

**ELSA MOOT COURT COMPETITION (EMC²) ON WTO LAW
2007-2008**

BENCH MEMORANDUM

Teleland – Measures Affecting Telecommunications Services

by

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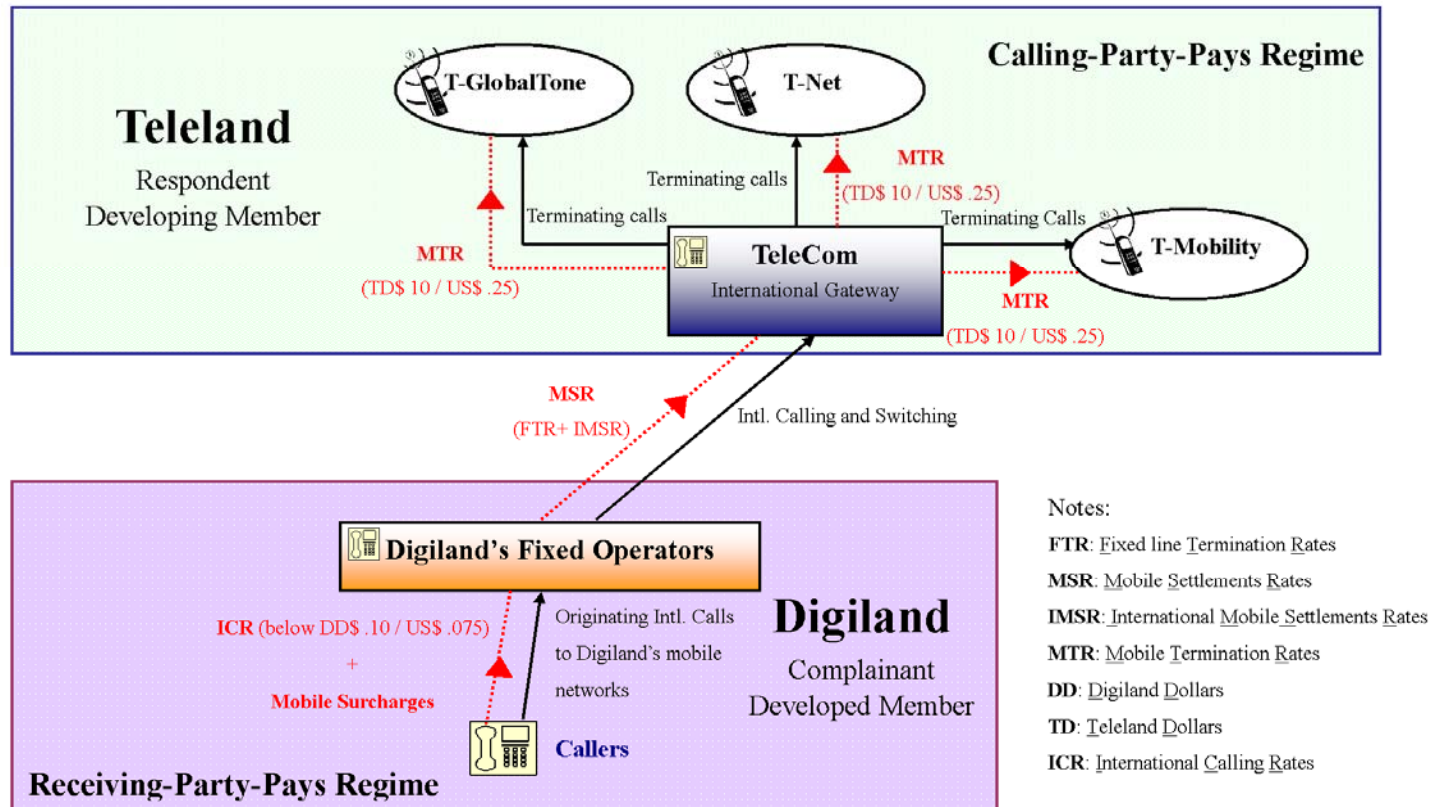
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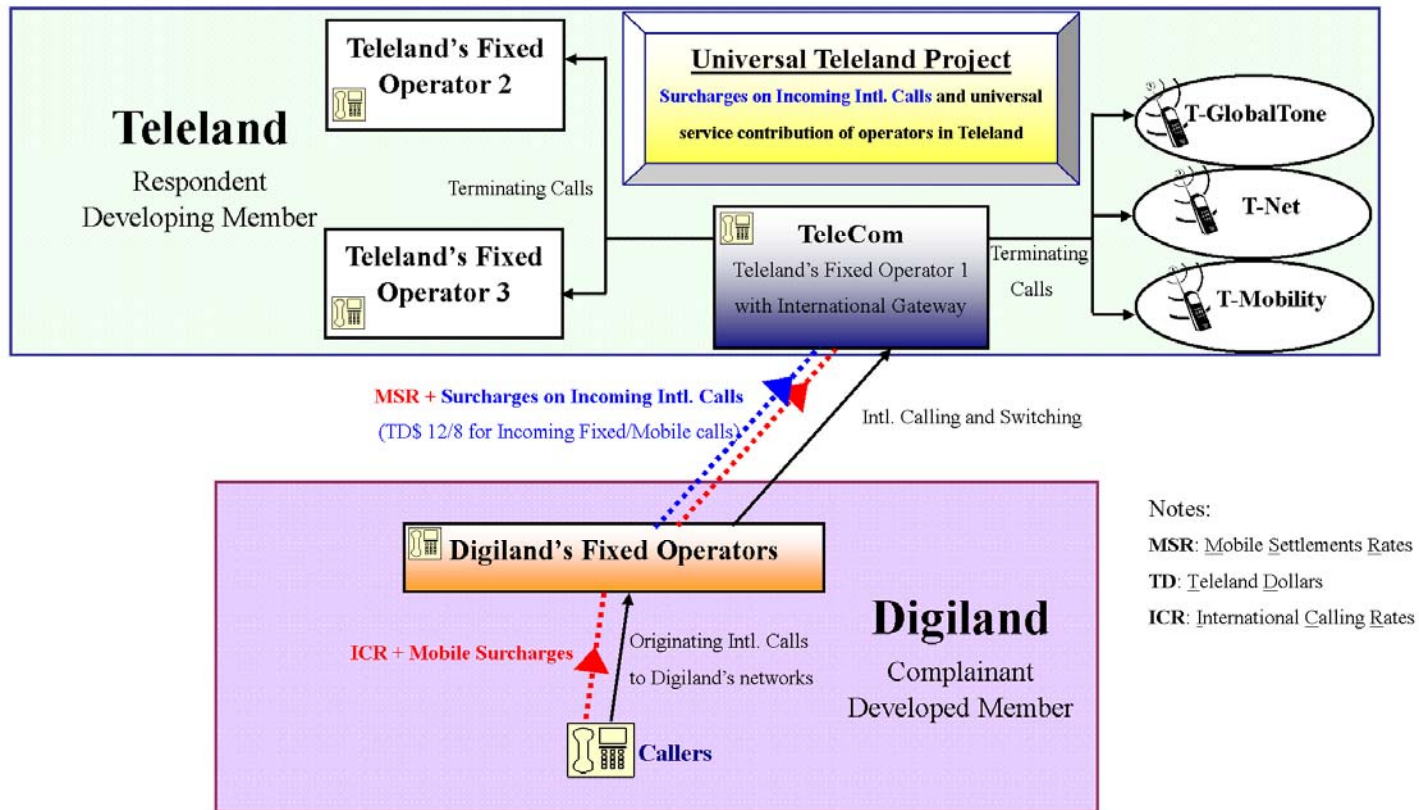
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1. Overview of key facts

a) Key facts regarding mobile termination rates



b) Key facts regarding universal services surcharges



2. Timeline of the case

By 1998	The Data Protection Act of Teleland became effective.
By 1999	Teleland issued three licenses for mobile telecommunications services, i.e., T-GlobalTone, T-Net and T-Mobility.
From 2004 to ?	T-GlobalTone, T-Net and T-Mobility have reduced their mobile termination rates by between 7-12%.
Since 2005	The total number of mobile telephone subscribers in Teleland has exceeded the total number of fixed telephone subscribers.
? 2006	The broadband penetration rate in Teleland was around 17% compared with an average penetration rate in developed countries of 52%.
1 December 2006	TCC issued the Regulation on Universal Services that requires Teleland operators to impose a surcharge on all incoming international calls.
By 1 January 2007	An Amendment to the Telecommunications Act in Teleland became effective which authorized the TCC the discretionary power to decide when to further open the mobile markets, and how many additional licenses to issue.
?	TCC has not yet officially issued a decision. However, it contends that it is currently drafting rules to govern the granting of additional licenses.
1 February 2007	TCC issued the Regulation on Number Portability.
1 May 2007	T-GlobalTone, T-Net and T-Mobility entered into a contract for the cross-border supply of Database Administrator Services with DigiStar.
?	The MOC rejected the contract.
?	Digiland and Teleland hold unsuccessful consultations pursuant to the DSU.
?	Digiland requests and DSB establishes panel.

