....	7
a. No Application of the AoT to Basic Telecommunications Services	7
b. Teleland Is Consistent with Sec. 5(a) and (b) AoT	8
i. Teleland Complies with Sec. 5(a) AoT	8

ii. Teleland Complies with Sec. 5(b) AoT.....	8
II. TELELAND COMPLIES WITH ART. XVII GATS AND OF SEC. 3 RP.....	8
1. Art. XVII GATS is Complied with	8
a. No Measure Undertaken by Teleland Affects Service Supply	8
b. No Likeness of the Services and Service Suppliers at Stake	9
c. No Less Favourable Treatment Accorded by Teleland	10
d. Compliance with National Treatment Obligation under Aims and Effects Test	11
2. No Violation of Sec. 3 of Telelands' Reference Paper.....	11
III. TELELAND DOES NOT VIOLATE ART. XVI:1, XVI:2(A) AND XVI:2 (C) GATS.....	13
1. The ATA Cannot Be Challenged Before a WTO Panel.....	13
2. Art. XVI GATS is Not Applicable in the Present Case	13
3. Teleland Accords No Less Favourable Treatment than Provided for in its Schedule	14
4. Teleland Complies with Art. XVI:2 GATS.....	15
a. Teleland Complies with Art. XVI:2(a).....	15
b. Teleland Complies with Art. XVI:2(c) GATS.....	15
IV. TELELANDS' MOC DECISION FULLY COMPLIES WITH ART. VI, XVI AND XVII GATS.....	15
1. Telelands' MOC Decision Is Consistent with Art. VI:1 and Art. VI:5 GATS.....	15
a. No Violation of Art. VI:1 GATS.....	15
i. Telelands' MOC Decision Does Not Constitute A Measure of General Application.....	16
ii. The MOC Decision Is Administered in a Reasonable, Objective and Impartial Manner.....	16
b. Telelands' MOC Decision Complies with Art. VI:5 GATS.....	16
i. Compliance with Art. VI:5(a)(i) GATS.....	16
(1) Privacy Protection is a Degree of Quality of a Service.....	17
(2) Requirement Not more Burdensome than Necessary to Ensure this Quality	17
ii. Telelands' MOC Requirement Complies with Art. VI:5(a)(ii) GATS.....	17
2. No Violation of Art. XVI:1, XVI:2(a) and XVI:2 (c) GATS.....	18
3. Compliance with Art. XVII GATS.....	18
4. Even if Telelands' MOC Decision Violates GATS, It Is Justified Under Art. XIV GATS	19
a. Justification Under Art. XIV(a) and (c) GATS.....	19
b. Requirements of the Chapeau of Art. XIV GATS Are Fulfilled.....	19
Request for Findings.....	20

*List of References***I. Treaties**

- (1) General Agreement on Tariffs and Trade of 15 April 1994, WTO Doc LT/UR/A-1A/1/GATT/2.
- (2) General Agreement on Trade in Services of 15 April 1994, WTO Doc. LT/UR/A-1B/S/1.
- (3) Universal Declaration of Human Rights, Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.
- (4) Vienna Convention on the Law of Treaties of 23 May 1969, I.L.M. 8 (1969), 679

II. Cases**1. WTO Appellate Body Reports**

- (1) *Canada – Certain Measures Concerning Periodicals*, 30 July 1997, WT/DS31/AB/R.
- (2) *European Communities-Customs Classification of Certain Computer Equipment*, 5 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R.
- (3) *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, 12 March 2001, WT/DS135/AB/R.
- (4) *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, 9 September 1997, WT/DS27/AB/R.
- (5) *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 19 December 1997, WT/DS50/AB/R.
- (6) *Japan-Taxes on Alcoholic Beverages*, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.
- (7) *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, 11 December 2000, WT/DS161/AB/R, WT/DS169/AB/R.
- (8) *Korea-Taxes on Alcoholic Beverages*, 18 January 1999, WT/DS75/AB/R, WT/DS84/AB/R.
- (9) *United States –Standards for Reformulated and Conventional Gasoline*, 29 April 1996, WT/DS2/AB/R.
- (10) *United States-Anti-Dumping Act of 1916*, 28 August 2000, WT/DS136/AB/R, WT/DS162/AB R.
- (11) *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998,

WT/DS58/AB/R.

(12) *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 7 April 2005, WT/DS285/AB/R.

(13) *United States-Restrictions on Imports of Cotton and Man-made Fibre Underwear*, 10 February 1997, WT/DS24/AB/R.

(14) *United States-Tax Treatment for "Foreign Sales Corporations"*, Recourse to Art. 21.5 of the DSU by the European Communities, 14 January 2002, WT/DS108/AB/RW.

2. WTO Panel Reports

(1) *Argentina-Measures Affecting the Export of Bovin Hides and the Import of Finished Leather*, 19 December 2000, WT/DS155/R.

(2) *Canada-Certain Measures Affecting the Automotive Industry*, 11 February 2000, WT/DS139/R, WT/DS142/R.

(3) *Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes*, 26 November 2004, WT/DS302/R.

(4) *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Complaint by Ecuador, 22 May 1997, WT/DS27/R/ECU.

(5) *Japan-Measures Affecting Consumer Photographic Film and Paper*, 31 March 1998, WT/DS44/R.

(6) *Japan-Taxes on Alcoholic Beverages*, 1 November 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R

(7) *Mexico-Measures Affecting Telecommunications Services*, 2 April 2004, WT/DS204/R.

3. GATT Reports

(1) *EEC-Regulation on Imports of Parts and Components*, 22 March 1990, L6657-37S/132.

(2) *United States- Denial of Most Favoured Nation-Treatment as to Non-Rubber-Footwear of Brazil*, 19 June 1992, DS18/R-39S/128.

(3) *United States-Measures Affecting Alcoholic and Malt Beverages*, 19 June 1992, DS/23/R-39S/206.

(4) *United States-Measures Affecting the Importation, Internal Sale and Use of Tobacco*, 4 October 1994, DS44/R.

(5) *United States-Section 337 of the Tariff Act of 1930*, 7 November 1989, L/6439-36S/345.

(6) *United States-Taxes on Automobiles*, 11 October 1994, DS31/R.

(7) *United States-Taxes on Petroleum and Certain Imported Substances*, 17 June 1987, L/6175-34S/136.

4. Other Cases

The Case of the S.S. Lotus, Decision of the Permanent Court of International Justice, Publications of the Permanent Court of International Justice, Series A - No. 10; Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden 1927.

III. Treatises, Restatements, Digests

(1) *Brickley, James/Smith, Clifford/Zimmerman*, Jerold, *Managerial economics and organizational architecture*, 4th Edition, McGraw-Hill Education 2007.

(2) *Brownlie, Ian*, *Principles of Public International Law*, 5th Edition, Oxford 1998.

(3) *Walter, Elizabeth*, *Cambridge Advanced Learner's Dictionary*, 2nd Edition, Cambridge 25 April 2005.

(4) *Hawker, Sara/Soanes, Catherine* (eds.), *Compact Oxford English Dictionary of Current English*, 3rd Edition, Oxford 30 June 2005.

(5) *Krajewski, Markus*, *National Regulation and Trade Liberalization in Services*, Kluwer Law International 2003.

(6) *Matsushita, Mitsuo/Schoenbaum, Thomas J/Mavroidis, Petros C.*, *The World Trade Organization – Law, Practice, and Policy*, 2nd Edition, Oxford New York 2006.

(7) *Senti, Richard/Conlan, Patricia*, *WTO: Regulation of World Trade after the Uruguay Round*, Zurich 1997.

(8) *Verhoosel, Gaetan*, *National Treatment and WTO Dispute Settlement – Adjudicating the Boundaries of Regulatory Autonomy*, Hart Publishing 2002.

IV. Articles and Contributions

(1) *Abu-Akeel, Aly K.*, *The MFN as it Applies to Service Trade – New Problems for an Old Concept*, in *Journal of World Trade (JWT)* Vol. 33 No.4 (1999), pp. 103-129.

(2) *Bhuiyan, Sharif*, *Mandatory and Discretionary Legislation: The Continued Relevance of the Distinction under the WTO*, in: *Journal of International Economic Law (JIEL)* Vol. 5 No. 3 (2002), pp. 571-604.

