

ELSA Moot Court Competition (EMC2) on WTO Law
Case 2013/2014

*Aquitania – Measures Affecting Water Distribution and Sewage
Collection Services*

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Bench Memorandum

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A. Facts of the case and clarifications¹

The case concerns a dispute between two WTO member countries: Aquitania is a developing country which acceded to the WTO on 1 July 2005. Comercia is a developed country and founding member of the WTO.

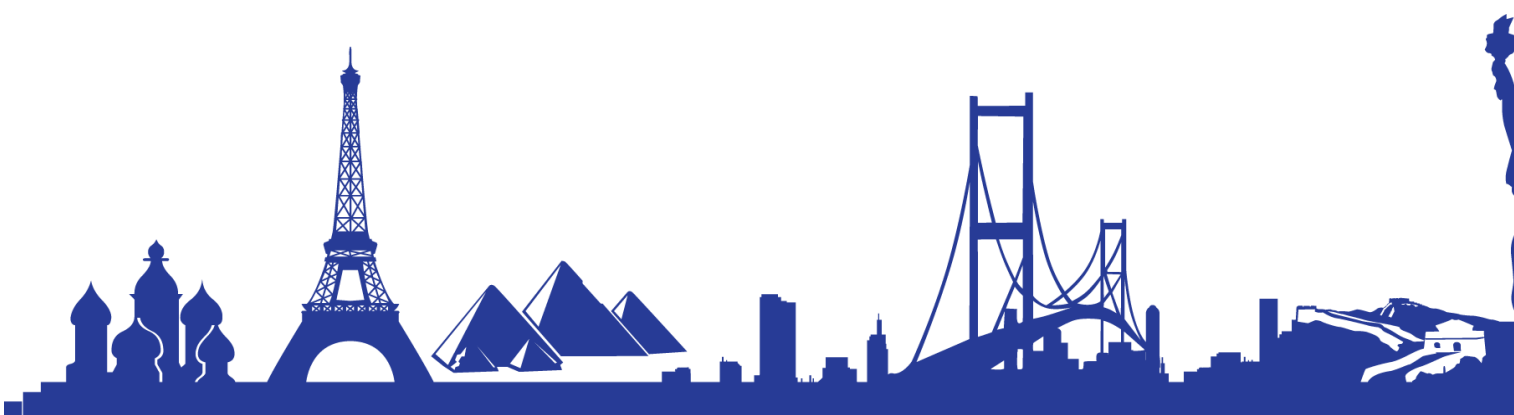
Both countries are also Members of the Occidental Free Trade Agreement (OFTA) which establishes a free trade area between its parties and is based on the model of the North American Free Trade Agreement. OFTA was signed in September 2003 and entered into force on 1 January 2004. The clarifications stated that the OFTA text is identical to the NAFTA text in all relevant provisions. However, where NAFTA provisions refer to the GATT dispute settlement mechanism the respective OFTA provisions refer to the DSU of the WTO.

The backgrounds of the dispute are privatisation policies and their reversal in the Aquitanian province of Nova Tertia. Water distribution and sewage collection services are matters within the competences of the provinces in Aquitania. Each province has its own regulatory framework for these services. Until the late 1990s, water distribution and sewage collection and treatment were considered a public function and provided by public entities in all provinces. The models of supply differed, but private commercial companies were not involved in the supply of any of these services. All provinces required that entities supplying water and collecting and treating sewage serve all households and commercial companies regardless of their geographical location and on the same terms and conditions, including the price (“universal service obligation”). This principle has been an important element of the national development strategy of Aquitania for many decades.

Households and companies were charged fees for water and sewage services. While the fees were based on actual consumption, they were significantly lower than the actual costs of providing these services. Consequently, the supply of water and the collection and treatment of sewage were also financed through the provincial budgets.

In the province of Nova Tertias, Aguas Tertias SA, an entity organised as a commercial company under the Commercial Code of Aquitania, but owned and operated entirely by the provincial government was in charge of supplying water and collecting and treating sewage between 1963 and 2005. Aguas Tertias was able to reach about 70% of all households and 90% of all commercial entities in the province. In some remote mountain villages and many informal settlements (slums) in the larger cities, not every household was connected to the

¹ The following paragraphs summarise the facts and the clarifications. For the full version of the case and the clarifications please refer to ELSA's webpage <http://www.elsamootcourt.org/preparation>.

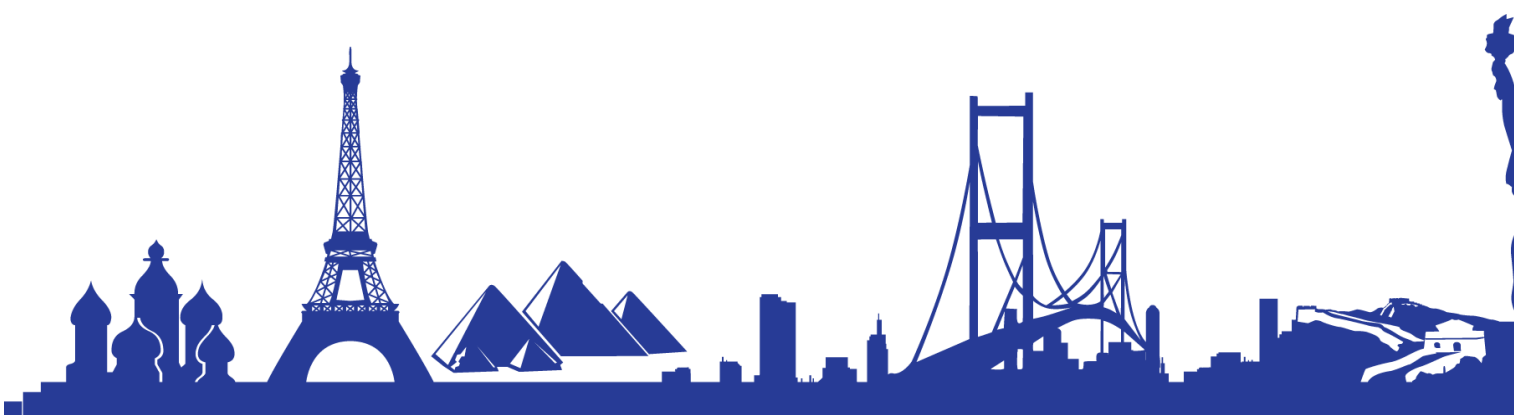


water and sewage infrastructure. The quality of the water supplied by Aguas Tercias was relatively good and met WHO standards for drinking water. The percentage of unaccounted-for water was negligible. However, sewage collection and treatment services were less than satisfactory: There were recurrent service interruptions and sewage leaks into the ground due to old infrastructure, in particular pipes, and inadequate sewage treatment facilities.