3. Background documents

a) Agreements

General Agreement on Trade in Services (GATS), Articles VI:1, VI:5, XIV(c), XVI:1, XVI:2, XVII:1, XVII:2, XVII:3, XVIII, XX and Sections 5(a) and (b) of the Annex on Telecommunications.

- The Case was drafted with inspiration from the decisions of *Mexico - Telecom* (WT/DS204) and *US - Gambling* (WT/DS285). Teams should also support their arguments by reference to WTO panels and Appellate Body in cases such as *EC - Bananas III* (WT/DS27), *Canada - Autos* (WT/DS139,142), *EC - Asbestos* (WT/DS135) and *US - 1916 Act* (WT/DS136,162).

Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

b) Documents regarding GATS and Telecommunications

United Nations, Statistical Papers, Series M, No. 77, Provisional Central Product Classification, 1991.

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

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

Chairman's Note of 3 February 1997 (WTO document S/GBT/W/3) on Market Access Limitations on Spectrum Availability.

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, S/L/92, 28 March 2001.

4. Digiland's claim against mobile termination rates

a) Reference Paper – a major supplier

- The facts of this Case do *not* suggest any issues relating to the rate charged by TeleCom for passing a telephone call through its facilities. The teams should therefore focus their efforts on the issue of "mobile termination rates." TeleCom's *de facto* status as the only operator with an international gateway does not give rise to any legal issues in this Case.
- In order to determine whether T-GlobalTone, T-Net and T-Mobility a "major supplier" in the context of the Reference Paper, both teams should take into account the Panel Report in *Mexico-Telecom*¹. Reference Paper indicates three factors, according to its text as interpreted by the *Mexico-Telecom* Panel:
 - First, what the "relevant market" is.
 - Second, whether, in that market, the disputed operator (for purposes of claims against Section 1, the concept of "alone or together" is relevant) has "the ability to materially affect the terms of participation (having regard to price and supply) in that market."
 - Third, whether that ability results either from "control over essential facilities", or "use of its position in the market." ²

Relevant market:

- Digiland should point out that, according to well-accepted principles of market analysis deriving from competition law, markets are defined in terms of "substitution." The notion of demand substitution – whether a consumer would consider two services as "substitutable" – is central to the process of market definition.
 - Applying that principle, Digiland could argue that a fixed network is not substitutable for a mobile one, and that an outgoing call is not substitutable for an incoming one. Therefore, the relevant market for the services at issue is the termination of mobile services in Teleland.

¹ Panel Report, *Mexico-Measures Affecting Telecommunications Services*, WT/DS204/R (April 2, 2004).

² Panel Report, *Mexico-Telecom*, paras.7.149-7.152.

The ability to materially affect the terms of participation:

- Because “control over essential facilities” and “use of its position in the market” are in the disjunctive, either is sufficient to meet the definition.
- Both teams should be able to put forth arguments (pro and con) that T-GlobalTone, T-Net and T-Mobility, alone or together, should or should not be considered as a "major supplier."
- The burden is on Digiland to demonstrate that interconnection at issue concerns a major supplier. Digiland can argue that T-GlobalTone, T-Net and T-Mobility, alone or together, are a "major supplier" because:
 - Each terminating operator, no matter how small, has a monopoly over termination to its own network and customers. All other operators that wish to reach these customers must pay the terminating operator for the privilege. T-GlobalTone, T-Net or T-Mobility plainly has the ability to materially affect the price of termination of calls from the Digiland into Teleland, as a result of its special position in the market.
- Teleland should first and foremost argue that T-GlobalTone, T-Net and T-Mobility, alone or together, are not a "major supplier" because:
 - To the extent that the duplication of a public telecom transport network or service does take place, it is no longer an “essential facility.” In other words, Teleland would need to show that facilities of a public telecommunications transport network are not “exclusively or predominantly provided by a single or limited number of suppliers”.
 - Where a supplier does not control essential facilities, it cannot be classified as a major supplier without a competitive analysis to determine whether it can exert market power in the relevant market. This requires consideration of the competitive conditions, e.g., suppliers’ market shares.
 - The Case has supplied information about the market shares of the three existing mobile operators in Teleland (Case, *para.* 2). Since the issue is not clarified in the WTO decisions, the teams have sufficient room to develop creative arguments. Teleland could support its arguments by reference to the practices of WTO Members. In some jurisdictions, for example, the regulator

considers it unlikely that a telecom operator will be dominant individually if its market share is below 40 per cent.³

- The measures to be maintained under Sections 1.1 and 2.2 of Teleland's scheduled Reference Paper refer only to practices of "a major supplier" and not to those of other suppliers in the market. Teleland needs to explain that, on this basis alone, the Digiland's claim must fail and Panel's analysis on mobile termination rates needs go no further than this.

b) Reference Paper Section 1.1 -- prevention of anti-competitive practices

Anti-competitive practices:

- Section 1.2 of Teleland's scheduled Reference Paper lists three examples of anti-competitive practices that are generally considered to be abuses of dominant position. However, the lists in Section 1.2 are not exhaustive⁴.
- Digiland could argue that the Teleland mobile operators appear to be price fixing, or that they are engaged in some kind of anti-competitive practices and that the Government has failed to prevent such conduct⁵.
- Digiland could also argue, as a last resort, that the CPP regime in Teleland falls under the prohibition of Section 1.1 of Teleland's scheduled Reference Paper.
 - Under CPP, T-GlobalTone, T-Net and T-Mobility offer free incoming calls to their mobile subscribers, but charge mobile termination rates for interconnecting calls to their networks. In other words, for Digiland end-users, international call that terminates in T-GlobalTone, T-Net or T-Mobility is equal to the Digiland calling rate(\$.10 Digiland dollars, equivalent to US\$.075) plus a mobile surcharge (\$10 Teleland dollars, equivalent to US\$.25) per minute.

³ See e.g., The Application of the Competition Act in the Telecommunications Sector, OFCOM, UK, http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/cact0100.htm (last visited 2007-12-16).

⁴ See generally Lee Tuthill, *The GATS and New Rules for Regulators*, 21 TELECOMMUNICATIONS POLICY 783-789 (1997). See also Damien Geradin and David Luff *et al.*, *THE WTO AND GLOBAL GOVERNANCE IN TELECOMMUNICATIONS AND AUDIO-VISUAL SERVICES* 146-151 (2004).