(3) *Cossy, Mireille*, *Determining “Likeness” under the GATS*, WTO Staff Working Paper No. ERSD-

- 2006-08, 2006, available at http://www.wto.org/english/res_e/reser_e/ersd200608_e.pdf.
- (4) *Davey, William J.*, Has the WTO Dispute Settlement System Exceeded Its Authority?, in: *Journal of International Economic Law (JIEL)* Vol. 4 No. 1 (2001), pp. 79-110.
 - (5) *Delimatsis, Panagiotis*, Due Process and 'Good' Regulation embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS”, in: *Journal of International Economic Law (JIEL)* Vol. 10 No. 1 (2007), pp. 13-50.
 - (6) *Dogan, Irem*, Taking a Gamble on Public Morals: Invoking the Article XIV Exception To GATS, in: *Brooklyn Journal of International Law (BJIL)* Vol. 32 No. 2 (2007), pp. 1131-1156.
 - (7) *Fredebeul-Krein, Markus/Freytag, Andreas*, Telecommunications and WTO discipline - An assessment of the WTO agreement on telecommunication services, in: *Telecommunications Policy (TP)* Vol. 21 No. 6 (1997), pp. 477-491.
 - (8) *Hoekman, Bernard*, The General Agreement on Trade in Services (GATS), in: *Jackson, John H./Davey, William J./Sykes Jr., Alan O.*, *Legal Problems of International Economic Relations*, 4th ed., West Group 2002, pp. 885-912.
 - (9) *Hudec, Robert E.*, GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test , in: *The International Lawyer (IIL)* Vol. 32 No. 3 (1998), pp. 619-649.
 - (10) *Leroux, Eric H.*, Eleven Years of GATS Case Law: What Have We Learned? *Journal of International Economic Law (JIEL)* Vol. 10 No. 4 (2007), pp. 749-793.
 - (11) *Low, Patrick/Mattoo, Aaditya*, Is There a Better Way? Alternative Approaches to Liberalization under GATS, in: *Sauvé, Pierre/Stern, Robert M.* (eds.), *GATS 2000 – New Directions in Services Trade Liberalization* (2000), pp. 449-472.
 - (12) *Marsden, Philip*, WTO decides its first competition case, with disappointing results, in: *Competition Law Insight (CLI)* May (2004), pp. 2-9.
 - (13) *Matsushita, Mitsuo/Iino, Aya*, Cross-Border Gambling and Betting Services under WTO Disciplines, in: *Asian Journal of Comparative Law (AJCL)* Vol. 1 No. 1 (2006), Article 17, pp. 1-19.
 - (14) *Mattoo, Aaditya*, National Treatment in the GATS: Corner-stone or Pandora's Box, in: *Journal of World Trade (JWT)* Vol. 31 No. 1 (1997), pp. 107-135.
 - (15) *McCloskey, H.J.*, The Political Ideal of Privacy, in: *The Philosophical Quarterly (TPQ)* Vol. 21 No. 85.

(Oct, 1971), pp. 303-314.

- (16) *Mitchell*, Andrew D., The Legal Basis for Using Principles in WTO Disputes, in: *Journal of International Economic Law (JIEL)* Vol. 10 No. 4 (2007), pp. 795-835.
- (17) *Naiki*, Yoshiko, The Mandatory, Discretionary Doctrine in WTO Law: The US-Section 301 and its Aftermath, in: *Journal of International Economic Law (JIEL)* Vol. 7 No.1 (2004), pp. 23-72.
- (18) *Neven*, Damien J./*Mavroidis*, Petros C., El Mess in TELMEX: A Comment on Mexico – Measures Affecting Telecommunications Services, in: *World Trade Review (WTR)* Vol. 5 No. 2 (2006), pp. 271-296.
- (19) *Nicolaidis*, Kalypso/*Trachtman*, Joel P., From Policed Regulation to Managed Recognition in GATS, in *Sauvé*, Pierre/*Stern*, Robert M. (eds.), *GATS 2000 – New Directions in Services Trade Liberalization* (2000), pp. 241-282.
- (20) *Ortino*, Federico, Treaty Interpretation and the WTO Appellate Body Report in U.S.-Gambling: a Critique, in: *Journal of International Economic Law (JIEL)* Vol. 9 No. 1 (2006), pp. 117-148.
- (21) *Park*, Michael, Market Access and Exceptions under the GATS and Online Gambling Services, in: *Southwestern Journal of Law and Trade in the Americas (SJLTA)*, 2006, Vol. 12 No. 2, pp. 495-524.
- (22) *Pauwelyn*, Joost, Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS, in: *World Trade Review (WTR)* Vol. 4 No. 2 (2005), pp. 131-170.
- (23) *Peng*, Shin-Yi, Trade in Telecommunications Services: Doha and Beyond, in: *Journal of World Trade (JWT)* Vol. 41 No. 2 (2007), pp. 293-317.
- (24) *Sherman*, Laura B., “Wildly Enthusiastic” About the First Multilateral Agreement on Trade in Telecommunications Services, in: *Federal Communications Law Journal (FCLJ)* Vol. 51 (1998), pp. 61-110.
- (25) *Sherman*, Laura B., Clarifying the Meaning of WTO Telecommunications Obligations: Mexico – Measures Affecting Telecommunications Obligations, in: *Info* Vol. 7 No. 6 (2005), pp. 16-32.
- (26) *Trachtman*, Joel P., Lessons for the GATS from Existing WTO Rules on Domestic Regulation, in: *Mattoo*, Aaditya/*Sauvé*, Pierre (eds.), *Domestic Regulation and Service Trade Liberalization*, The World Bank 2007, pp. 57-82.
- (27) *Trachtman*, Joel P., United States: Measures Affecting the Cross-Border Supply of Betting and

Gambling Services. WT/DS285/AB/R, in: the American Journal of International Law(AJIEL)Vol. 99 No. 4 (2005), pp. 861-867.

(28) *Van Damme, Isabelle*, The Interpretation of Scheduled Commitments, in: Journal of World Trade (JWT) Vol. 41 No. 1 (2007), pp. 1-52.

(29) *Wellenius, Björn/Galarza, Juan/Guermazi, Bouthaina*, Telecommunications and the WTO: the Case of Mexico, World Bank Policy Research Working Paper 3759, November 2005.

(30) *Wunsch-Vincent, Sacha*, The Internet, cross-border trade in services, and the GATS: lessons from US-Gambling, in: World Trade Review (WTR) Vol. 5 No. 3 (2006), pp. 319-355.

V. Materials

(1) Border Tax Adjustments, Report of the Working Party, adopted 2 December 1970, BISD 18S/97.

(2) Chairman's note of 16 January 1997, (WTO document S/GBT/W/2/Rev. 1) on Scheduling Basic Telecommunication Service Commitments.

(3) Council for Trade in Services - Special Session - Economic Needs Tests - Note by the Secretariat, (WTO document S/CSS/W/118), 30 November 2001.

(4) Decision on Disciplines Relating to the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998, (WTO document S/L/63), 15 December 1998.

(5) Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 23 March 2001, (WTO document S/L/92 28), March 2001.

(6) ITU-T Series Recommendation D.140, available at http://www.itu.int/osg/csd/intset/itu-t/d140/d140_e_rev.html.

(7) Services Sectoral Classification List: Note by the Secretariat, (WTO document MTN.GNS/W/120), 10 July 1991.

(8) Working Party on Professional Services, the Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI.4 of the General Agreement on Trade in Services, Note by the Secretariat, (WTO document S/WPPS/W/9), 11 September 1996.

List of Abbreviations

AB	Appellate Body
AJCL	Asian Journal of Comparative Law
AoT	Annex on Telecommunications
Art.	Article/ Articles
ATA	Amendment to the Telecommunications Act
BJIL	Brooklyn Journal of International Law
CLI	Competition Law Insight
CPP	calling-party-pays
DAS	Database Administrator Services
Doc.	Document
DPA	Data Protection Act
DR	Dominican Republic
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
eds.	editors
ENT	Economic Needs Test
<i>et seq.</i>	<i>et sequence</i> , and the following
FCLJ	Federal Communications Law Journal
Fn.	Footnote
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trades 1994
<i>i. e.</i>	<i>id est</i> , that is
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
RNP	Regulation on Number Portability

RP	Reference Paper
RPP	Receiving-Party-Pays
RUS	Regulation on Universal Services
Schedule	Schedule of Specific Commitments
Sec.	Section/Sections
SSCL	Services Sectoral Classification List
TCC	Teleland Communications Commission
Telecoms	Telecommunications
TIL	The International Lawyer
TP	Telecommunications Policy
TPQ	The Philosophical Quarterly
US	United States
UTP	Universal Teleland Project
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
<i>vs</i>	<i>versus</i>
WTO	World Trade Organization
WTR	World Trade Review
subpara.	subparagraph/ subparagraphs

Statement of the Facts

Digiland is a developed country WTO Member that follows a receiving-party-pays (RPP) mobile telephone regime. In the recent years, the volume of *Digiland*-outbound international telephone calls to mobile phones in *Teleland* has rapidly increased. For their supply to *Teleland*, *Digiland* telephone operators link their networks at the border with that of TeleCom, a *Teleland* fixed-line operator with an international gateway. TeleCom, in turn, links its network with those of *Telelands'* mobile operators for termination within their networks. *Teleland* is a developing country WTO Member and made specific commitments in telecommunications (telecoms) services and committed to the Reference Paper (RP). *Teleland* follows a calling-party-pays (CPP) mobile telephone regime. It has three mobile suppliers with similar frequency-bandwidths and similar domestic market shares. They charge different settlement rates for each telephone call terminating within their networks regardless of its origin. Over the past three years, they reduced their mobile termination rates between 7-12 %.