After a general election in 2003, the provincial government of Nova Tertia changed. As a reaction to budget constraints, the province decided to partially privatise the supply of water distribution and sewage services. The province enacted the Water Distribution and Sewage Services Law of Nova Tertia (the 2003 Law) which empowered the provincial Government to grant concessions for the collection, purification, treatment and distribution of drinking water and the collection and treatment of sewage over public networks to public or private companies or joint ventures of public and private companies. The law also enabled the provincial Government to transfer the right to grant concessions to municipalities with more than 100,000 inhabitants. The law also stated that the “distribution of drinking water and the collection and treatment of sewage are essential services provided to all citizens of the province of Nova Tertia in fulfilment of the human right to water and sanitation.” In addition, the principle of universal service obligation shall continue to apply.

In 2004 the provincial government of Nova Tertia adopted the Water and Sewage Concession Regulation (the 2004 Regulation), complementing the 2003 Law. The 2004 Regulation contained detailed provisions regarding the respective rights and obligations between a company supplying water distribution and sewage services and the local public authority. The 2004 Regulation provided that a company which has been granted a concession will operate the public network for water distribution and sewage collection and treatment and will also be responsible for the maintenance and repair of the public network. However, the ownership of the public network remained in the hands of the public authority. The 2004 Regulation further stipulated that the company shall collect all relevant charges for drinking water and sewage services directly from consumers. It may increase these charges one year after the conclusion of the contract and thereafter annually in so far as such increases are necessary to ensure the quality of the service. Any such increase should not exceed 35 % of the charges of the previous year, except where exceptional circumstances are shown to exist. The situation of special customers, in particular the elderly and persons with disabilities should be taken into account. Finally, the 2004 Regulation required the company to expand the public networks into areas which are not yet connected to the network.

At the end of 2004, the provincial government of Nova Tertia transferred the right to grant concessions to the capital the province, the city of Tertiaia, which has about two million inhabitants. In May 2005, the city of Tertiaia decided to grant a water and sewage concession to a private water company. After a public tender, the city government selected Avanti SA, a company duly established under the laws of Aquitania, to supply drinking water



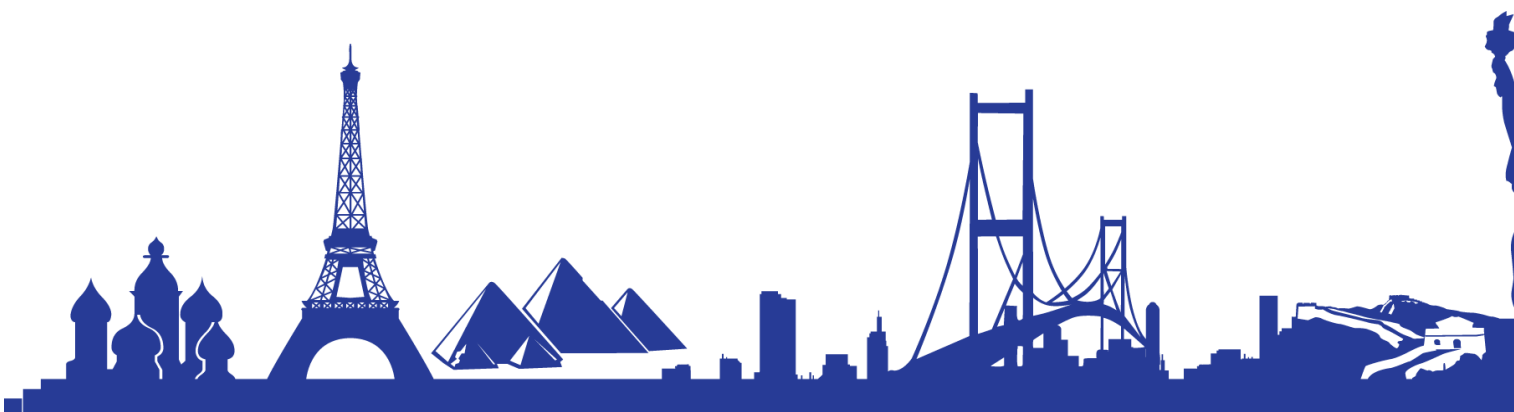
and to collect and treat sewage in Tercialia. Avanti SA is 100%-owned by Avanti Ltd., an international water distribution company headquartered in Commercia. In December 2005, Tercialia and Avanti SA signed a contract whereby Tercialia granted Avanti SA a concession to supply drinking water and to collect and treat sewage on Tercialia's public network until 31 December 2025.

In December 2007, Avanti SA imposed an increase of 75% of the water and sewage charges compared to the 2006 charges. Avanti SA justified this on the basis of investments it needed to make in Tercialia's dated and poorly maintained pipe network and sewage treatment facilities. Avanti undertook a number of repair works and investments into the network in 2008. However, despite these investments, many leaks in the networks remained leading to the loss of sewage into the ground. According to independent studies, the problem actually increased compared to the time when Aguas Tertias was in charge. However, Avanti claimed that its investments prevented even greater environmental damage because the infrastructure was in a very poor condition.

Over the last four decades price increases in water and sewage services were minimal, even lower than the general inflation rate in Nova Tertia. Leaks, however, were frequent. Yet, due to changed perceptions and better education many citizens of Tercialia are increasingly concerned about the environmental dangers associated with these leaks. When Avanti announced in a press release in October 2008 that despite its investments, it could not prevent leaks and that further price increases were necessary, public opposition to Avanti grew leading to media campaigns and demonstrations against Avanti in the subsequent months. In 2007 and 2008, the city of Tercialia also repeatedly invited Avanti to develop plans for the expansion of the infrastructure. However, Avanti refused to do so claiming that such investments would have no meaningful commercial basis, because the areas which were not yet connected to the network are very poor neighbourhoods.

As a consequence of these events, the city of Tercialia decided to terminate the agreement with Avanti SA on 15 April 2009. In its letter of termination, the city claimed that Avanti breached the 2004 Regulation and the corresponding provisions of its contract with the city. Avanti filed a law-suit against this termination before the competent courts of Aquitania which is still pending. In December 2009, Avanti SA terminated all activities in Tercialia and dismantled its commercial presence there. On 1 January 2010, Aguas Tertias, which had continued to provide services for the rest of the province of Nova Tertia between 2005 and 2009, resumed services in Tercialia and re-established the conditions for the supply of water and sewage collection which existed before 2003 including the tariff structure thus lowering substantially consumer charges. However, sewage leaks persisted.