⁵ Teleland's scheduled Reference Paper, Section 1.1: (Prevention of anti-competitive practices in telecommunications): Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

- To be more specific, the customer (in Digiland) who initiates the call to the mobile phone in Teleland pays T-GlobalTone, T-Net or T-Mobility for the mobile termination, while the called party (in Teleland), who is a customer of the mobile operator, is not charged for the termination. Because the person who subscribes to T-GlobalTone, T-Net or T-Mobility is not the same person who pays these three mobile operators for call termination, there is no market constraint on these three mobile operators to reduce call termination fees. Market forces do not and cannot provide any constraint on T-GlobalTone, T-Net and T-Mobility to reduce high call termination fees.
- In recent years, the volume of Digiland-outbound international calls terminated on mobile networks in Teleland has been rapidly increasing (Case, *para.* 3). Due to the lack of effective competitive pressure on T-GlobalTone, T-Net and T-Mobility, Digiland operators and consumers are forced to absorb such costs when calling Teleland's mobile networks.
- Teleland should respond that the CPP regime in Teleland is quite different to the situation in Telmex where the Government of Mexico positively required suppliers to engage in price fixing.

Appropriate measures:

- Section 1.1 leaves Members with wide latitude as to the measures that may be maintained to prevent anti-competitive conduct. Digiland can raise the issue of "appropriate measures" and argue that Section 1.1 of Teleland's scheduled Reference Paper imposes an obligation to maintain measures of some sort to "prevent" anti-competitive marketplace conduct.
- Teleland can argue that the measures to be maintained under Section 1.1 refer only to practices of "major suppliers" and not to those of other suppliers in the market.
- Teleland may also argue that the TCC has the discretion to choose the CPP mobile termination rate system if it best fits the country's needs.
 - Section 1.1 is drafted in a manner that it allows Teleland to have discretion in deciding what measure would be proper to accomplish the intended objectives.⁶

⁶ See First Written Submission of the United Mexican States, *Mexico-Measures Affecting Telecommunications Services*, WT/DS204/R, *para.* 202 (November 15, 2002).

- In the alternative, Teleland may argue that it has maintained “appropriate measures” for the purpose of preventing T-GlobalTone, T-Net and T-Mobility from engaging in anti-competitive practice, including:
 - Mobile termination rates charged by T-GlobalTone, T-Net and T-Mobility have decreased dramatically over the past three years. (Case, *para.* 5). Teleland’s regulatory policies have contributed to a significant drop in mobile termination rates.

c) Reference Paper Section 2 – interconnection

- It is vital that the teams develop arguments to establish that whether or not Digiland operators are able to rely on Teleland’s Reference Paper commitments.
 - Section 2 only applies “where specific commitments are undertaken.” Both teams should examine whether or not relevant specific commitments have been undertaken.
 - Based on the reasoning of *Mexico-Telecom*, Digiland should point out that the fixed-mobile termination rates are a form of “interconnection” under Section 2.1 of the Reference Paper, therefore, major suppliers must provide interconnection “...., on terms, conditions and cost-oriented rates...”⁷
 - Teleland could attempt to argue that the *Mexico-Telecom* Panel made a fundamental error, in failing to give proper weight to GATS Article 1 which states that the treaty applies to “measures affecting trade in services.” It could, given absence of an Appellate Body decision, credibly argue that the *Mexico-Telecom* Panel erred in finding that the Reference Paper disciplines on cost-based interconnection applied in a situation where the US suppliers seeking the benefit of the commitments were not in fact “trading” in services.
- Digiland has to establish that the mobile termination rates charged by T-GlobalTone, T-Net and T-Mobility are not cost-oriented. To support this position, Digiland could draw the attention to the Panel’s analysis in *Mexico-Telecom*:⁸

⁷ Reference Paper, Section 2.2(b): (Such interconnection is provided) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; (...)

⁸ Panel Report, *Mexico-Telecom*, paras. 7.160-7.185.

- The *Mexico-Telecom* Panel Report makes it clear that cost-oriented means pricing based on the costs incurred in supplying the services. The ITU also suggests the long term incremental cost methodologies which focus on the additional costs that are attributable to the service, as the *de facto* standard for interconnection pricing around the world⁹.
- In *Mexico-Telecom*, the Panel concluded overall that the interconnection rates charged by Telmex [Mexico's incumbent fixed operator] to United States suppliers were not "cost-oriented" within the meaning of Section 2.2 (b) of Mexico's Reference Paper,¹⁰ since by any of the methodologies presented to the Panel by the United States, they were substantially higher than the costs actually incurred in providing the interconnection¹¹. Digiland may argue that the same analysis can be applied to mobile termination rates.
- In this dispute, it is uncontested (*Case, para. 5*) that the fixed-mobile rates exceed domestic fixed interconnection by greater magnitudes (i.e., approximately 8 times), and the rates are higher than those in some neighboring countries with a CPP regime. Digiland can therefore argue that the mobile termination rates are substantially higher than the costs which are actually incurred in providing the interconnection.
- Teleland should concede that Section 2 of the Reference Paper applies to the mobile termination rates, but could argue that Section 2 does not apply to the facts of this dispute because GlobalTone, T-Net and T-Mobility are not engaged in "trade in services" , or because none of them is a "major supplier".
- In the alternative, if Section 2 is found to apply to this dispute, Teleland could note the relevant figures and argue that the Digiland has failed to establish a *prima facie* case that the settlements rates negotiated between individual fixed operators in Digiland and TeleCom are not cost-oriented pursuant to Section 2.2(b) of Teleland's Reference Paper.

⁹ Panel Report, *Mexico-Telecom*, paras. 7.166-7.177. Forward -looking and long-run economic costs are the total service or element long-run incremental costs per unit plus a reasonable share of forward-looking joint and common costs. Such costs are not the major supplier's existing embedded costs but the costs that an effectively competitive market would yield or that regulation would seek to ensure.

¹⁰ Panel Report, *Mexico-Telecom*, paras. 7.166-7.177. See also ITU Recommendation, ITU-T Rec. D.140 (06/2002), para 1.

¹¹ See generally Shin-yi Peng, *Trade in Telecommunications Services: Doha and Beyond*, JOURNAL OF WORLD TRADE, Volume 41, Issue 3, 289-314 (2007).

- Section 2 is drafted in fairly general terms. There are continuing controversies between countries over cost methodologies. The facts of the Case leave open the question of whether the mobile termination rates are cost-oriented.

d) Telecom Annex Sections 5(a) & 5(b) – access to and use of networks

Reasonable terms¹²:

- There is a degree of overlap between the obligations of the Annex and Reference Paper, despite their differences in scope and level of obligations. It should also be noted that while the Reference Paper obligations on interconnection apply only with respect to “major suppliers,” the Annex applies to all operators of public telecommunications transport networks and service within a Member, regardless of their competitive situation.
- Teleland’s Reference Paper contains obligations additional to those in the Annex¹³. Rates charged for access to and use of public telecommunications transport networks and services may still be reasonable, even if generally higher than rates for interconnection that are cost-oriented in terms of Section 2.2(b) of the Reference Paper.
- Digiland will argue that Teleland has failed to ensure that Digiland service suppliers may access and use public telecom networks and services through interconnection at reasonable terms and conditions for the supply of scheduled services (instead, Digiland suppliers may only obtain interconnection at anti-competitive, unreasonable terms and conditions).
 - If the mobile termination rates are “terms”, they would have to meet the “reasonable standard” in Section 5(a).
 - While “reasonable” does not mean “cost-oriented”, according to the Panel in *Mexico-Telecom*, rates that exceed cost by a substantial margin may not be reasonable¹⁴. Digiland can claim

¹² Annex on Telecommunications, Section 5(a) - Access to and use of Public Telecommunications Transport Networks and Services: “Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f).” (*emphasis added*).

¹³ See generally Lee Tuthill, *The GATS and New Rules for Regulators*, 21 TELECOMMUNICATIONS POLICY 783,-792-793 (1997).

¹⁴ Panel Report, *Mexico-Telecom*, paras. 7.323-7.335.

that the clarification of Section 5(a) of the GATS Annex supports its arguments that Teleland is violating its GATS commitments by continuing to permit excessive fixed-to-mobile rates.

- Teleland will of course argue the opposite on this issue:
 - The CPP regime, which the Digiland considers unreasonable, was widespread around the world. “Reasonableness” must be judged only within the context of all the relevant circumstances. The mobile termination rates would have to be evaluated in light of all the facts related to the CPP regime.