Teleland has a broadband penetration rate of only 17 % compared with an average penetration rate of 52 % in developed countries. For the purpose of bridging this "digital divide" and funding the "Universal *Teleland* Project" (UTP) for building broadband access to schools, libraries and hospitals, the *Teleland* Communications Commission (TCC) issued the Regulation on Universal Services in 2006, according to which a surcharge is imposed on all incoming international telephone calls. Likewise, all operators in *Teleland* have to contribute 1 % of their annual revenue which is also allocated to the UTP to promote the extension of telecoms into rural areas and therefore support *Telelands'* development.

Prior to 1 January 2007, *Teleland* issued the Amendment to the Telecommunication Act (ATA), which became effective immediately. It allows the TCC to open the mobile telecoms sector and to extend the number of additional licenses. Furthermore, *Teleland* is currently drafting rules to properly govern the further opening of the mobile telecom market.

In 2007, the TCC issued the Regulation on Number Portability (RNP), which enables subscribers to retain their existing numbers when switching the mobile telephone operator. For administration of this database, *Telelands'* mobile operators must collectively enter into a contract with a database management company. The database allows the operators to exchange wireless port requests and contains all subscriber information. The RNP also stipulates that the contract must be approved by the Ministry of Communications (MOC). The MOC rejected the contract between *Telelands'* mobile operators and *DigiStar*, a *Digiland* Database Administrator. The MOC Decision is based on the principles set forth in the Data Protection Act (DPA) of *Teleland* that secures the privacy and personal data within *Teleland*.

Since both countries failed to resolve the disputes at issue, *Digiland* requested the establishment of a panel according to Art. 6 DSU.

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

- *Teleland* complies with Section 2.1 and 2.2 Reference Paper, because *Teleland* only committed to ensure interconnection of facilities-based and public-switched basic telecoms services. Thus, telecoms services by *Digiland* suppliers through TeleCom on a resale basis within *Teleland* are excluded. *Even if Teleland* had undertaken such a commitment, T-GlobalTone, T-Net and T-Mobility are not a major supplier within Section 2.2 RP because they do not have market power in the relevant market. *Even if Telelands'* three mobile suppliers are a major supplier, *Teleland* ensures an interconnection with cost-oriented rates and reasonable terms and conditions.
- *Teleland* is consistent with Section 1.1. RP, since T-GlobalTone, T-Net and T-Mobility are not a major supplier engaging or continuing in anti-competitive practices. *Even if so, Teleland* maintains appropriate preventive measures by passing the Amendment to the Telecommunications Act (ATA) of *Teleland* which counteracts possible price fixing cartels and enhances competition.
- *Teleland* does not violate Sections 5(a) and (b) Annex on Telecommunications (AoT), because the AoT does not apply to basic telecoms services. *Even if the AoT is applicable, Teleland* ensures *Digiland* suppliers access to and use of public transport telecoms services on reasonable terms and conditions.

Claim II:

- The Regulation on Universal Services (RUS) issued by the Teleland Communications Commission (TCC) is consistent with the National Treatment Obligation of Art. XVII of the GATS and with Sec. 3 of *Telelands'* RP, because: First, the RUS is not a measure affecting service supply. Second, even if the Panel should take the view that the services and service suppliers at stake are not "like". Third, the treatment accorded to foreign services is no less favourable than that accorded to domestic suppliers. Fourth, it complies with Art. XVII GATS under the Aims and Effects test.
- The Regulation on Universal Services (RUS) complies Section 3 RP, because: First, it is not more burdensome than necessary; Second, it is competitively neutral; Third, it does not discriminate against foreign service suppliers.

Claim III:

- The ATA cannot be challenged under GATS because it is discretionary law that according to the mandatory-discretionary-doctrine cannot violate WTO if it is not specifically applied.
- *Even if the Panel should review the ATA's consistency with WTO law, Art. XVI GATS is not applicable in the present case*
- *Even if the Panel were to apply Art. XVI GATS in the present case, Teleland complies with XVI:1 GATS by according less favourable treatment than provided for in its Schedule.*

- *Even if* the Panel were to review the ATA's consistency with its WTO obligations, Art. XVI:2(a) and XVI:2(c) are complied with since there is neither a limitation of the number of service suppliers nor on the service volume, because: First, the analysis of the relevant market inscribed in the Schedule does not constitute an Economic Needs Test (ENT). Second, there is no numerical quota for number of service suppliers. Third, the service volume is neither limited by an ENT nor by a numerical quota.

Claim IV:

- *Telelands'* Ministry of Communications (MOC) Decision does not violate Art. VI:1 GATS, because the Decision is not a measure of general application within Art. VI:1 GATS. *Even if so*, it is administered reasonably, objectively and impartially, since it is based on the necessary interpretation of the Data Protection Act (DPA) protecting individual privacy and applies to both domestic and foreign suppliers in the same manner.
- The MOC Decision complies with Art. VI:5 GATS, because the requirement of the physical location of Database Administrators and their servers within *Teleland* is not more burdensome than necessary to ensure the quality of the Data Administrator Services (DAS) pursuant to Art. VI:5(a)(i) and (ii) GATS.
- Art. XVI GATS is not applicable, since Art. VI:5 GATS and Art. XVI GATS are mutually exclusive. *Even if* Art. XVI GATS is applicable, *Teleland* complies with Art. XVI:1, XVI 2 (a) and (c) GATS, since the MOC Decision is not a limitation on the number of service suppliers or service operations in the form of a "zero quota".
- *Teleland* complies with Art. XVII GATS because the DAS supplied by foreign suppliers through the mode 1 of Art. I:2 GATS and DAS supplied by domestic suppliers within *Teleland* are not like. *Even if so*, the Decision does not treat foreign services or foreign suppliers less favourably than domestic ones, since the MOC requirement is equally applied *de-facto* and *de jure* to both.
- The MOC Decision is in any case justified under Art. XIV GATS, because it is necessary to protect public morals and to maintain public order according to Art. XIV (a) GATS and to secure compliance with the GATS-consistent DPA pursuant to Art. XIV(c) GATS. Further, the Decision fulfils the requirements of the *chapeau* of Art. XIV GATS.

Identification of the WTO Measures at Issue

Regarding the scheduled commitments, **Sec. 1.1 RP** requires the maintenance of preventive measures against a major supplier's anti-competitive practices. 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 respectively should be ensured. **Sec. 3 RP** allows discretion to maintain universal service obligations of any kind decided upon by a Member. **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 Complies with Its Scheduled RP Commitments and Obligations under the AoT****1. Full Conformity with Telelands' Scheduled RP Commitments*****a. Full Compliance with Sec. 2.1 and 2.2 RP***

Teleland complies with Sec. 2.1 and 2.2 RP, because: First, *Teleland* has undertaken no interconnection commitment with respect to the international telephone calls originating in *Digiland* and terminating in *Telelands'* mobile network; Second, even if so, T-GlobalTone, T-Net and T-Mobility are not a major supplier under Sec. 2 RP. And third, *Teleland* has in any case ensured an interconnection with cost-oriented prices and reasonable terms and conditions.

i. No Commitment of Teleland to Ensure Interconnection Under the RP

Teleland did not commit to ensure interconnection between *Digiland* telecom services suppliers and its mobile operators under Sec. 2 RP. To terminate telephone calls into *Telelands'* mobile networks, *Digiland* suppliers link their networks to that of TeleCom, which in turn connects its' network with those of *Telelands'* mobile operators. Indeed, *Teleland* has not committed to ensure interconnection in the latter case. According to the principles set out in Art. 3.2 DSU, WTO Law and thus the scheduled commitments as an integral part of the GATS¹ are interpreted pursuant to the rules of treaty interpretation of the VCLT². An application of Art. 31 and 32 VCLT to the interpretation of the introductory heading of the basic telecommunications services sector in *Telelands'* Schedule³ demonstrates that it only committed to ensure interconnection of these services supplied facilities-based and public switched. Hence, the supply of telecom services by *Digiland* suppliers through TeleCom on a resale basis within *Teleland* is

¹ *Neven/Macroidis*, WTR Vol. 5 No. 2 (2006), p. 277; *Van Damme*, JWT Vol. 41 No. 1 (2007), p 4.