Following another general election which brought a party opposing water privatisation to power, the Province of Nova Tertia changed its Water and Sewage Law in September 2011



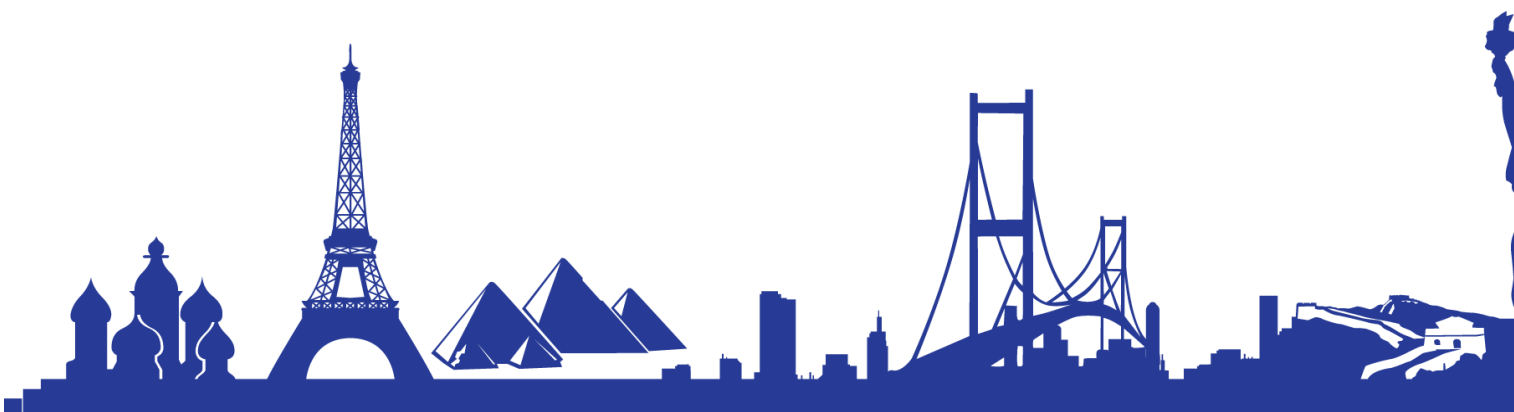
(Water and Sewage Law of 2011) excluding private companies from providing water distribution and sewage collection services. The relevant section of the Water and Sewage Law of 2011 stipulate that the collection, purification, treatment and distribution of drinking water to households and commercial entities and the collection and treatment of sewage from households and commercial entities will be operated by a public company which is owned and controlled in its entirety by the Provincial Government. The Provincial Parliament justified the new law by pointing out that “it has been shown that the supply of water and the collection of sewage in private hands lead to price increases and dangerous under-investment in the network and infrastructure. While the former threatens the basic human right to water and sanitation, the latter can endanger human health and the environment. These challenges are better met by a public company closely controlled by the Provincial Government.”

In January 2013, Avanti Ltd approached the Trade Ministry of Commercias to lodge a complaint against Aquitania at the WTO and before the dispute settlement mechanism of the OFTA. The OFTA dispute settlement mechanism is identical to NAFTA Chapter 20 and contains inter alia a clause (Art. 2005:6 OFTA) which provides that once dispute settlement procedures have been initiated under the OFTA or the WTO the forum selected by the complaining party shall be used to the exclusion of the other.

On 1 February 2013 the Trade Ministry of Commercias requested consultations with Aquitania regarding the changed Water and Sewage Law under the dispute settlement provisions of both the DSU and the OFTA. The request reminded Aquitania of its “commitments under the agreements we both signed, OFTA and GATS”. Aquitania replied that its activities are in conformity with all international agreements and indicated that it did not intend to change its law. Commercias therefore considered that consultations with Aquitania failed to settle the dispute.

In a letter dated 2 May 2013 the Trade Ministry of Commercias requested a meeting of the OFTA Free Trade Commission which is in charge of dispute settlement under the OFTA and submitted the dispute to the Commission. The OFTA Free Trade Commission consists of one Commissioner from each OFTA member country. It has not met for two years because the state of Oppositia, a member of OFTA, refuses to send its Commissioner to the meetings due to political reasons. The OFTA Free Trade Commission is only competent to hear a case if all three Commissioners are present.

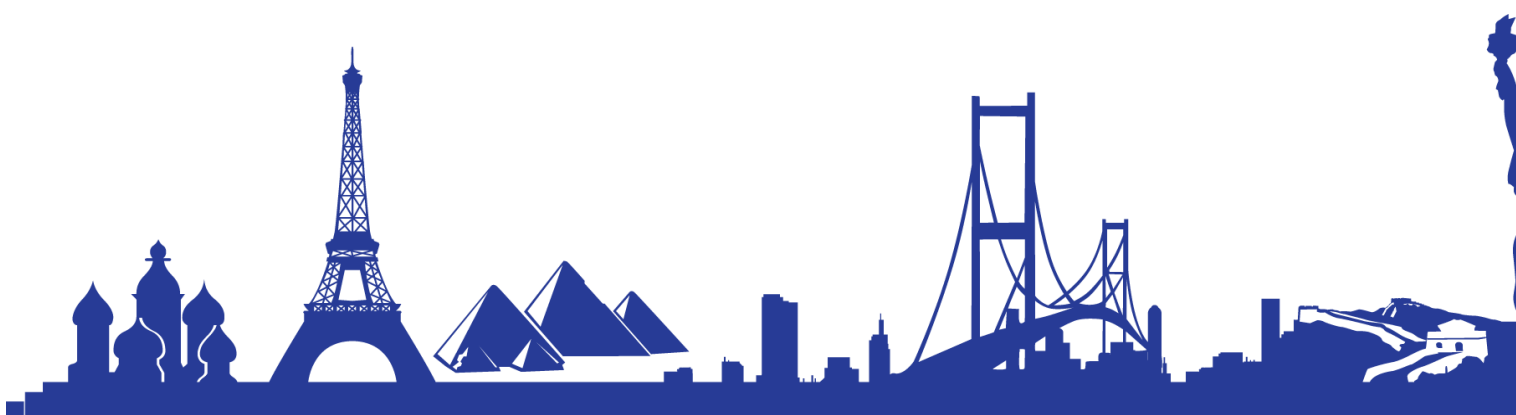
On 3 May 2013 the Trade Ministry of Commercias also requested the establishment of a WTO panel in accordance with Article 4.7 of the DSU. At its meeting of 30 August 2013 the DSB established a panel in accordance with Article 6 of the DSU, with standard terms of reference, to examine the matter referred to the DSB by Commercias in its panel request.