No condition other than as “necessary”:

- Teams have significant flexibility in approaching this issue. They should have a good understanding of the case *Mexico-Telecom*, and must point out the question of whether mobile termination rates are “conditions” within the meaning of 5(e), and if they are, what the interpretation of the word “necessary” in Section 5(e) would be¹⁵.
- With respect to Section 5(a), the Panel in *Mexico-Telecom* found that the rates charged for the access to and use of public telecommunications transport networks and services are “terms” within the meaning of 5(a) but not “conditions” within the meaning of 5(e)¹⁶.
 - The *Mexico-Telecom* Panel rejected an interpretation of “necessary” in Section 5(e) that would mean that a condition must be “indispensable” to achieve the policy goals listed in subparagraphs (i) to (iii). In other words, if access rates, in the alternative, were considered to be “conditions” under Section 5(e), then the term “necessary” in that provision would have a meaning that required a determination of whether the access rates were “reasonable” under Section 5(a), and Panel would therefore arrive at the same finding as to Section 5(a).¹⁷
- If the students follow the analysis in *Mexico-Telecom*, they will probably raise the issue of Section 5(b) and argue that Teleland has failed to ensure that Digiland service suppliers may access to and use of public telecommunications transport network or service offered within or across the border of Teleland. However, Digiland will be

¹⁵ Panel Report, *Mexico-Telecom*, paras. 7.336-7.343.

¹⁶ Panel Report, *Mexico-Telecom*, para. 7.327.

¹⁷ Panel Report, *Mexico-Telecom*, para. 7.343.

more successful in relying on Section 5(a) rather than 5(b) because the Case facts do not contain any evidence that Teleland has failed to ensure that Digiland cross-border suppliers may interconnect circuits with public telecommunications transport networks with circuits of TeleCom, T-GlobalTone, T-Net and T-Mobility.

5. Digiland's claim against universal services surcharges

a) GATS Article XVII – likeness

Like services and services suppliers:

- A significant difference between GATT and GATS is that the national treatment obligation under the latter explicitly applies to both “products” and “producers.” GATS NT obligation extends to not only “services” but also “services suppliers”. Digiland must initiate its case by arguing that it finds the international and domestic calls are “like services”, and the Digiland and Teleland operators at issue are “like service suppliers.”
- The text of GATS does not provide guidance as to which criteria should be taken into account to determine likeness. In addition, the limited GATS case-law does not provide much clarification on the interpretation of likeness.
 - To date, panels and the Appellate Body have addressed the issue of "likeness" in the GATS in only two disputes (*EC – Bananas III* and *Canada – Autos*)¹⁸. In both disputes the Panels accepted that foreign and domestic services and services suppliers were “like” and reference was made to the nature and characteristics of the services at issue without justifying its decision in great details.¹⁹
 - In *US-Gambling*, the parties developed detailed arguments on “likeness” in the gambling industry but the Panel exercised judicial economy with respect to the complaint of national

¹⁸ Appellate Body Report, *European Communities- Regime for the Importation Sale and Distribution of Bananas*, WT/DS27/AB/R. Panel Report, *European Communities, Regime for the Importation Sale and Distribution of Bananas*, WT/DS27/R. Appellate Body Report, *Canada- Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R. Panel Report, *Canada- Certain Measures Affecting the Automotive Industry*, WT/DS139/R.

¹⁹ Panel Report, *EC – Bananas III (US)*, para. 7.322. Panel Report, *Canada – Autos*, paras. 10.247-10.248. See generally Mireille Cossy, *Determining "likeness" under the GATS: Squaring the circle?* WTO ECONOMIC RESEARCH AND STATISTICS DIVISION (Manuscript date: September 2006).

treatment violation made by Antigua & Barbuda under Article XVII.²⁰

- Teleland can argue that the burden rests on Digiland to provide evidence demonstrating that Digiland services and service suppliers are "like" particular Teleland services and suppliers for purposes of GATS Article XVII.
 - Some commentators suggest that requiring a complaining party to demonstrate likeness for the services and the suppliers may make the burden of proof more difficult.²¹ However, in *EC-Bananas III*, the Panel found that "to the extent that entities provide these like services, they are like service suppliers"²². The Panel in *Canada-Autos* applied the same reasoning as the *EC-Bananas III* Panel²³.

Likeness across modes: mode 1 v. mode 3:

- Digiland can argue that services and service suppliers of Digiland are "like" those of the Teleland. The fact that services of Digiland operators are supplied via a different "mode of supply" than services suppliers of Teleland origin (cross-border as opposed to commercial presence) does not make these "unlike."
 - The text of GATS Article XVII does not suggest that the mode of supply is relevant for defining likeness. The Panel introduced the concept of likeness across modes in *Canada-Autos*.²⁴ There must at least be a presumption that the fact that the services are provided by cross-border supply cannot, standing alone, make a service "unlike" a domestically provided service.²⁵
 - There is also a strong argument that if the use of a different "mode of supply" were sufficient for a WTO Member to escape the obligations of national treatment on the basis of "unlikeness," this would seriously undermine the effectiveness of the GATS.²⁶

²⁰ Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005). Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (November 10, 2004).

²¹ See e.g., Markus Krajewski, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES 95-117 (2003).

²² Panel Report, *EC-Bananas III*, para. 7.322.

²³ Panel Report, *Canada-Autos*, para. 10.283.

²⁴ Panel Report, *Canada-Autos*, para. 10.307.

²⁵ See generally Mireille Cossy, *Determining "likeness" under the GATS: Squaring the circle?* WTO ECONOMIC RESEARCH AND STATISTICS DIVISION (Manuscript date: September 2006).

²⁶ *Id.*

- Teleland should respond that the structure of GATS schedules indicates that Members' commitments are mode-specific. The potential consequences of likeness across modes would limit the possibility for regulatory distinctions between modes, and may contradict with regulatory needs.²⁷
- Teleland could also argue that, according to the paragraph 15 of S/L/92, there is no obligation in the GATS which requires a Member to take measures outside its territorial jurisdiction. It follows that the national treatment obligation in Article XVII does not require Teleland to extend the same treatment to a service supplier located in Digiland.
- In arguing this issue, Teleland's best argument might be that, in order for service or service suppliers to be "like" they must at least be competing in some way. On the available facts, Teleland could credibly argue that Digiland's suppliers are not competing with Teleland's mobile suppliers in any way. They are serving entirely different customer bases. The surcharge payable by Digiland suppliers does not appear to have any impact on the competitive conditions in any relevant market. Thus, Digiland suppliers and their services are not "like" those of Teleland for Article XVII purposes.

GATT (goods) - GATS (services) Transplant:

- In the context of trade in goods the Appellate Body referred to four categories of characteristics that have been used to assess "likeness" in the context of the GATT: (i) physical properties; (ii) capability of serving the similar end-uses; (iii) consumer perception; and (iv) international tariff classification.²⁸
- To the extent that a comparable analysis of characteristics would need to be made in the GATS context, teams should put forth arguments (but should not focus too much time) on whether the telecommunications services offered from Digiland and those offered in the Teleland are virtually the same.
 - **Services Properties:** Digiland can point out that the types of telecommunications services offered from Digiland are the same as those offered in the Teleland, which all involve "transmission and reception of signals by any electromagnetic means." Teleland should, on the other hand, attempt to

²⁷ *Id.*

²⁸ Appellate Body Report, *EC - Asbestos*, para. 101.

differentiate between various kinds of telecommunications services.