² *US-Gasoline*, AB Report, 16-17; *India-Patents*, AB Report, paras. 45-46, *US-Shrimp*, AB Report, para. 34; *EC-Computer Equipment*, AB Report, para. 84, see also *Mitchell*, JIEL Vol. 10 No. 4 (2007), p. 807.

³ The introductory heading reads as follows: "(A) Basic Telecommunications Services (Facilities-based and public switched telecom services)".

excluded. The Panel in *Mexico-Telecoms*⁴ stated that the introductory heading of a service sector in a Schedule limits the scope of the additional commitments and must be understood as a limitation of the scope of the RP obligations to services supplied only in this way. Thereby, “facilities-based” services, which only refers to services that are provided by an operator over its own facilities⁵, must be distinguished from services on a “resale basis”. The interpretation of “public” in the accompanying definition in the AoT of “public telecommunications transport service”, refers to a service supplied for public use. This interpretation is confirmed by the Note by the Chairman⁶, which according to Art. 32 VCLT serves as “supplementary means” of interpretation⁷. Therein, it is specified that any basic telecom service listed in the sector column encompasses public and non-public services unless clearly otherwise noted. As *Teleland* clearly noted otherwise in its sector column, it only commits to ensure interconnection of facilities-based and public switched basic telecoms services.

ii. T-GlobalTone, T-Net and T-Mobility Not a Major Supplier within Sec. 2.1 and 2.2 RP

Even if *Teleland* had undertaken an interconnection commitment, *Teleland* complies with Sec. 2.1 and 2.2 RP, since T-GlobalTone, T-Net and T-Mobility are not a major supplier. Pursuant to the RP’s definition, a major supplier is a supplier which has the ability to materially affect the terms of participation in the relevant market as a result of control over essential facilities or use of its market position. The relevant market on hand is the one for termination of international telephone calls in *Telelands’* mobile network. The relevant market is defined by application of a “demand substitution test”, i.e., whether a consumer would consider “two products” substitutable; thereby, from the consumer’s perspective international and domestic as well as outgoing and incoming voice telephone calls are not a practical alternative to the other.⁸ Thus, a consumer would not substitute international calls from *Digiland* to *Teleland* for termination in the mobile network for voice telephone service from *Teleland* to *Digiland* or within *Teleland*. In the relevant market here, no single mobile provider in *Teleland* enjoys market power as a result of control over essential facilities or use of its market position. Market power means the ability to raise prices without risking losing customers to competitors.⁹ As there are only three mobile operators with similar share frequency-bandwidths and market shares, none of them enjoys a monopoly status

⁴ *Mexico-Telecoms*, Panel Report, paras. 7.48 et. seq., 7.93-95.

⁵ *Mexico-Telecoms*, Panel Report, paras. 7.56 and 7.71.

⁶ Note by Chairman, 16 January 1997, S/GBT/W/2/Rev. 1, attached to the Guidelines for the Scheduling of Specific Commitments Under the GATS, S/L/92, 28 March 2001, paras. 26, 28.

⁷ *US-Gambling*, AB Report, para. 197.

⁸ *Mexico-Telecoms*, Panel Report, para. 7.152.

⁹ *Brickley/Smith/Zimmerman*, p. 185.

with the ability to raise prices without losing their customers to the other mobile operators.

iii. Interconnection with Cost-Oriented Rates and Reasonable Terms and Conditions

Even if the Panel were to consider the three mobile operators as a major supplier, *Teleland* ensures an interconnection with cost-oriented rates and reasonable terms and conditions under Sec. 2.2(b) RP. “Cost-oriented” means that the rates charged by telecoms services suppliers should be founded on costs incurred in supplying the service. The flexibility of the term “cost-oriented” suggests that several costing methodologies exist for the calculating of “cost-oriented” rates.¹⁰ Due to that, the Panel in *Mexico-Telecoms* considered several methodologies to determine whether rates are cost-oriented, *inter alia*, whether rates charged to domestic and foreign suppliers differ¹¹. Thereby it found that interconnection rates are not cost-oriented if they are by any of these methodologies substantially higher than the costs in providing an interconnection.¹² Thus, it must be understood that the mobile rates charged are cost-oriented, as long as they are cost-oriented by at least one costing methodology. Since in the present case, the mobile operators charge identical mobile settlement rates to both domestic and foreign suppliers, this indicates that they are cost-oriented. Furthermore, the interconnection is supplied on reasonable terms and conditions. Following the Panel in *Mexico-Telecoms*, the term “reasonable” is to be interpreted more broadly than the term “cost-oriented”.¹³ Thus, “reasonable” terms and conditions still cover rates charged for interconnection that are higher than rates that are cost-oriented. Hence, rates for interconnection are “reasonable”, as long as they are cost-oriented. Since the mobile rates on hand are cost-oriented, they are supplied on reasonable terms and conditions.

b. Full Compliance with Sec. 1.1 RP

Teleland complies with Sec. 1.1 RP, because: First, there are no anti-competitive practices of a major supplier. Second, even if so, it maintains preventive measures against such conduct.

i. No Anti-Competitive Practices of a Major Supplier

As stated above, none of *Telelands'* mobile operators are a major supplier pursuant to the RP's general definition. Even if the Panel were to consider them so, they are not engaging in or continuing anti-competitive practices. Sec. 1.2 RP merely contains a non-exhaustive list of examples of “anti-competitive practices”¹⁴. In accordance with this, the Panel in *Mexico-Telecoms* observed that anti-

¹⁰ *Mexico-Telecoms*, Panel Report, para. 7.168, with reference to ITU-T Series Recommendation D.140; see also *Wellenius/Galarza/Guermazi*, p. 8; *Peng*, JWT Vol. 41 No. 2 (2007), p. 314.

¹¹ *Mexico-Telecoms*, Panel Report, paras. 7.189 *et seq.*

¹² *Ibid*, para. 7.216.

¹³ *Ibid*, para. 7.334.

¹⁴ *Marsden*, CLI May (2004), p. 5; *Sherman*, Info Vol. 7 No. 6 (2005), p. 26.

competitive practices by its wording refer to actions that lessen rivalry or competition in the market which include “horizontal price fixing agreements”¹⁵. In the present case, the charging of different mobile rates is evidence for there being no price fixing in *Teleland*. In fact, there is clear evidence of competition in the market, since the mobile rates were reduced between 7-12% over the past three years.

ii. Teleland Maintains Appropriate Measures to Prevent Anti-Competitive Practices

In casum the Panel takes the view that T-GlobalTone, T-Net and T-Mobility are engaging in anti-competitive practices, *Teleland* complies with Sec. 1.1 RP, since it maintains appropriate preventive measures by passing the ATA. The RP does not specify what measures must be adopted in order to carry out the provisions of Sec. 1.1 of the RP. Furthermore, the phrasing of para. 1.1 RP does not require a Member to guarantee to completely prevent or to stop such conduct.¹⁶ *Telelands'* ATA sets forth the distribution of additional frequency to enable market entry for new suppliers. Thus, competition would in any case be enhanced and possible price fixing cartels would be eradicated.

2. No Violation of the GATS Annex on Telecommunications (AoT)

Teleland does not violate the AoT, because: First, the GATS AoT is not applicable to basic telecoms services. Second, even if so, *Teleland* complies with Sec. 5(a) and (b) AoT.

a. No Application of the AoT to Basic Telecommunications Services

The AoT does not apply to basic telecoms services. Although the Panel in *Mexico-Telecoms* found, by narrowly interpreting the wording of the “objective” and Sec. 5(a) AoT, that these services are covered by the AoT¹⁷, the AB in *US-Gambling* stated that a dictionary interpretation alone is not sufficient to resolve complex questions of interpretation.¹⁸ Particularly, the AoT by its wording rather applies to “access to and use of” public telecommunications transport networks and services (PTTNS) as a transport means for other economic activities, and not to the supply of basic telecoms services *per se*.¹⁹ Furthermore, the AoTs’ negotiation history confirms that approach for the AoT was not aimed at liberalizing the basic telecoms market.²⁰ Additionally, as there is no doctrine of *stare decisis* in WTO dispute settlement²¹, this underscores the need for the Panel in the present case to make an independent assessment

¹⁵ *Mexico-Telecoms*, Panel Report, paras. 7.230, 7.232.