B. Timeline

The following timeline serves to briefly summarise the course of events:

| | |
|--------------------------|---|
| since 1963 | Aguas Tertias, a public company controlled by the provincial government, supplies water and sewage services in the Aquitaniian province of Nova Tertia; no private companies are engaged in supplying these services in Aquitania |
| 2003 | General elections in Nova Tertia and change of government |
| 2003 | Adoption of the Water Distribution and Sewage Services Law (the 2003 Law) which empowered the provincial government to grant concessions for water distribution and sewage collection and treatment <i>inter alia</i> to private companies |
| 1 January 2004 | OFTA enters into force |
| 2004 | Adoption of the Water and Sewage Concession Regulation (the 2004 Regulation) with detailed provisions regarding the respective rights and obligations between a company supplying water distribution and sewage services and the local public authority |
| End of 2004 | Right to grant concessions transferred to City of Tertialia |
| May 2005 | Decision to grant a water and sewage concession to a private company and public tender by City of Tertialia; Avanti is selected as service provider |
| 1 July 2005 | Aquitania accedes to the WTO |
| December 2005 | Contract between Avanti and City of Tertialia signed |
| 1 January 2006 | Avanti begins supplying water distribution and sewage services |
| 2007 and 2008 | City of Tertialia requests Avanti to invest in network |
| December 2007 | Imposition of 75% increase of charges by Avanti |
| October 2008 | Announcement of further increases of charges by Avanti |
| November 2008-March 2009 | Growing opposition to Avanti (media campaigns and demonstrations) |
| 15 April 2009 | Letter of termination sent to Avanti by City of Tertialia |
| December 2009 | Avanti terminates activities in Tertialia and dismantles its commercial presence |
| 1 January 2010 | Aguas Tertias resumes services in Tertialia |
| 2011 | General elections and change of government in Nova Tertia |
| September 2011 | Entry into force of Water and Sewage Law of 2011 of Nova Tertia excluding private companies from providing water distribution and sewage collection services. |
| 1 February 2013 | Request for consultations with Aquitania by Comercia with reference to OFTA and WTO commitments |
| 2 May 2013 | Request of meeting of OFTA Free Trade Commission by Comercia |
| 3 May 2013 | Request of establishment of DSU panel by Comercia |
| 30 August 2013 | Establishment of Panel by DSB |



C. Introduction and overview

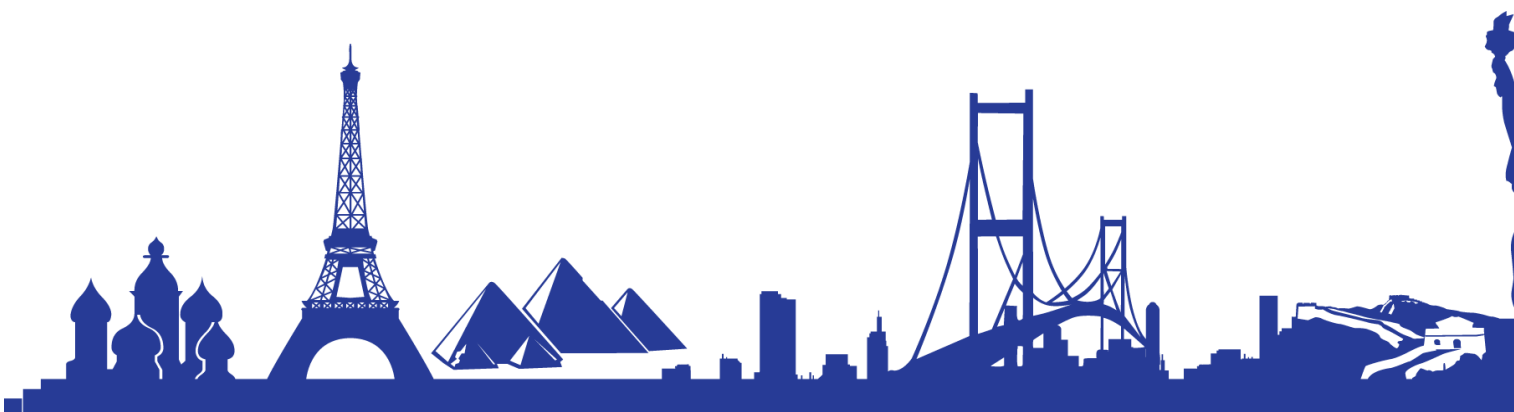
The case is inspired by water privatisation policies in South American countries in the 1990s and 2000s. Some of the facts are based on investor-state disputes on the basis of investment protection treaties.² However, neither privatisation policies nor water and sewage services have been subjects to WTO disputes until today. Yet, a number of GATS cases, in particular *EC – Bananas III*, *US – Gambling*, *China – Publications and Audiovisual Products* and *China – Payment Services* have dealt with issues which are also relevant to the case. In addition, the relationship between the GATS and public services, in particular water distribution, has been discussed extensively in the literature.³

According to the facts of the case (paras 17 and 18) *Commercia* claims that the *Nova Tertia* Water and Sewage Law of 2011 violates Articles XVI:1 and XVI:2(a) GATS (market access) and Article XVII GATS (national treatment), because the law practically prohibits the supply of water and sewage services by private companies even though *Aquitania* made full market access and national treatment commitments in the relevant sectors.

Aquitania raises a preliminary objection on jurisdictional matters claiming that the case is inadmissible because *Commercia* had first selected the OFTA dispute settlement mechanism before turning to the WTO thus violating Art. 2005:6 OFTA. On merits, *Aquitania* argues that water supply and sewage collection and treatment in *Nova Tertia* are services supplied “in the exercise of governmental authority” pursuant to Article I:3(b) GATS and thus fall outside the scope of the GATS. Should the panel find otherwise, *Aquitania* argues that its specific commitments do not cover water distribution and sewage collection and treatment services. *Aquitania* further argues that the 2011 law of *Nova Tertia* is not in breach of GATS Articles XVI and XVII. In any event, *Aquitania* considers its law to be justifiable under Art. XIV (a) and (b) GATS, because the imposition of universal service obligation is a fundamental value of the *Aquitanian* society and reflects also *Aquitania*’s human rights obligations. Furthermore, the environmental dangers associated with sewage leaks can only be addressed by significant public investments which a private company is not willing to undertake.

² See e. g. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. vs. Argentine Republic*, ICSID Case No. ARB/97/3; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17.

³ See e. g. Barnali Choudhury, *Public Services and International Trade Liberalization*, 2012. Specifically on water see e.g. Elisabeth Tuerk et al., *GATS and its Impact on Private Sector Participation in Water Services*, in: Edith Brown Weiss et al. (eds), *Fresh Water and International Economic Law*, 2005, p. 143 et seq.



Based on these claims the following elements need to be addressed by both sides: Jurisdiction of the WTO panel (I.), scope of the GATS (II.1.), violations of market access and national treatment commitments (II.2.) and a potential justification based on general exceptions (II.3.).