- **End-uses**: Digiland could stress that, the analysis made by the Appellate Body in the *EC-Asbestos*, can arguably be transposed to the services context. The concept of end-uses would entail a determination of the extent to which products are capable of performing the same or similar functions (i.e., end-uses). To apply these criteria, Digiland will have to rely on a significant amount of factual evidence (i.e., technology). This may be the weakest area for Digiland because the facts of the Case do not support the arguments that the end-uses of international and domestic telecommunications services are identical.
- **Consumer perception**: This may also be the weakest area for Digiland because the facts of the Case do not support the arguments that consumers perceive Digiland and Teleland telecommunications services and suppliers as interchangeable.
- **Classification**: CPC Prov. Classifies mobile telecommunications services as a class “voice telephone services” (7521) and/or “circuit- switched data transmission services’ (7534) under "Section 2 (A) –Communication Services- Basic Telecommunication Services. However, Teleland should point out that two services fall under the same CPC category will not be sufficient to establish “likeness”.

b) GATS Article XVII – less favorable treatment

- The discussion should be conducted on the basis of the terms of Article XVII which requires "conditions of competition" that are "not less favourable" for "like services."²⁹
 - The Regulation on Universal Services explicitly differentiates services based on “origin,” so the *de jure* discrimination is easily found. (Case *para.* 6). In other words, the Regulation is not even origin neutral on its face, and therefore both teams should focus their arguments on what modifies the conditions of competition in favour of domestic services or service suppliers.

²⁹ See generally Joost Pauwelyn, *Some Thoughts on the Concept of Likeness in the GATS*, WTO STAFF WORKING PAPER ERSD-2006-08 (2006).

- Digiland could respond that Teleland clearly has and enforces regulations that specifically discriminate telecommunications services that cross international borders. This is *de jure* discrimination in the context of a national treatment commitment for cross-border supply, irrespective of whether these regulations also impose universal services obligations on operators in Teleland. (Case *para.* 7)
- Teleland can argue that even if Digiland could show likeness between cross-border basic telecommunications service and supplier and a local basic telecommunications service and supplier, the Teleland may nonetheless maintain a regulatory distinction between international and non-international supply of telecommunications services.
 - Teleland should point out that the universal services surcharges on incoming international calls do not modify the conditions of competition in favour of domestic services or service suppliers because Digiland’s operators do not and are not seeking to compete with Teleland’s operators.
 - The Regulation does not discriminate between service suppliers. A Teleland operator with a presence in Digiland would presumably still have to pay the surcharge for calls it terminates in Teleland.

c) Reference Paper Section 3 – universal services

- Generally the arguments under Section 3 of the Reference Paper are the easiest part of the issue of Universal Services. The Reference Paper requires that the measures/obligations used to achieve these social objectives be administered in a competitively neutral, non-discriminatory manner and that they are not more burdensome than necessary.³⁰
- Digiland may argue that the Project appears to lack sufficient transparency to determine whether the extraordinarily large surcharge is necessary to accomplish Teleland’s goals (i.e., to bridge the “digital divide.”) Nor would it adhere to the requirements for

³⁰ Reference Paper, Section 3 Universal service: “Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.”

non-discrimination and competitive neutrality because it would burden only foreign operators terminating calls in Teleland.

- Teleland is choosing to fund the “Universal Teleland Project” predominantly, although not exclusively, through surcharges imposed on foreign operators.
- Digiland should claim that the surcharge is more burdensome than necessary. Digiland should also question the method Teleland calculates and allocates the universal services surcharges. For example, why does the Regulation on Universal Services impose a higher surcharge for terminating on fixed networks than it does for terminating on mobile networks?
- The social objective of universal services has traditionally meant making basic voice service affordable to all consumers. The surcharges for enhancing broadband penetration rate have adversely affected access to the Teleland market, and therefore are more burdensome than necessary to achieve Teleland’s universal service goals.
- Teleland could credibly argue that, by publishing the Regulation, the administration is transparent.
- Teleland could respond that, if Digiland suppliers and services are not in any way competing with Teleland’s suppliers, it is not clear how the surcharge can be said to be “anti-competitive.”
- Teleland could also respond that Section 3 allows a Member to "define the kind of universal service obligation it wishes to maintain".
 - Especially as Teleland is among those countries with strong needs for infrastructure and the expansion of telecom services. (Case *para.7*)

6. Digiland’s claim against the Telecommunications Act

a) GATS Article XVI – market access

- The first paragraph of Article XVI obliges Members to accord services and service suppliers of other Members "no less favourable treatment than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." The second paragraph of Article XVI defines, in six sub-paragraphs, measures

that a Member, having undertaken a specific commitment, is not to adopt or maintain," unless otherwise specified in its Schedule."

- Digiland needs to rely on *US-Gambling* to explain why the Amendment of the Telecommunications Act violates GATS Article XVI³¹.
 - The relevant entry for mode 3 supply in the market access column of subsector 2 C (A) of the Teleland's Schedule reads "None, except for mobile telecommunications services:...". In other words, the Teleland has undertaken to provide partial market access, within the meaning of Article XVI, in respect of the services included within the scope of its subsector 2 C (A) commitment. In so doing, it has committed that "[f]oreign services suppliers will be permitted to establish joint venture enterprises and provide services by 1 January 2007 at the latest." and "[n]o limitation on number of services suppliers will exist on 1 January 2007." (Case Attachment I.)
 - Digiland should add that, by maintaining "discretionary power" on when to open the mobile markets and on how many additional licenses it will issue, the TCC is maintaining quantitative limitations that fall within the scope of subparagraphs (a) and (c) of Article XVI and that are inconsistent with the market access commitment undertaken in subsector 2 C (A) of the Schedule (Teleland has not scheduled any restrictions under these sub-paras).
- Teleland could, on the other hand, argue that the TCC measures fall outside the scope of Article XVI:2(a) and Article XVI:2(c)³², arguing (per discussion of mandatory v discretionary legislation below) that the TCC's discretion is not a quantitative restriction and is not inconsistent with the post-2007 full MA commitment.
 - Teleland could contest that the Appellate Body's interpretation of GATS Articles XVI:1, XVI:2(a) and (c) is at odds with the object and purpose of the GATS to preserve "the right of Members to regulate ... the supply of services within their territories in order to meet national policy objectives."³³ This may be a very difficult argument to make because Teleland has to argue that *US-Gambling* was incorrectly decided.³⁴

³¹ Appellate Body Report, *US-Gambling*, paras. 214-215.

³² Appellant Submission of the United States, *US -Gambling* (January 14, 2005), para. 78.

³³ Preamble of the GATS: "Members, (...) Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives (...)"

³⁴ Appellate Body Report, *US-Gambling*, para.265.

b) Chairman's Note and GATS Article XX - scheduling issues

GATS Article XX:

- The licensing issue is also intended to be analysed under GATS Article XX.
 - In *Mexico-Telecom*, Mexico stressed that nothing in its entry committed it to issuing the corresponding regulations, but the Panel stated that “[i]f the meaning of Mexico's entry is that Mexico has full discretion whether or not to issue regulations [governing the granting of licenses], then it follows that Mexico has indeed not undertaken any commitment on the number of suppliers.”³⁵
 - The Panel further stated that “Subparagraph (d)[of Article XX:1] requires that a schedule “shall specify ... where appropriate the time-frame for implementation of such commitments.We therefore consider that subparagraph (d) of Article XX:1 requires the specification of a time-frame for implementation, should a Member wish to implement a commitment *after* its entry into force. Where a Member does not specify a time-frame, implementation must be deemed to be concurrent with the entry into force of the commitment.” (*emphasis added*)
 - Digiland could therefore point out that the language of Teleland's Schedule implies that rules to govern the granting of additional licenses for mobile telecommunications services would have been issued by 1 January 2007. Therefore, the Amendment of the Telecommunications Act is inconsistent with the market access commitment inscribed in Teleland's schedule.

Chairman's Note³⁶:

- Teleland's best argument on this point is that the Chairman's Note on Market Access Limitations on Spectrum Availability explicitly states that words such as "subject to availability of

³⁵ Panel Report, *Mexico-Telecom*, para. 7.356.