¹⁶ See also: *Sherman*, FCLJ Vol. 51 (1998), p. 9.

¹⁷ *Mexico-Telecoms*, Panel Report, paras. 7.274 *et seq.*.

¹⁸ *US-Gambling*, AB Report, para 164; see also: *Ortino*, JIEL Vol. 9 No. 1 (2006), p. 123.

¹⁹ *Fredebeul-Krein/Freytag*, TP Vol. 21 No. 6 (1997), pp. 485 *et seq.*; *Krajewski*, p. 167.

²⁰ *Fredebeul-Krein/Freytag*, TP Vol. 21 No. 6 (1997), p. 483.

²¹ *Japan- Alcohol*, AB Report, para. 14; *US-Foreign Sales Corporations*, AB Report, para. 108.

of the AoTs' applicability, or rather the lack of it thereof, to basic telecoms services.

b. Teleland Is Consistent with Sec. 5(a) and (b) AoT

i. Teleland Complies with Sec. 5(a) AoT

Even if the AoT is applicable, *Teleland* complies with Sec. 5(a) AoT, because it ensures *Digiland* suppliers access to and use of PTTNS on reasonable terms and conditions. As elaborated above, the rates charged by the mobile operators for access to their networks are reasonable.

ii. Teleland Complies with Sec. 5(b) AoT

Teleland complies with Sec. 5(b) AoT. It ensures, as committed to in its Schedule, that non-facilities-based, commercially present suppliers have access to and use of public mobile telecoms transport networks to supply private leased circuits. This is because, *Teleland*, according to Sec. 2(ii) AoT and its scheduled commitments, grants market access for mobile services only through mode 3 by establishing joint venture enterprises and to provide mobile private leased services. *Even if* the Panel should read the Schedule to include the supply of mobile private leased circuits by *Digiland* suppliers over their own mobile telecoms networks, *Teleland* complies with Sec. 5(b) AoT, even though the market has not been opened by the TCC yet. Pursuant to Sec. 5(e) (ii) and (f) (vi) AoT, licensing procedures can be imposed, if it is necessary to protect the technical integrity of public telecoms services. Without a licensing procedure for mobile frequencies *Teleland* cannot prevent the overlapping of frequencies used, which could lead to grave impairments of mobile telecommunications service supply.

II. Teleland Complies with Art. XVII GATS and of Sec. 3 RP

In the following, *Teleland* will demonstrate that the RUS issued by the TCC is consistent with the National Treatment Obligation of Art. XVII of the GATS and with Sec. 3 of *Telelands'* RP.

1. Art. XVII GATS is Complied with

Teleland complies with Art. XVII GATS because: First, the RUS is not a measure affecting service supply. Second, the services and service suppliers at stake are not "like". Third, the treatment accorded to foreign services is no less favourable than that accorded to domestic suppliers. Fourth, it complies with Art. XVII GATS under the Aims and Effects test.

a. No Measure Undertaken by Teleland Affects Service Supply

There is no measure taken by *Teleland* affecting service supply. The AB in *EC-Bananas III* held that the term "affecting" has a broad scope and must be understood as "has an effect on"²². Irregardless of whether it is interpreted as above or more narrowly, *Teleland* has neither taken any direct measures nor is there any effect on supply. Reading the definition of "affecting" narrowly, as a direct regulation on service supply, there is no measure affecting it in the present case. This is because the RUS does not govern the supply of telecoms services itself. It simply imposes a surcharge and leaves the supply itself

²² *EC-Bananas III*, AB Report, para 220.

unaffected. However, even with the *de facto* determination of whether a measure is “affecting” service supply, as in the AB Report in *EC-Bananas*, there is no effect on the service supply, because of the fact that the calling volume has rapidly increased. The Panel in *Japan-Film*²³ held that it must be shown that the market position of the imported products is *upset by* the measure. The onus thus lies on *Digiland* to show a causal link between the measure and a detrimental effect on the competitive position of the foreign services at stake. *Digiland* has neither succeeded in showing such effect, nor in demonstrating sufficient causality.

b. No Likeness of the Services and Service Suppliers at Stake

The services and service suppliers at stake, namely incoming and outgoing international telephone calls and their suppliers, are not like. Firstly, the Services at stake, are not like under Art. XVII GATS under the Border Tax Adjustment Working Party report likeness criteria. These criteria of *intrinsic characteristics, classification, end-uses and consumer tastes* in the *Border Tax Adjustments*²⁴ have been consistently referred to in WTO jurisprudence.²⁵ They also apply in the GATS context as it was used by GATS jurisprudence²⁶. The *Border Tax Adjustments'* likeness test is a holistic approach. It is not a closed treaty-mandated list of criteria to determine likeness²⁷, but rather it is merely indicative, inferring that likeness is more likely the more criteria are met; the majority of these four criteria show that *Digiland* and *Teleland* operators and services are not like. The *classification* criterion is not applicable because the Services Sectoral Classification List (SSCL)²⁸ *Teleland* used in its Schedule is too ambiguous²⁹. The *intrinsic characteristics* criterion must be understood as “physical” characteristics³⁰. Since services often have no physical form, this test is not suitable for determining their likeness³¹. *Consumers' tastes* examines the

²³ *Japan-Film*, Panel Report, para. 10.82.

²⁴ Border Tax Adjustments, BISD 18S/97, para. 18.

²⁵ *US-Gambling*, AB Report, p. C-65; *Korea-Alcohol*, AB Report, para. 137; *Japan-Alcohol*, AB Report, paras. 20-21; *EC-Asbestos*, AB Report, para. 85; *Canada-Periodicals*, Panel Report, para. 5.18.

²⁶ *US-Gambling*, Panel Report, para. 3.151; *EC-Bananas III*, Panel Report, para. 7.322.

²⁷ *EC-Asbestos*, AB Report, para. 102.

²⁸ Services Sectoral Classification List, MTN.GNS/W/120.

²⁹ *Peng*, JWT Vol. 41 No. 2 (2007), p. 316.

³⁰ *Cossy*, WTO Staff Working Paper ERSD-2006-08, p. 18.

³¹ *Mattoo*, JWT Vol. 31 No. 1 (1997), p. 125; *Cossy*, p. 20; *Leroux*, JIEL Vol. 10 No. 4 (2007), Fn. 118.

substitutability of a product or service in the eyes of customers³². It applies where the physical properties are very different³³. Since the comparison is drawn between services and not products, applying *physical* characteristics is not possible³⁴ and this criterion must be *a fortiori* inapplicable here. The indicator for the unlikeness of the calls at issue, aside from the fact that incoming and outgoing international calls are generally not substitutable, is the different accounting systems. They result, depending on the call origin, in either one party paying for the *whole* call or each party paying *a share*, which is of significant importance to the consumer. Secondly, the service suppliers at stake are not like. Suppliers are like once they supply like services³⁵. Assessing likeness by means of supplier-related characteristics is also not viable as the realistic application of these criteria is contentious - for example: two completely different service suppliers can provide "like" services. Hence, likeness vastly depends on the service itself. Since the services provided are as stated above unlike, service suppliers at hand are as well.

Thirdly, *even if* the Panel should regard services or service suppliers to be "like", this is not sufficient to establish likeness within the meaning of Art. XVII GATS for the determination of likeness must be based on a cumulative test. Art. XVII GATS refers by its wording to both the service "and" its supplier. The distinction between service and service supplier is artificial³⁶ and a measure targeted at the supplier always affects the service and *vice versa*³⁷. Furthermore, an alternative approach would contradict the principle that likeness should be construed narrowly³⁸ and shift the burden of proof in an inappropriate manner, putting the onus on the complainant to prove the likeness of either supplier *or* services. This interpretation refers to the GATT context, but is equally applicable here since the concept of national treatment in GATS and GATT is the very same³⁹.

c. No Less Favourable Treatment Accorded by Teleland

Even if the Panel were to assume likeness, the treatment *Teleland* accords to *Digiland* suppliers is no less favourable than that accorded to its own suppliers. According to Art. XVII:2 GATS, *Teleland* may meet its obligation by according formally, i.e. *de jure*, different treatment, which means that the *de facto* situa-

³² *Cosy*, p. 22.

³³ *EC-Asbestos*, AB Report, para. 139.

³⁴ *Cosy*, p. 19.