It should be noted that even though the facts of the case resemble an investor-state dispute under a bilateral investment treaty⁴ any arguments relating to the treatment of the investor or the behaviour of the investor are only relevant if they relate to claims under the GATS. Whenever teams refer to investor-state cases they should clearly indicate on which basis these cases can be considered in the context of WTO law.

D. Claims

I. Jurisdiction

Note: Jurisdictional issues do not play an important role in WTO jurisprudence. This is not surprising for a system of mandatory dispute settlement with a defined set of applicable law. However, potential overlaps between WTO dispute settlement and dispute settlement under regional trade agreements could become an issue in the near future. In fact, previous disputes such as Mexico – Soft Drinks and US – Tuna II included this dimension. However, as this issue was not raised by the parties, neither the panel nor the Appellate Body ruled on it in these cases.

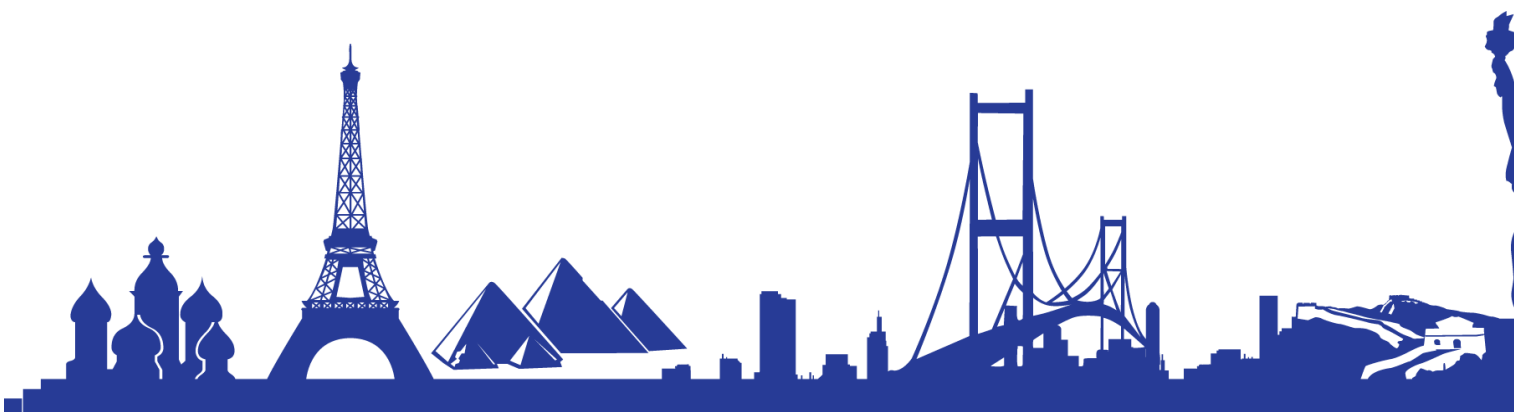
1. Legal basis

The jurisdiction of panels and the Appellate Body under the DSU is defined in Article 1:1 DSU:

“The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the “covered agreements”).”⁵

⁴ In fact, and many questions for clarifications indicate that participants were thinking in that direction.

⁵ Covered agreements are the Agreement Establishing the World Trade Organization, the Multilateral Trade Agreements in Annex 1A (Multilateral Agreements on Trade in Goods), Annex 1B (General Agreement on Trade in Services), Annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights) and Annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) as well as – subject to certain modifications - the Plurilateral Trade Agreements in Annex 4.



Aquitania claims that despite the fact that the current dispute is brought to the WTO dispute settlement mechanism pursuant to a covered agreement - the GATS – the panel does not have jurisdiction due to a conflicting provision in the – fictitious - Occidental Free Trade Agreement (OFTA). Article 2005:6 OFTA states

“ Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the WTO, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4.”

Article 2007 OFTA contains the details of the dispute settlement procedure under the OFTA. Based on Article 2005:6 OFTA Aquitania claims that by opting for the OFTA dispute settlement proceedings before turning to the WTO *Commercia* is barred from recourse to the WTO dispute settlement mechanism.

In order to support this claim, *Aquitania* will argue that Article 2005:6 OFTA applies to the case at hand and that it prohibits a WTO panel from hearing the case. *Commercia* will reject this claim and try to show that Article 2005:6 OFTA does not apply in the current situation. In any event, *Commercia* will claim that it cannot affect the jurisdiction of the panel.

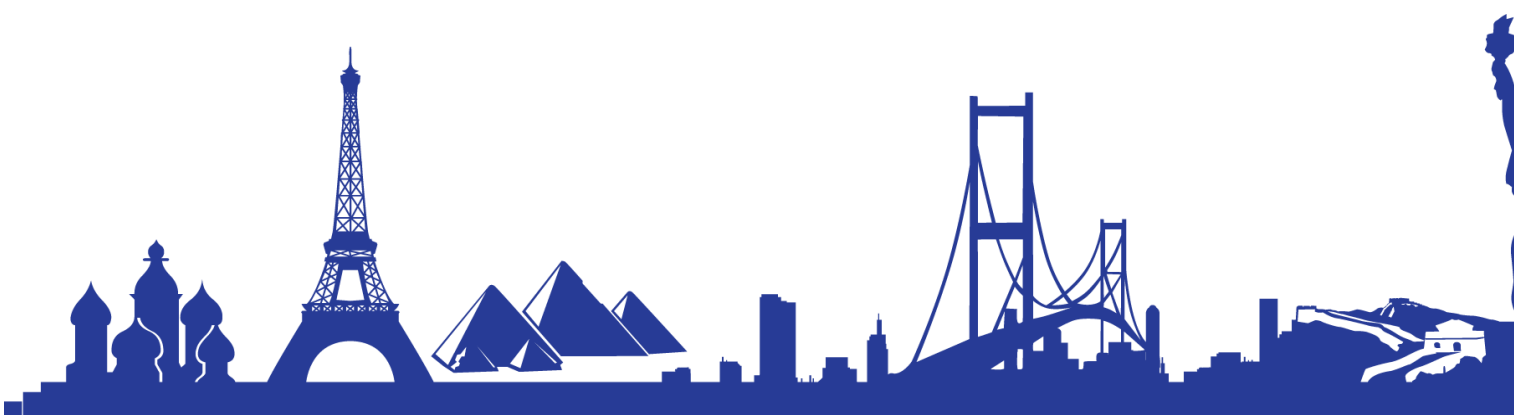
The DSU does not contain any explicit reference to the competence of WTO panels or the Appellate Body to rule on jurisdictional matters. However, it is a generally accepted rule of international law that a judicial organ has an implied competence to decide on its own jurisdiction and to satisfy itself that it has jurisdiction in any case that comes before it.⁶

2. Application of Article 2005:6 OFTA to the case at hand

According to the facts of the case *Commercia* requested a meeting of the OFTA Free Trade Commission on 2 May 2013 whereas it requested the establishment of a panel on 3 May 2013. The request for a meeting of the OFTA Free Trade Commission commences the dispute settlement procedures on the basis of Article 2007:1 OFTA which states that if the consulting parties fail to resolve a matter pursuant to Article 2006 within a certain period of time, any party may request a meeting of the Free Trade Commission.