³⁶ Chairman's Note on Market Access Limitations on Spectrum Availability, S/GBT/W/3 (3 February 1997).

spectrum/frequency" are unnecessary and should be deleted from Members' schedules because:

“[s]pectrum/frequency management is not, *per se*, a measure which needs to be listed under Article XVI. Furthermore under the GATS each Member has the right to exercise spectrum/frequency management, which may affect the number of service suppliers, provided that this is done in accordance with Article VI and other relevant provisions of the GATS. This includes the ability to allocate frequency bands taking into account existing and future needs. Also, Members which have made additional commitment in line with the Reference Paper on regulatory principles are bound by its paragraph 6.”

- The Chairman's Note suggests that Teleland needs not have mentioned spectrum availability in its Schedule and it would still have been free to decline a new licence due to lack of it.

- The bands 895 MHz to 915 MHz, 940 MHz to 960 MHz, and 1805 MHz to 1850 MHz are intensively used by 2G networks in Teleland. (Case *paras.* 2). It will be an advantage if the teams also discuss the issues of “availability of spectrum/frequency (band)” and provide arguments on “an analysis of the relevant markets”. (Case *paras.* 8)

c) Mandatory versus discretionary legislation

Burden of Proof:

- Both parties could also raise the issue of mandatory versus discretionary legislation. Several WTO panels have considered the applicability of the distinction to an examination of discretionary domestic laws, taking very different approaches³⁷.

- Digiland may draw the attention to the Appellate Body's analysis in *US-1916 Act* and argue that Teleland bears the burden of showing that the law being challenged is discretionary³⁸.
 - The Appellate Body also considered that the Panel applied the correct standard, in that a complaining Member bears the

³⁷ See e.g., *U.S. - Section 301, U.S. - Export Restraints, Brazil - Aircraft, U.S. - German Steel CVDs*.

³⁸ Appellate Body Report, *US-1916 Act*, *paras.* 92-93.

burden of proving a *prima facie* case. After a *prima facie* case has been made, it is up to the responding party to rebut the case.

- Teleland should first maintain that several WTO panels seem to have taken a different approach. In addition, the Appellate Body implied that when there is an issue related to the mandatory discretionary character of laws being challenged, the burden of proof will be on the complainant to show that the law is mandatory.
- Teleland could also argue that the language of the Amendment of the Telecommunications Act (Case *para.* 8) is a classical discretionary legislation because the discretion vested is in the *executive branch* of government, i.e., the TCC.

Discretionary Domestic Law:

- Teleland could refer to the *US-Export Restraints* to support its position that, under GATT/WTO practice, only laws that *mandate* specific action may be challenged "as such" to be inconsistent with [WTO] obligations. By contrast, discretionary laws may only be challenged on the basis of a specific application of the law.
- If Digiland raises the issues of *US-Section 301*, Teleland can respond that the TCC is currently drafting rules to govern the granting of additional licenses. The facts of the Case (Case *paras.* 8-9) do not give any indications that the Teleland government will not, after an analysis of the relevant market, interpret the Act in a manner consistent with GATS commitments.
 - The Panel in *US-Section 301* stated that a rule that only legislation mandating a WTO inconsistency can violate the WTO Agreement does not necessarily mean that legislation with discretion can never violate the WTO Agreement. The Panel said that it could not accept that reserving the discretion to do exactly what one promises not to do constitutes a good faith interpretation of the WTO Agreement.³⁹ Although the Panel found provisional violations based on the discretion to violate the DSU, U.S. commitments to act in accordance with rules overcame provisional violations and Panel ultimately found no violation."

³⁹ Panel Report, *US-Section 301*, *paras.* 7.47-136.

7. Digiland's claim against the MOC decision

a) GATS Article XVI - market access

Classification issues:

- Teleland should concede this point because it probably has the weaker side here. Teleland should concede that by virtue of entry "2 C n" in its GATS Schedule of Specific Commitments under subheading "Value-added Telecommunications Services-Online information and/or data processing", Teleland has made a full market access commitment for the cross-border supply (mode 1) of "Database Administrator Services."
- With respect to the context of the Teleland Schedule (Case Attachment), the two most important instruments connected to the conclusion of the GATS that are relevant for the interpretation of GATS Schedule are W/120 and the 1993 Scheduling Guidelines.⁴⁰
- However, the major problem is that rapid sectoral change has meant that W/120 classifications (which date back to 1991) have become inadequate, and their correspondence with the CPC confused and partly out of date, leading to unreliable segmentations. A striking example of this is the confusion about the classification of the computer-related and telecom service sectors. The existing W/120 classification includes an overlap problem between these two, listing "2.C.n - online information and/or data processing services" (CPC 843**) in the telecom sector, while also listing "1.B. c - data processing services" in the computer sector.⁴¹
- Teleland thus has made commitments for the same activity in two different parts of the schedule. Thankfully, both commitments are the same.

⁴⁰ The W/120 breaks down the telecoms sector into 14 sub-sectors and an "other" category. Although optional, most Members follow the W/120 classification system, whose 160 sub-sectors are defined as aggregates of the more detailed categories contained in the United Nations provisional Central Product Classification ("the CPC"). Thus CPC categories help clarify the scope of the commitments actually undertaken under the GATS, and most Members list the corresponding CPC numbers when scheduling their GATS commitments.

⁴¹ See Information Note by the Secretariat, Council for Trade in Services, Special Session: Telecommunications services, job(05)/208, 26 September 2005. See also Communication from the European Communities, Classification in the Telecom Sector under the WTO-GATS Framework, TN/S/W/27, S/CSC/W/44, 10 February 2005.

GATS Articles 16 v. 6 – zero quota⁴²

- As discussed, the relevant entry for mode 1 supply in the market access column of subsector 2.C.n of the Teleland's Schedule reads "None". In other words, Teleland has undertaken to provide full market access, within the meaning of Article XVI, in respect of the services included within the scope of its subsector 2.C.n. commitment. In so doing, it has committed not to maintain any of the types of measures listed in the six sub-paragraphs of Article XVI:2.
- Digiland may claim that, by maintaining measures that prohibit the cross-border supply of Database Administrator services, Teleland is maintaining quantitative limitations that fall within the scope of sub-paragraphs (a) and (c) of Article XVI and that are, therefore, inconsistent with the market access commitment undertaken in its Schedule.
 - The Decision of the MOC, which requires that the Database Administrator Services and their "servers" must be physically located in the territory of Teleland, constitutes a prohibition of cross-border supply (mode 1) of data processing services. (Case *para.* 10).
 - And in relation to the argument of a prohibition of mode 1 supply of data processing services, Digiland could recall the Panel and Appellate Body's conclusions that such a prohibition amounting to a "zero quota" is a quantitative limitation and, therefore, constitutes a "limitation on the number of service suppliers in the form of numerical quotas' within the meaning of Article XVI:2(a)." ⁴³
 - Digiland could also rely on *US-Gambling* and argue that the measures at issue, by prohibiting the supply of services in respect of which a market access commitment has been taken, amount to a "zero quota" on service operations or output with respect to such services. As such, they fall within the scope of Article XVI:2(c). ⁴⁴
- Teleland may probably need to argue that *US-Gambling* was incorrectly decided.

⁴² See Joost Pauwelyn, *Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4 WORLD TRADE REVIEW, 131-170 (2005).

⁴³ Panel Report, *US-Gambling*, paras. 6.338, 6.355.

⁴⁴ Appellate Body Report, *US-Gambling*, paras. 257-265.