³⁵ *Canada-Autos*, Panel Report, para. 10.248.

³⁶ *Verhoosel*, p. 62; *Nicolaïdis & Trachtman*, in: *Sauvé/Stern* (eds.), GATS 2000, p. 254.

³⁷ *Abu-Akeel*, JWT Vol. 33 No.4 (1999), pp. 109-110.

³⁸ *Japan- Alcohol*, AB Report, p. 19.

³⁹ *Senti/Conlan*, p. 93.

tion matters. Less favourable treatment exists when a measure has a detrimental effect on the supply⁴⁰. The calling volume has increased despite the surcharge, which evidences that there is no such effect. It should also be borne in mind that domestic suppliers equally have to contribute to universal service.

d. Compliance with National Treatment Obligation under Aims and Effects Test

In addition, *Teleland* complies with its obligation under the Aims and Effects Test. It was initially espoused in *US-Malt*⁴¹ and further elaborated on in *US-Taxes on Automobiles*⁴²; the latter report functioning as useful guidance for other panels⁴³. The test elaborates whether a regulatory distinction has a *bona fide* aim and whether it creates a domestic protectionist effect⁴⁴. It thus shifts the main focus of determining a violation of Art. XVII from the likeness test to the measure at stake, since the protection of domestic production is a mandatory requirement for an infringement of the National Treatment obligation⁴⁵. Thus, the determination of likeness only has relevance when a measure has such effect⁴⁶. The RUS does neither have the aim to protect domestic suppliers, nor does it have the effect. A measure that influences competitive conditions in favour of domestic suppliers and which does so as its intended aim and effect, not merely incidentally, is protectionistic⁴⁷. The RUS is intended to promote digital development, not improve the market situation of domestic suppliers. It also has no protectionistic effect since the calling volume between *Digiland* and *Teleland* has vastly increased. Thus, no protectionist aim or effect exists and affirms *Telelands'* compliance with its national treatment obligations. Furthermore, the burden of proof for a national treatment violation is on the complainant⁴⁸. *Digiland* has not proved a national treatment obligation violation, as elaborated above.

2. No Violation of Sec. 3 of Telelands' Reference Paper

The Regulation on Universal Services (RUS) is consistent with Section 3 of the RP, because: First, it is not more burdensome than necessary; Second, it is competitively neutral; And Third, it does not dis-

⁴⁰ *Korea-Beef*, AB Report, para. 137.

⁴¹ *US-Malt*, Panel Report, para. 5.74.

⁴² *US-Taxes on Automobiles*, Panel Report, paras. 5.25, 5.29.

⁴³ *Japan- Alcohol*, Panel Report, p. 15-16.

⁴⁴ *US-Taxes on Automobiles*, Panel Report, para. 5.10.

⁴⁵ *Hudec*, TIL Vol. 32 No. 3 (1998), p. 631.

⁴⁶ *Cossy*, p. 25.

⁴⁷ *US-Taxes on Automobiles*, Panel Report, para. 5.10.

⁴⁸ *Korea-Beef*, AB Report, para. 617.

criminate against foreign service suppliers.

The RUS is not more burdensome than necessary. This is because there is no disadvantage for *Digiland* services. To determine what “necessary” means, the Panel in *DR-Cigarettes*⁴⁹ examined the effect on trade. It found that the less impact a measure has on the supply, the more likely it is to be considered “necessary”. Following this *de facto*-approach, the fact that there is no restrictive effect on the volume of telephone calls from *Digiland* to *Teleland*, demonstrates that the RUS is not more burdensome than necessary. Furthermore, the purpose asserted by the RUS justifies the imposition of a surcharge. According to the AB on *Korea-Beef*, it takes a “weighting and balancing of a series of factors”, *inter alia* of the interests and values asserted by the measure, its impact on commerce and alternative, less burdensome measures⁵⁰. This statement refers to Art. XX GATT and is equally applicable in the GATS context⁵¹. The RUS funds the digital development and helps to diminish the digital divide, which is a substantial obstacle for *Telelands*’ further advancement as a developing country. These values must be weighed against the surcharge that is charged to *Digiland* suppliers. Since the volume of international telephone calls terminated in *Teleland* has increased greatly, the surcharge has no effect on commerce. Further, a surcharge on incoming international telephone calls is the only way to involve foreign suppliers, which is fully legitimate since pursuant to Sec. 3 RP, *Teleland* has the right to define the kind of universal service obligations it wishes to maintain. As the aim pursued by the RUS is sufficiently important and no other equally effective measure exists for achieving it, the RUS necessary.

The RUS is competitively neutral, because it does not modify the market position of *Digiland* suppliers and *Teleland* operators are equally obliged to contribute. Competitive neutrality implies that a measure does not affect the conditions of competition. It is therefore necessary to assess whether it modifies the market position of service suppliers. Firstly, there is no direct impairment for there is no detrimental effect on the calling volume. Secondly, *Teleland* suppliers are not treated preferentially for they also have universal service obligations - they have to contribute 1% of their annual revenues. This amount is a percentage of *all* revenue. Contrastingly, *Digiland* operators are only charged per call and for one service sector. Hence, the contributions of domestic operators is higher than that of *Digiland* operators.

The RUS is not discriminatory. It would be so only if it distinguished between service operators on the basis of their origin. Since domestic suppliers also have to contribute, this is not the case. Further, *Teleland* emphasises that the burden of proof concerning the reasonable availability of alternative measures

⁴⁹ *DR-Cigarettes*, Panel Report, para. 7.212.

⁵⁰ *US-Gambling*, AB Report, para. 308; *US-Section 337*, Panel Report, para. 5.26; *Park*, SJLTA Vol. 12 No. 2 (2006), p. 511.

⁵¹ *US-Gambling*, AB Report, para. 291.

is on the complainant⁵². *Digiland* has not successfully demonstrated the availability of less burdensome alternatives with the same effectiveness in fulfilling the objectives of the RUS.

III. Teleland Does Not Violate Art. XVI:1, XVI:2(a) and XVI:2 (c) GATS

In the following, *Teleland* will demonstrate that the ATA does not violate Art. XVI:1, XVI: 2(a) and XVI: 2(c) GATS because: First, the ATA cannot be challenged under GATS; Second, Art. XVI GATS is not applicable in the present case; Third, there is no less favourable treatment for foreign services and service suppliers than provided for in its Schedule; And fourth, there is neither a limitation on the number of suppliers nor on service volume.

1. The ATA Cannot Be Challenged Before a WTO Panel

Teleland submits that the Panel has no review competence over the ATA's compliance with *Telelands'* WTO obligations, because the ATA is discretionary law. The mandatory-discretionary-doctrine is a general principle of international law that is well established in WTO jurisprudence⁵³. Discretionary law cannot constitute an infringement of WTO obligations unless its application is in violation of WTO provisions⁵⁴. This follows from the established principle of international law, that the legality of a measure is assumed as long as it is not infringing⁵⁵. In absence of the law being applied and therein a clear indication of its actual effects being present, its consistency with WTO law must be presumed. A measure is considered discretionary once it accords relevant discretion to the executive or administrative agencies⁵⁶. As the TCC is empowered to decide how many mobile operators will be licensed, it is implicitly mandated by the government to wield executive and administrative power. Thus, the ATA is a manifestation of discretionary law. Hence, it can only be challenged if it was applied in a non-WTO-compliant manner. This is not the case here because there has not yet been a decision on the number of additional licenses to be granted by virtue that *Teleland* is still in the implementation period. Until the ATA has been implemented, there are no grounds for challenging its WTO-compliance.

2. Art. XVI GATS is Not Applicable in the Present Case

Even if the Panel were to review the ATA's compliance with WTO law, the market access obligation of Article XVI GATS does not apply. The ATA falls within the scope of Art. VI GATS and is therefore not

⁵² *US-Gambling*, AB Report, paras. 309-310.

⁵³ *US-Tobacco*, Panel Report, para. 118; *US-Superfund*, Panel Report, para. 5.2.10; *US-Malt*, Panel Report, para. 5.39; *US-Non-Rubber-Footwear*, Panel Report, paras. 4.1-4.14; *EEC-Parts and Components*, Panel Report, para. 5.26; *Bhuiyan*, JIEL Vol. 5 No. 3 (2002), p. 574; *Davey*, JIEL Vol. 4 No. 1 (2001), p.102.

⁵⁴ *US-1916 Act*, AB Report, para. 60; *Naiki*, JIEL Vol. 7 No.1 (2004), p. 24; *Brownlie*, p. 35.