Aquitania would argue that *Commercia* initiated dispute settlement procedures on the basis of Article 2007 OFTA on 2 May 2013 and hence before initiating dispute settlement proceedings under the DSU on 3 May 2013. *Commercia* could reject this argument by suggesting that dispute settlement proceedings on the basis of the DSU are initiated by the request for consultations on the basis of Article 3 DSU which was received by *Commercia* in February 2013. *Aquitania* could

⁶ Appellate Body Report, US – 1916 Act, para. 54. See also Appellate Body Report, Mexico -Soft Drinks, para. 45.



reply that the object and purpose of Article 2005:6 OFTA is to exclude parallel formal proceedings and potentially conflicting decisions, but not parallel consultations. Hence, the date of the initiation of a WTO dispute in the meaning of Article 2005:6 OFTA should be the request for the establishment of a panel on the basis of Article 6 DSU.

Commercia could also argue that recourse to the OFTA dispute settlement mechanism was effectively non-existing, because it was not to be expected that the OFTA Free Trade Commission would meet in the near future. *Commercia* would claim that according to general principles of law, recourse to a particular dispute settlement mechanism can only be made mandatory if that mechanism is effectively available. *Aquitania* could reply that despite the difficulties associated with the OFTA mechanism currently, this mechanism is still available. Furthermore, it could be argued that *Commercia* would be estopped from claiming that the OFTA mechanism is not available after it initiated proceedings on that basis in May 2013.

3. Effects on jurisdiction

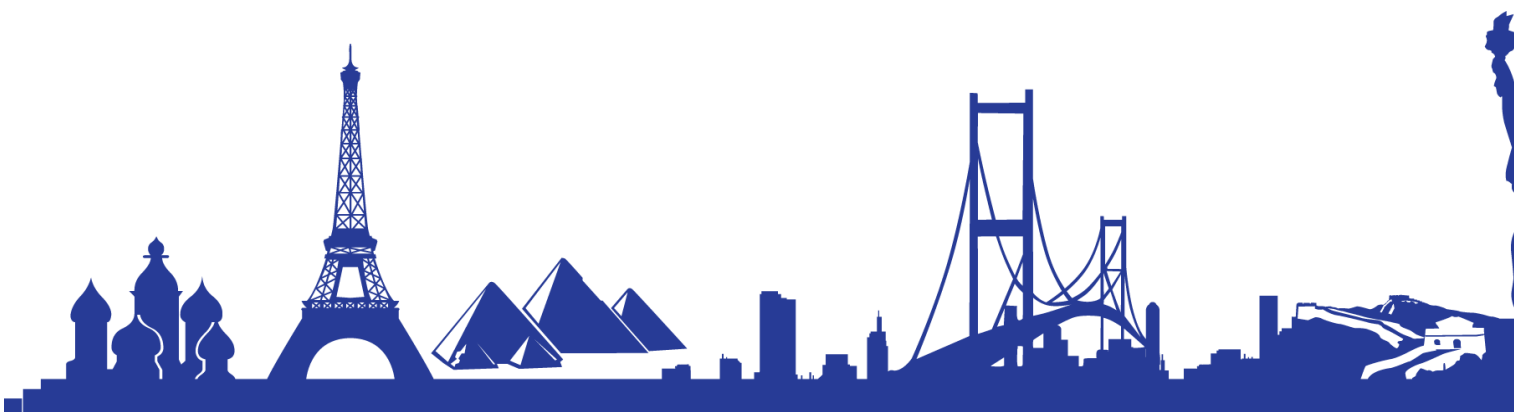
In *Mexico – Soft Drinks* the Appellate Body explicitly left open the question whether a provision such as Art. 2005:6 OFTA could be considered a legal impediment on the panel's jurisdiction.⁷ However, the Appellate Body held that "panels are required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute"⁸. Furthermore, the Appellate Body stated:

"Article 11 of the DSU states that panels should make an objective assessment of the matter before them. (...) Under Article 11 of the DSU, a panel is, therefore, charged with the obligation to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Article 11 also requires that a panel "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." It is difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it."

Furthermore, Article 23 of the DSU states that Members of the WTO shall have recourse to the rules and procedures of the DSU when they "seek the redress of a violation of obligations ... under the covered agreements". (...) We also note in this regard that Article 3.3 of the DSU provides that the "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by

⁷ Appellate Body Report, Mexico -Soft Drinks, para. 54.

⁸ Appellate Body Report, Mexico -Soft Drinks, para. 49.



another Member is essential to the effective functioning of the WTO". The fact that a Member may initiate a WTO dispute whenever it considers that "any benefits accruing to [that Member] are being impaired by measures taken by another Member" implies that that Member is entitled to a ruling by a WTO panel."⁹

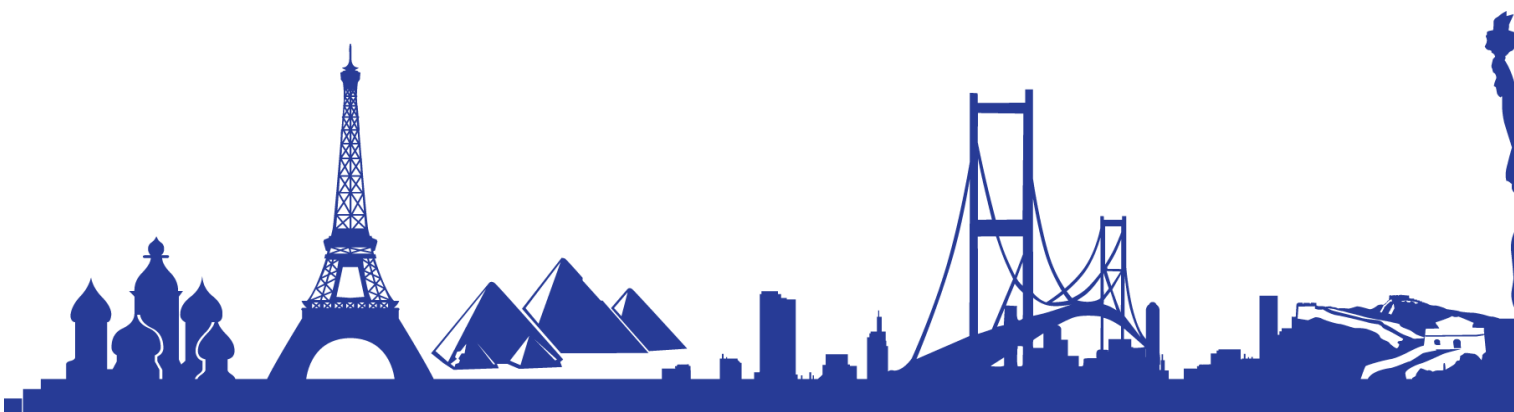
Based on this interpretation of the relevant provisions of the DSU, *Commercia* would argue that regardless of the application of Article 2005:6 OFTA to the present case, the panel would have jurisdiction in any case because the WTO has compulsory jurisdiction over disputes arising under its covered agreements and thus a panel does not have the discretion of declining validly established jurisdiction. Any other ruling would in fact diminish *Commercia*'s rights under the WTO contrary to Art. 3.2 DSU. In addition, the provisions of the DSU do not provide a clear textual basis for declining jurisdiction in presence of a rule such as Article 2005:6 of OFTA. Furthermore, *Commercia* could also argue that parties to an FTA cannot modify WTO DSU inter se, because this would be "incompatible with the effective execution of the object and purpose of the treaty as a whole" (see VCLT Art. 41).