- To support this position, Teleland could draw attention to the responding party's arguments in *US-Gambling*:

“Under the Panel’s interpretation of Article XVI, however, it would appear that very little domestic regulation could “escape” Article XVI if it can be described as prohibiting part of a sector or part of a mode of supply. The United States submits that this result is absurd, unreasonable, and inconsistent with the object and purpose of the GATS to preserve “the right of Members to regulate ... the supply of services within their territories in order to meet national policy objectives.””⁴⁵

- The responding party in *US-Gambling* further clarified the serious threat that the Panel’s interpretation of Article XVI poses to legitimate government regulation:

“There is no reason why a Member’s imposition of nationality-neutral limitations such as these should violate Article XVI of the GATS, so long as the particular measures in question do not take the form of numerical quotas or any other form prohibited by Article XVI:2”⁴⁶

- Teleland may also point out that the so-called “zero quota” theory is inconsistent with the balance between liberalization and regulation reflected in Members’ right to regulate services. The approach taken under the GATS is to single out for removal certain forms of market access limitations consistent with the ordinary meaning of the text of Article XVI:2 (a) and Article XVI:2(c). Other limitations – whether or not they have the *effect* of limiting the ability to supply a service – fall outside the scope of Article XVI:2(a) and Article XVI:2(c). On this point, Teleland should emphasize that none of the measures regarding database administrator services at issue states any numerical units or is in the form of quotas, and therefore *none* of those measures falls within the scope of sub-paragraph (a) or (c) of Article XVI:2.

⁴⁵ Appellant Submission of the United States, *US-Gambling*, para.80.

⁴⁶ *Id.*, para. 83.

b) GATS Article VI:4/5 - domestic regulation

- Article VI:5 contains disciplines which shall apply “pending the entry into force of disciplines developed (...) pursuant paragraph 4” meaning that Article VI:5 disciplines already apply domestic regulation.
- At the core of these disciplines are the same standards as stipulated in Article VI:4, i.e., domestic regulations must be based on objective and transparent criteria, not more burdensome than necessary to ensure the quality of the service and, in the case of licensing procedures, not in themselves a restriction on the supply of the service.
- Digiland needs to establish that there is a “licensing requirement” within the meaning of GATS Article VI:4/5, or that the MOC decision, based on the Regulation on Number Portability and Data Protection Act, is a “technical standard” within the meaning of Article VI:4/5. (Teams could note and pay attention to the ongoing negotiations).
 - "Licensing requirements" are substantive requirements, other than qualification requirements, with which a natural or a juridical person is required to comply in order to obtain, amend or renew authorization to supply a service⁴⁷.
 - "Technical standards" are measures that lay down the characteristics of a service or the manner in which it is supplied. Technical standards also include the procedures relating to the enforcement of such standards⁴⁸.
- Digiland should further claim that the Teleland measures which require that “Database Administrators and their servers must be physically located in the territory of Teleland to ensure an adequate level of protection of privacy and personal data” are more burdensome than necessary to ensure the quality of the service.
- Digiland could also argue that the measures at issue are also in themselves a restriction on the cross-border supply of Database Administrator Services.

⁴⁷ Informal Note by the Chairman, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Working Party on Domestic Regulation, Room Document (18 April 2006), *para.* II:5.

⁴⁸ *Id.*, at II:9.

c) GATS Article VI:1 - application of domestic regulation

- Another issue could be the “administration” of the domestic regulation⁴⁹.
 - Article VI:1 is modelled after GATT. The respective provision is Article X:3(a) of the GATT.
 - In *EC - Bananas III*, the Appellate Body stated that “[t]he text of Article X:3(a) clearly indicates that the requirements of uniformity, impartiality and reasonableness do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings.
 - Data Protection Act is a “measure of general application affecting trade in services” caught by Article VI:1 of the GATS, and therefore the Act should be administered by the MOC in a reasonable, objective and impartial manner.
 - Digiland may argue that the service suppliers of Teleland origin may be given an authorization to supply database management services. It is impossible, however, for foreign service suppliers to obtain the approval from the MOC to supply services on a cross-border basis. This constitutes a violation of Article VI:1 of the GATS. (Case *para.* 11)

d) GATS Article XVII - national treatment

See also 5 a) & 5 b) of this Bench Memo (pages 15-18)

- The legal issues of national treatment arise out of the unanswered questions from *US-Gambling*. In the case, the Panel exercised judicial economy with respect to the complaint of national treatment violation.
- The burden rests on Digiland to provide evidence demonstrating that DigiStar and the services it supplies are “like” particular Teleland suppliers and services for purposes of GATS Article XVII.

⁴⁹ GATS Article VI:1 “In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”

- Both teams should be able to put forth arguments on whether the modes of supply should play in the determination of likeness? Should services be presumed to be liked irrespective of the mode of supply?
- The Panel introduced the concept of likeness across modes in *Canada-Autos* and stated that: “it is reasonable to consider for the purposes of this case that services supplied in Canada through modes 3 and 4 and those supplied from the territory of other Members through modes 1 and 2 are like services.” Digiland can argue that the fact that services of Digiland operators are supplied via a different "mode of supply" than services of suppliers of Teleland origin (cross-border as opposed to commercial presence) does not make these "unlike."
- Teleland may respond that the definition of the modes of supply contained in Article I:2 could provide some guidance in this regard. It might serve as a basis for distinguishing cases where suppliers are present in the territory of the Member from cases where they are situated outside the territory. The structure of GATS schedules indicates that Members' commitments are mode-specific.
- Digiland can argue that Teleland's Data Protection Act and the MOC decision (under Regulation on Number Portability) that require the physical presence of the operator within the territory of Teleland result in less favourable treatment of Digiland service suppliers that seek to supply their services on a cross-border basis.
 - Teleland has made a full national treatment commitment for the cross-border supply (mode 1) of "Database Administrator Services." The fact that the Teleland's measures at issue disfavour services and service suppliers of Digiland compared to services and service suppliers of Teleland origin needs no further explanation.
 - The Teleland' regulatory provisions (i.e., the Data Protection Act and Regulation on Number Portability) and the applications thereof (i.e., the MOC decision) make up the total prohibition violate Article XVII.
 - Article XVII:3 explicitly provides that formally identical treatment can be less favourable if it modifies conditions of competition. Requiring that Database Administrators and their servers must be physically located in the territory of

Teleland makes it impossible for DigiStar to supply its services.

- The impact of that prohibition on domestic operators, however, is clearly much less far reaching. Thus, the "formally identical treatment" advanced by Teleland modifies conditions of competition very considerably. In fact, it makes competition from Digiland impossible.
- Teleland could respond that, if what Digiland really means to argue is that it is inherently harder for DigiStar and its facilities (e.g., the server) to be located in the territory of Teleland, then its argument is precluded by Article XVII, footnote 10, which states that:

"Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers." (*emphasis added*)

- Teleland could point out that, consistent with footnote 10, TCC would be under no obligation to make up for the fact that DigiStar and its server(s) are from Digiland, and by reason of that fact may find it inherently more difficult to be physically located in Teleland than would be the case for some Teleland suppliers.

8. Teleland's defence on privacy issues

a) General exceptions - GATS Article XIV(c)

- Teleland should establish that the MOC decision was "necessary" for the realization of the purposes it serves under Article XIV(c). Teleland must provisionally justify that the MOC decision was "necessary" within the meaning of Article XIV(c)(ii) of GATS to secure compliance with the Data Protection Act.
- Article XIV of the GATS, like Article XX of the GATT 1994, contemplates a "two-tier analysis" of a measure that a Member seeks to justify under that provision. A panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. Where the challenged measure has been found to fall within one of the paragraphs of Article XIV, a panel should then consider whether

that measure satisfies the requirements of the chapeau of Article XIV.