⁵⁵ *The Case of the S.S. Lotus*, Decision of the PCIJ, Ser. A., No. 10, 1927, p. 14.

⁵⁶ *US-1916 Act*, AB Report, para. 100.

a market access regulation but a domestic regulation. A distinction between Art. VI and XVI GATS is inevitable, since they are mutually exclusive⁵⁷. Art. VI:4 and VI:5 GATS allows a member to maintain trade-restrictive measures, as long as they are not more burdensome than necessary to ensure service quality, while Art. XVI GATS only examines whether a measure is trade-restrictive or not. Applying Art. XVI GATS to domestic regulation would undermine the concept of necessity and the Member's sovereignty and thus contradicts the fundamental principle of the GATS.⁵⁸ The distinction has to be drawn by considering whether the measure is a quantitative or a qualitative restriction⁵⁹. The measure at stake makes the establishment of mobile operators in *Teleland* depend on licenses, which are substantive requirements, which a service supplier is required fulfil in order to be permitted to supply a service⁶⁰. Therefore, the licenses are a qualitative requirement. The quantitative restriction resulting from the fact that a license will not be granted to all suppliers is necessarily the effect of any limitation⁶¹, regardless of which criteria are used. Thus, Article VI GATS applies and not Art. XVI GATS.

3. Teleland Accords No Less Favourable Treatment than Provided for in its Schedule

Even if the Panel were of the opinion that Art. XVI GATS applies, *Teleland* does not accord less favourable treatment than provided for in its Schedule, because: First, the measure is sheltered by the implementation period in *Telelands'* Schedule; Second, *Teleland* has made good faith efforts to comply with its commitments. *Telelands'* grants in its Schedule full market access, except for the mobile telecoms sector, and that on 1 January 2007, no more limitation will exist. The term "on January 2007" should not be understood as "by 1 January 2007", because in order for it to be so, it must explicitly be formulated as such. Further, the Panel in *Mexico-Telecoms*⁶² found that a Schedule entry stating only when, not if at all, a measure will be issued, is to be interpreted as a commitment expressing *that* the subject will be issued, and that Mexico should have at least started to implement the regulations. This is the case here, for the Schedule entry only states *when*, not *whether* the granting of additional licenses should take place. It must therefore be seen as a timeline for *Teleland* to take action to grant the licensing of additional operators, not as a date whereby the implementation must be completed. *Teleland* has, prior to

⁵⁷ *US-Gambling*, Panel Report, para 6.305; not reassessed by the AB; *Krajewski*, pp. 139-141; *Low/Mattoo*, in: *Sauvé/Stern* (eds.), GATS 2000, p. 455.

⁵⁸ *Krajewski*, p. 140.

⁵⁹ *US-Gambling*, AB Report, paras. 248, 255.

⁶⁰ Note by the Secretariat, S/WPPS/W/9.

⁶¹ *Trachtman*, AJIEL Vol. 99 No. 4 (2005), p. 866.

⁶² *Mexico-Telecoms*, Panel Report, para. 7.371.

January 2007, empowered the TCC to administer the granting of additional licenses and is currently drafting rules to govern the mobile telecoms market. *Even if* the Panel should read the term “on 1 January 2007” as “by 1 January 2007”, *Teleland* complies with its commitments. *Teleland* has also gone further than the minimum requirement by taking all the measures mentioned above. Furthermore, regarding the fact that *Teleland* is currently drafting rules to govern the mobile telecoms market, it is unreasonable to further open the market without a properly regulated market situation.

4. Teleland Complies with Art. XVI:2 GATS

Teleland does not violate Art. XVI:2 GATS because it neither limits the number of service suppliers nor the service volume as set forth in subparas. 2(a) and 2(c) GATS.

a. Teleland Complies with Art. XVI:2(a)

Firstly, the analysis of the relevant markets mentioned in *Telelands'* Schedule is not an economic needs test (ENT). The term “economic needs test” is not defined in the GATS, but the wording of Art. XVI GATS states that it must be “specified” in the Member’s Schedule. “Specifying” implies that there must be a precise and explicit reference to such a test, otherwise the words “inscribe” or “list” would have been used. Although an ENT must not be inscribed as a “rigid mechanical formula”⁶³, this cannot mean that the scope of an ENT has to be broadened in a disproportional manner for this would lead to interferences with the scope of Art. VI GATS⁶⁴. As it is not even indirectly labelled as such in *Telelands'* Schedule, the analysis of the relevant markets is not an ENT. Secondly, *Teleland* did not set up a numerical quota. The ATA neither states percentages nor absolute numbers to limit the number of suppliers. *Even if* the Panel were to consider that the measure *results* in a zero-quota, *Teleland* emphasises that the term “in the form of” should *not* be read as “have the effect of”⁶⁵. Further, the fact that a prohibition constitutes a numeral quota⁶⁶ does not apply here since *Teleland* does not maintain a prohibition.

b. Teleland Complies with Art. XVI:2(c) GATS

As elaborated, *Teleland* complies with Art. XVI:2(c) GATS because there is no numeral quota.

IV. Telelands' MOC Decision Fully Complies with Art. VI, XVI and XVII GATS

1. Telelands' MOC Decision Is Consistent with Art. VI:1 and Art. VI:5 GATS

a. No Violation of Art. VI:1 GATS

The MOC Decision does not violate Art. VI:1 GATS, because: First, it is not a measure of general application; And second, even if so, it is administered in a reasonable, objective and impartial manner.

⁶³ *US-Gambling*, AB Report, para. 231.

⁶⁴ WTO Secretariat Note on “Economic Needs Tests”, S/CSS/W/118, 30 November 2001, para. 6.

⁶⁵ *US-Gambling*, AB Report, para. 232.

⁶⁶ *US-Gambling*, AB Report, para. 241; *Matsushita/Iino*, AJCL Vol. 1 No. 1 (2006), p. 14.

i. Telelands' MOC Decision Does Not Constitute A Measure of General Application

The Decision is not a measure of general application under Art. VI:1 GATS. Art. VI:1 GATS widely corresponds with Art. X:3 (a) GATT; thus, principles developed under that Article can also apply to Art. VI:1 GATS.⁶⁷ A measure applies in a general manner if it addresses a multitude of unidentified persons and to a loose number of cases.⁶⁸ In the present case, the Decision only refers to specific service suppliers in a certain case, namely the contract between DigiStar and *Telelands'* mobile operators.

ii. The MOC Decision Is Administered in a Reasonable, Objective and Impartial Manner

Even if the Panel regards the MOC Decision as a measure of general application, it is administered reasonably, objectively and impartially. Art. VI:1 GATS is a procedural provision⁶⁹ and only refers to the process of decision making and not to the effect of the measure.⁷⁰ In the present case, there is no evidence that the decision-making of the MOC was not carried out in a reasonable manner. The administration of a measure must be reasonable in relation to the aim of the measure.⁷¹ The term "reasonable" means, *inter alia*, "as much as is appropriate or fair"⁷². The MOC had to decide on the approval of the contract between T-GlobalTone, T-Net and T-Mobility and DigiStar which involves the administration of personal data of subscribers. The MOC as a governmental authority is bound to the DPA and, thus had to apply its principles in the present case. The MOC's application of the principles set out in the DPA is also objective and impartial, because the manner of implementation is only a result of the protection of privacy and personal data and would apply equally to any service provider.

b. Telelands' MOC Decision Complies with Art. VI:5 GATS

The Decision of the MOC complies with Art. VI:5 GATS, because it has fulfilled the requirements set out in Art. VI:5(a)(i) and (ii) GATS regarding the Database Administrator Services (DAS) at issue.

i. Compliance with Art. VI:5(a)(i) GATS

The MOC Decision complies with Art. VI: 5(a)(i) GATS in conjunction with Art. VI:4(b) GATS. *Teleland* has undertaken specific commitments on DAS, pending the entry into force of disciplines developed in these sectors pursuant to Art. VI:4 GATS⁷³. With respect to this, the requirement of the physical loca-

⁶⁷ *Matsushita/Schoenbaum/Mavroidis*, p. 630.

⁶⁸ *US-Cotton Underwear*, AB Report, para. 21.

⁶⁹ *Trachtman*, in: *Mattoo/Sauvé* (eds.), *Domestic Regulation and Service Trade Liberalization*, p. 66.

⁷⁰ *EC-Bananas III*, AB Report, para. 200; *Delimatsis*, JIEL Vol. 10 No. 1 (2007), p. 19.

⁷¹ *Argentina-Hides and Leather*, Panel Report, para. 11.94.

⁷² Compact Oxford English Dictionary of Current English.