Aquitania could reject this argument by pointing to the dangers associated with the fragmentation of international law due to divergent rulings of different dispute settlement systems addressing the same issue. Hence, Articles 3, 11 and 23 of the DSU should be interpreted in a manner which would give due respect to clauses explicitly addressing the choice of forum such as Article 2005:6 OFTA. At least, this should be the case if such clauses allow the complaining party to freely choose a forum which it deems most appropriate. *Aquitania* could therefore also argue that a ruling rejecting jurisdiction by a WTO panel would not diminish the rights of *Commercia* under the DSU, but be only the consequence of *Commercia*'s own decision to have recourse to the OFTA dispute settlement mechanism before turning to the WTO dispute settlement mechanism. Essentially, *Aquitania* would argue that *Commercia* effectively renounced its right to a panel under the DSU by submitting its claim to the OFTA dispute settlement mechanism first.

4. Summary

In sum, *Commercia* would claim that Article 2005:6 OFTA is not applicable to the facts of the case, but more importantly rely on the argument that even if Art. 2005:6 OFTA applies it would not preclude the WTO panel from assuming jurisdiction. *Aquitania* would argue that the DSU should be interpreted in a way which gives deference to other fora if specific choice-of-forum clauses exclude recourse to the WTO dispute settlement mechanism. It seems that a WTO panel would be more likely to follow *Commercia*'s arguments, because international judicial organs have a tendency to assume that they have jurisdiction rather than reject

⁹ Appellate Body Report, Mexico -Soft Drinks, paras 51-52, references omitted.



it. However, Aquitania's arguments are based on fundamental concerns about the much lamented fragmentation of international law and bear significant weight.

II. Merits

Commercia claims that certain measures of Aquitania violate the GATS. This requires that the relevant measures are covered by the GATS.

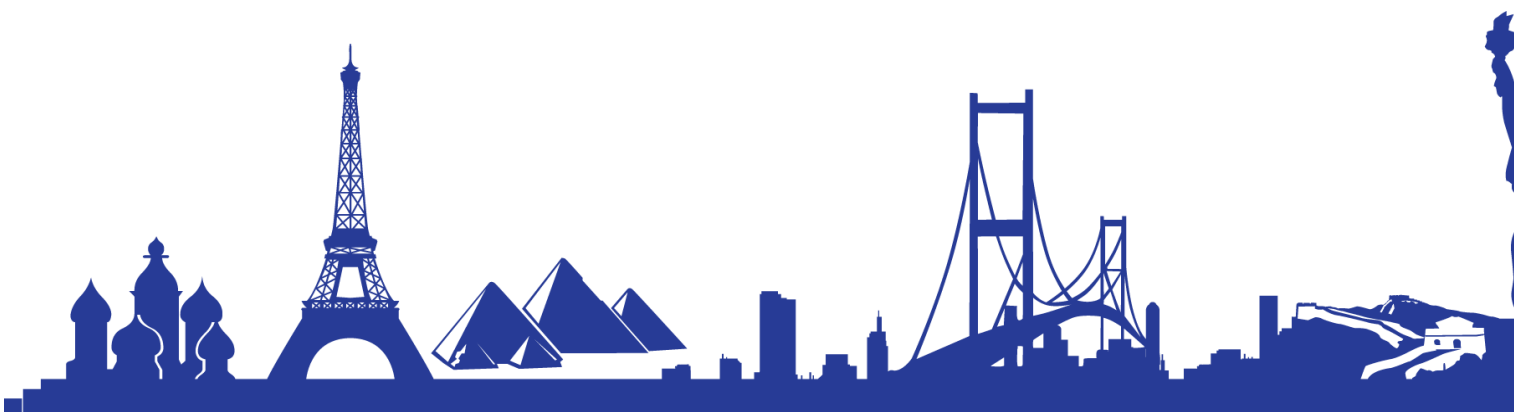
1. Scope of the GATS

The scope of the GATS is addressed in Article I of the agreement. It holds:

- “1. This Agreement applies to measures by Members affecting trade in services.
2. For the purposes of this Agreement, trade in services is defined as the supply of a service:
 - (a) from the territory of one Member into the territory of any other Member;
 - (b) in the territory of one Member to the service consumer of any other Member;
 - (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
 - (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.
3. For the purposes of this Agreement:
 - (a) "measures by Members" means measures taken by:
 - (i) central, regional or local governments and authorities; and
 - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;
 - (...)
 - (b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;
 - (c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”

a) Measures by Members

Both parties to the dispute should therefore begin their analysis with Art. I:1 GATS and reference to the notion of “measures by Members affecting trade in services”.



Commercia will stress that “Measures by Members” include “measures taken by central, regional or local governments and authorities” (Art. I:3 (a) GATS) and that a “measure” is defined as “any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form” (Art. XXVIII (a) GATS). Hence, the Nova Tertia Water and Sewage Law of 2011 would be a measure covered by the GATS.

Aquitania would have difficulties challenging this view by claiming that the measure at stake is not a measure of the Federal Republic of Aquitania which is a Member of the WTO, but by the Province of Nova Tertia which is not subject to public international law. Apart from the clear wording of Art. I:3(a) (i) GATS there is also a precedent in the GATS case law which also addressed measures of subcentral levels of government.¹⁰ In addition, the fact that the GATS also applies to regional and local measures reflects a general principle of public international law.

b) Trade in services

However, the measure at stake (the Water and Sewage Law of 2011) also needs to affect trade in services. This requires that the activities in questions are “services” in the meaning of the GATS and that there is “trade in services”.