- Textually, GATS Article XIV(c) is very similar to Article XX(d) of the GATT 1994. Accordingly, both parties can refer to and rely upon such jurisprudence to the extent to which it is applicable and relevant in the interpretation of Article XIV(c).
- Pursuant to the text of Article XIV(c), in determining whether a challenged measure is provisionally justified under that Article, three elements must be demonstrated by the Member who invokes Article XIV(c): (1) the measure for which justification is claimed must "secure compliance" with other laws or regulations; (2) those other "laws or regulations" must not be inconsistent with the WTO Agreement; and (3) the measure for which justification is claimed must be "necessary" to secure compliance with those other laws or regulations.⁵⁰
- With respect to the third element, Teleland should also refer to the "weighing and balancing" test by the Appellate Body in *EC-Asbestos* and assess: (1) the importance of interests or values that the laws or regulations to be enforced are intended to protect. (2) the extent to which the enforcement measure contributes to the realization of the end pursued. (3) the trade impact of the enforcement measure⁵¹.
- Teleland should establish that the interests protected by the Data Protection Act -- to ensure an adequate level of protection of privacy and personal data -- are important. Further, Teleland should establish that the decision of MOC under the Regulation on Number Portability makes a significant contribution to ensuring that law enforcement of the Data Protection Act is not undermined
- The Database contains all information on subscribers who keep their existing numbers when changing operators, as well as other data technically necessary for the functioning of number portability (Case *para.* 10). Both teams will have sufficient room to develop creative arguments because the facts of the Case reveal no "reasonably available alternative measures" that would establish that the MOC decision under the Regulation of Number Portability is not "necessary" within the meaning of Article XIV(c). If Teleland made its *prima facie* case of "necessity", Digiland must identify a

⁵⁰ Appellate Body Report, *Korea - Beef*, *para.* 157.

⁵¹ Appellate Body Report, *EC-Asbestos*, *para.* 172.

reasonably available alternative measure and argue that Teleland's privacy concerns can be addressed in a WTO-consistent manner.⁵²

b) The Chapeau of Article XIV

- Teleland should raise the issue of finding the measures regarding number portability meet the requirements of the Article XIV chapeau and are therefore justified under Article XIV (c).
 - In *US-Gambling*, the Appellate Body stated that, the focus of the chapeau, by its express terms, is on the *application* of a measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the paragraphs of Article XIV.
 - By requiring that the measure be *applied* in a manner that does not constitute "arbitrary" or "unjustifiable" discrimination, or a "disguised restriction on trade in services", the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded other Members by the substantive rules of the GATS.⁵³
- Teleland could maintain that the Data Protection Act was enacted long before number portability was even thought possible, and for reasons having nothing to do with protection of domestic database administrator.

⁵² See Appellate Body Report, *US-Gambling*, paras 335-337.

⁵³ See Appellate Body Report, *US-Gambling*, paras 338-369.

9. Summary of arguments

a) Mobile Termination Rates

Issue	Digiland's arguments	Teleland's arguments
RP Definitions	Each of the Teleland mobile operators has the ability to materially affect the price of termination of calls from the Digiland into Teleland, as a result of its special position in the market.	T-GlobalTone, T-Net and T-Mobility, alone or together, are <i>not</i> a "major supplier" in the context of the Reference Paper.
RP Sec. 1	Section 1.1 of Teleland's scheduled Reference Paper imposes an obligation to maintain measures of some sort to "prevent" anti-competitive marketplace conduct.	Concede, but Section 1.1 refers only to practices of "major suppliers" and not to those of other suppliers in the market.
	The lists in Section 1.2 are not exhaustive.	Section 1.1 is drafted in a manner that it allows Teleland to have discretion in deciding what measure would be proper to accomplish the intended objectives.
	Market forces do not and cannot provide any constraint on T-GlobalTone, T-Net and T-Mobility to reduce high call termination fees.	Teleland has maintained appropriate measures for the purpose of preventing the mobile operators from engaging in anti-competitive practice.
RP Sec. 2	Fixed-mobile termination rates are a form of interconnection under Section 2.1 of the Reference Paper.	Section 2 does not apply to the facts of this dispute because GlobalTone, T-Net and T-Mobility are not engaged in "trade in services".
	The mobile termination rates are substantially higher than the costs which are actually incurred in providing the interconnection.	Digiland has failed to establish a <i>prima facie</i> case that the settlements rates are not cost-oriented.
Annex Sec. 5	While reasonable does not mean cost-oriented, Teleland is violating its GATS commitments by continuing to permit excessive fixed-to-mobile rates.	The CPP regime was widespread around the world. "Reasonableness" must be judged only within the context of all the relevant circumstances.

b) Regulation on Universal Services

Issue	Digiland's arguments	Teleland's arguments
GATS Art. XVII	The fact that services of Digiland operators are supplied via a different "mode of supply" than services suppliers of Teleland origin (cross-border as opposed to commercial presence) does not make these "unlike."	The potential consequences of likeness across modes would limit the possibility for regulatory distinctions between modes, and may contradict with regulatory needs.
	Teleland clearly has and enforces regulations that specifically discriminate telecommunications services that cross international borders. This is <i>de jure</i> discrimination in the context of a national treatment commitment for cross-border supply.	The universal services surcharges on incoming international calls do not modify the conditions of competition in favour of domestic services or service suppliers because operators in Teleland also have universal services obligations.
RP Sec. 3	The Project appears to lack sufficient transparency to determine whether the extraordinarily large surcharge is necessary to accomplish Teleland's goals. Nor would it adhere to the requirements for non-discrimination and competitive neutrality because it would burden only foreign operators terminating calls in Teleland.	Section 3 allows a Member to "define the kind of universal service obligation it wishes to maintain."

c) Amendment to the Telecommunications Act

Issue	Digiland's arguments	Teleland's arguments
GATS Art. XVI	TCC is maintaining quantitative limitations that fall within the scope of sub-paragraphs (a) and (c) of Article XVI and that are inconsistent with the market access commitment undertaken in subsector 2 C (A) of the Teleland' Schedule.	The TCC measures fall outside the scope of Article XVI:2(a) and Article XVI:2(c).
GATS Art. XX & Chairman's Note	The language of Teleland's Schedule implies that rules to govern the granting of additional licenses for mobile telecommunications services would have been issued by 1 January 2007.	The Chairman's Note on Market Access Limitations on Spectrum Availability explicitly states that words such as "subject to availability of spectrum/frequency" are unnecessary.
Discretionary Legislation	Teleland bears the burden of showing that the law being challenged is discretionary.	When there is an issue related to the mandatory discretionary character of laws being challenged, the burden of proof will be on the complainant to show that the law is mandatory.
	Legislation with discretion can also violate the WTO Agreement.	Only laws that <i>mandate</i> specific action may be challenged "as such" to be inconsistent with [WTO] obligations. By contrast, discretionary laws may only be challenged on the basis of a specific application of the law.

d) Decision on Database Administrator Services

Issue	Digiland's arguments	Teleland's arguments
GATS Art. XVI	Teleland has made a full market access commitment for the cross-border supply (mode 1) of "Database Administrator Services."	Teleland should concede this point.
	Teleland is maintaining quantitative limitations that fall within the scope of sub-paragraphs (a) and (c) of Article XVI.	The measures in question do not take the form of numerical quotas or any other form prohibited by Article XVI:2.
	The Decision of the MOC constitutes a prohibition of cross-border supply (mode 1) of data processing services. The measures of Teleland amount to a "zero quota".	Digiland's interpretation is inconsistent with the object and purpose of the GATS to preserve "the right of Members to regulate."
GATS Art. VI:4/5	Teleland measures are more burdensome than necessary to ensure the quality of the service.	The Regulation and the Act are based on objective and transparent criteria, and not more burdensome than necessary to ensure the quality of the service.
GATS Art. VI:1	The service suppliers of Teleland origin may be given an authorization to supply database management services. It is impossible, however, for foreign service suppliers to obtain the approval to supply services on a cross-border basis. This constitutes a violation of Article VI:1 of the GATS.	The Act and the Regulation are administered in a reasonable, objective and impartial manner.
GATS Art. XVII	The "formally identical treatment" advanced by Teleland modifies conditions of competition very considerably. In fact, it makes competition from Digiland impossible.	The measures are consistent with footnote 10 of the GATS.
GATS Art. XIV(c)	There are "reasonably available alternative measures" and therefore the MOC decision is not "necessary" within the meaning of Article XIV(c).	The interests protected by the Data Protection Act are important, and the Regulation on Number Portability makes a significant contribution to ensuring that law enforcement of the Data Protection Act is not undermined.

10. Suggestions for further reading

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