⁷³ So far, the Council for Trade in Services only developed disciplines with regard to the Accountancy

tion of Database Administrators and their servers within *Teleland* is not more burdensome than necessary to ensure the quality of the services at issue.

(1) Privacy Protection is a Degree of Quality of a Service

The quality of a service is *inter alia* defined by its compliance with the protection of privacy and personal data. The term “quality” means “a characteristic or feature”⁷⁴. Thus, the term “quality” relates to a broad spectrum of characteristics of a service. This would include the services’ degree of compliance with privacy protection with regard to domestic law. This is because the presence or absence of adequate privacy protection measures would be highly relevant to a consumer.

(2) Requirement Not more Burdensome than Necessary to Ensure this Quality

The licensing requirement within the MOC Decision is not more burdensome than necessary to ensure this quality in regard to the principles set forth in the DPA. As mentioned above, the determination of necessity involves a weighing and balancing of a series of factors. Thereby, *Teleland* emphasizes that according to the principle of state sovereignty, WTO Members have the right to determine the level of protection that they consider appropriate in a given situation.⁷⁵ With respect to this, firstly, there is no reasonable alternative available to ensure the protection of privacy and personal data to the same extent as the MOC Decision. The prevention of abuse of these data or the criminal prosecution of such abuse by governmental authorities is only possible *within Teleland*. Thus, it would be the most reliable and effective way to ensure legal enforcement and jurisdiction over such abuse. Secondly, in the light of the very high importance of the privacy of individuals, the protection of privacy and personal data must take priority over the interests of foreign suppliers to supply their services cross-border. The AB in *EC-Asbestos* classified the preservation of human life or health as vital and important values at the highest degree⁷⁶. As the protection of privacy as a fundamental freedom⁷⁷ must be understood as a value similarly important to human life and health, it is important at the highest degree. Hence, in the absence of a WTO-consistent alternative, the asserted values outweigh the impairment for *Digiland* suppliers. Further, *DigiStar* is still perfectly free to supply its services through mode 3 of Art. I:2 GATS.

ii. Telelands’ MOC Requirement Complies with Art. VI:5(a)(ii) GATS

The requirement of the MOC within its decision-making complies with Art. VI:5(a)(ii) GATS. The

Sector: S/L/63.

⁷⁴ Cambridge Advanced Learner’s Dictionary.

⁷⁵ See for instance *EC-Asbestos*, AB Report, para. 168, regarding the level of protection of health.

⁷⁶ *EC-Asbestos*, AB Report, para. 172.

⁷⁷ As Recognized in Art. 12 Universal Declaration of Human Rights; *McCloskey*, TPQ Vol. 21 No. 85 (1971), p. 303.

MOC Decision and thus the requirement became effective upon the issuance of the Regulation on Number Portability on 1 February 2007. However, the decision is based on the principles set forth in the DPA which was already effective at a time the specific commitments on the services at issue were made. Therefore, the requirement within the Decision could reasonably have been expected of *Teleland* at the time the specific commitments were made.

2. No Violation of Art. XVI:1, XVI:2(a) and XVI:2 (c) GATS

Teleland does not violate Art. XVI GATS, because: First, Art. XVI GATS is, as elaborated above, not applicable, since Art. VI:5 GATS and Art. XVI GATS are mutually exclusive. Second, *even if* the Panel were to apply Art. XVI GATS, the MOC Decision complies with Art. XVI:1, XVI 2 (a) and (c) GATS. It is not a limitation on the number of service suppliers or service operations in the form of a “zero quota”. The term “in the form of” must be interpreted narrowly⁷⁸. The AB in *US – Gambling*⁷⁹ clearly held that this term should not be replaced by the words “that have the effect of”. In contrast to the statement that a prohibition constitutes a zero-quota, the Decision does not prohibit the cross-border DAS. It is only a rejection of a particular contract form, based on qualitative regulations, and not a prohibition *per se*. It only has the effect of a limitation on the number of the suppliers and operations of the services in the specific context at hand. *Even if* the Decision were to constitute a “zero-quota”, it would not be a limitation on market access. Measures aimed at consumers do not contain limitations which fall in the scope of Art. XVI GATS.⁸⁰ The Regulation on Number Portability stipulates that a contract made by *Telelands’* mobile operators must be MOC approved. Hence, its Decision must be understood as a restriction on the ability of these mobile suppliers to conclude a contract. Thus, the Decision is aimed at a consumer and does not constitute a limitation under Art. XVI GATS.

3. Compliance with Art. XVII GATS

Teleland complies with Art. XVII GATS because firstly, the DAS supplied by foreign suppliers through the mode 1 of Art. I:2 GATS and DAS supplied by domestic suppliers within *Teleland* are not like. By applying the criterion of consumers’ tastes, the supply of cross-border administrations services including the exchange of wireless port request cannot be considered comparable to a domestic one. From the consumer’s perspective, these two services are distinctly not substitutable. Risks and dangers must be included in determining likeness under the criteria of consumers’ tastes and habits, as the AB did in

⁷⁸ *Ortino*, JIEL Vol. 9 No. 1 (2006), pp. 139 *et seq.*; *Pauwelyn*, WTR Vol. 4 No. 2 (2005), p. 132.

⁷⁹ *US-Gambling*, AB Report, para. 232; *Hoekman*, in: *Jackson/Davey/Sykes*, Legal Problems of International Economic Relations, p. 890.

⁸⁰ *US-Gambling*, Panel Report, paras. 6.382, 6.383; not refuted by the AB; See also: *Wunsch-Vincent*, WTR Vol. 5 No. 3 (2006), pp. 337, 338.

EC-Asbestos with health risks related to a product⁸¹ Applying this finding, a consumer would not consider the services at stake substitutable, because one has a significantly higher risk of abuse of personal data than the other. Further, DigiStar and suppliers within the territory of *Teleland* are also not interchangeable from the consumer's perspective as there is the same substantial difference in privacy risk, and an adequate prevention of such conduct is only possible within *Teleland*. Secondly, even if services or service suppliers were like, the Decision does not treat foreign services or foreign suppliers less favourably than domestic ones, since the MOC requirement is equally applied *de-facto* and *de jure* to both.

4. Even if Telelands' MOC Decision Violates GATS, It Is Justified Under Art. XIV GATS

In casum the Panel found the decision of the MOC to be inconsistent with Art. VI:1, VI:5, XVI:1, XVI:2(a) and (c) or XVII GATS, it is nonetheless justified under Art. XIV GATS. Art. XIV GATS requires a "two-tier analysis" of the measure to be justified under that provision.⁸² Accordingly, the MOC Decision is firstly justified under Art. XIV(a) and (c) GATS and secondly applied in a non-discriminatory manner, as required by the *chapeau*.

a. Justification Under Art. XIV(a) and (c) GATS

Firstly, the MOC Decision is necessary to protect public morals and to maintain public order. The term "public morals" denotes standards of right and wrong conduct maintained by or on behalf of a community; "Public order" refers to the preservation of the fundamental interests of a society and can relate *inter alia* to standards of law and security.⁸³ The Decision is designed to protect public morals and to maintain public order. It ensures an adequate level of protection of privacy and personal data. As elaborated above, the MOC's requirement for approving a contract regarding the DAS is necessary to protect the privacy and personal data. Secondly, pursuant to Art. XIV(c) GATS, the Decision is also necessary to secure compliance with the DPA which complies to the GATS according to Art. XIV(c)(ii) GATS. The DPA protects the privacy of individuals in relation to the processing of personal data and the confidentiality of individual records by not allowing DigiStar to include this data in its database.

b. Requirements of the Chapeau of Art. XIV GATS Are Fulfilled

The Decision complies with the *chapeau* of Art. XIV GATS. It is not applied in a manner which constitutes means of arbitrary or unjustifiable discrimination since it is based on the necessary interpretation of the DPA protecting individual privacy and applies to both domestic and foreign suppliers.

⁸¹ *EC-Asbestos*, AB Report, paras. 113, 122.

⁸² *US-Gambling*, AB Report, para. 292; see also: *Dogans*, BJIL Vol. 32 No. 2 (2007), pp. 1143 *et seq.*

⁸³ *US-Gambling*, AB Report, para. 373.

Request for Findings

The Government of Teleland asks the Panel to recommend that the DSB declares that Teleland is in full Compliance with Sections 1.1, 2.1, 2.2 and 3 of its scheduled Reference Paper commitments, Sections 5(a) and (b) of the GATS Annex on Telecommunications and with Articles VI:1, VI:5, XVI:1, XVI:2(a), XVI:2(c) and XVII of the GATS.