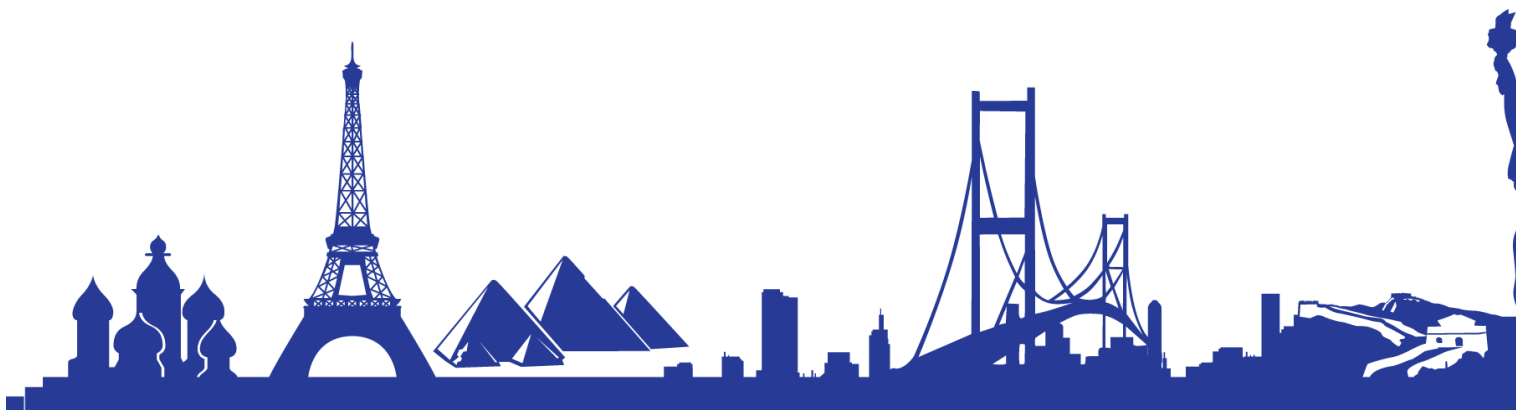
(1) Services

Article I:3 (b) GATS defines “services“ as “any service in any sector except services supplied in the exercise of governmental authority”. This is further clarified in Article I:3 (c) GATS which stipulates that “a service supplied in the exercise of governmental authority” means “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.” As Aquitania specifically refers to this provision, both teams need to address this question.

The meaning of Art. I:3 (b) and (c) GATS has not yet been subject to WTO case law, but has been discussed extensively in the literature.¹¹ Based on the various interpretations suggested in the literature *Aquitania* could argue that as of 2011 water distribution and sewage

¹⁰ US – Gambling and Betting Services concerned US federal and state laws.

¹¹ Amedeo Arena, The GATS Notion of Public Services as an Instance of Intergovernmental Agnosticism: Comparative Insights from EU Supranational Dialectic JWT 2011, 489; Rudolf Adlung, Public Services and the GATS, JIEL 2006, 455; Eric Leroux, What Is a “Service Supplied in the Exercise of Governmental Authority” under Article I:3(b) and (c) of the General Agreement on Trade in Services?, JWT 2006, 345; Markus Krajewski, Public Services and Trade Liberalization: Mapping the Legal Framework, JIEL 2003, 341.



collection services are not provided on a commercial basis, because the service provider (Agua Tertias) is not making profit. Aquitania could also point to the social service requirements imposed by the 2004 regulation in order to support the argument that services are not provided on a “commercial basis”. Furthermore, there is no competition between different service suppliers because the 2011 Law stipulates that the service will be provided by “a public company” effectively prohibiting any other service supplier.

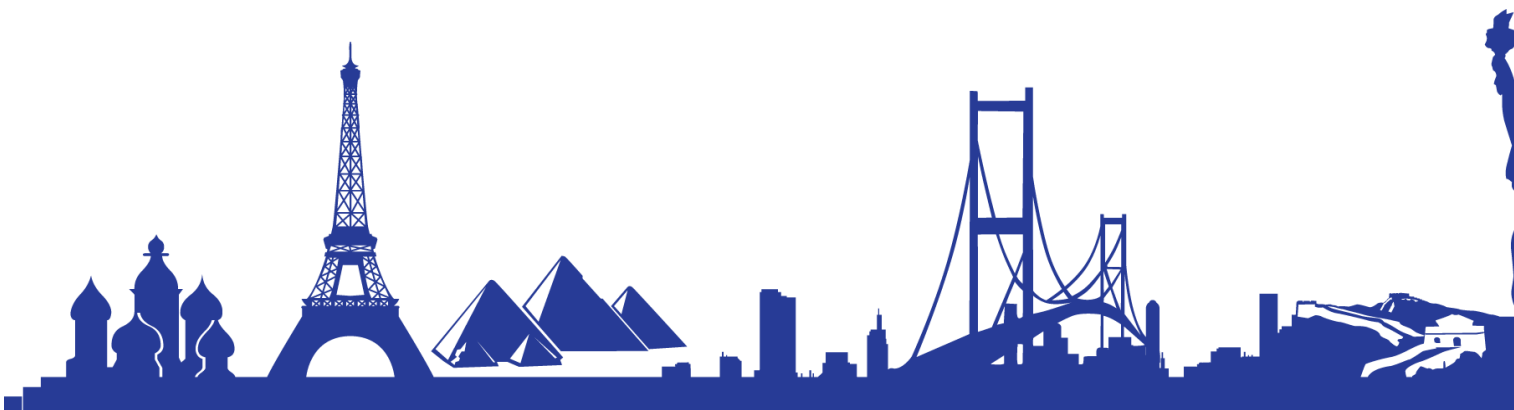
Commercia could suggest a narrower understanding of the term “commercial” which would include the provision of a service against some form of remuneration even if the remuneration does not cover the costs and does not allow a profit. *Commercia* would not need to address the question of “in competition”, because the two conditions of Art. I:3(c) GATS are cumulative. *Commercia* might strengthen its case by pointing out that “no competition” or one single service supplier in a given geographic area is common practice in water distribution and sewage collection services.

There seems to be a growing consensus in the academic literature that Article I:3 (b) and (c) GATS only covers those governmental activities which are considered as core sovereign functions such as legislation, the administration of justice and executive activities, in particular police, military and correctional services, but not network-based services such as water and sewage services. This would support *Commercia’s* position, but *Aquitania* could point to the changing nature of the idea of “sovereign function”.

Apart from the question whether water and sewage services are covered by Art. I:3(b) and (c) GATS, it is also important to discuss whether the analysis should be based on the situation in July 2005 when Aquitania joined the WTO or in 2013 when the dispute was initiated. In July 2005, the laws of Aquitania generally allowed the private and commercial provision of water and sewage services and Tertialia already submitted these services to a public tender. This could be used by *Commercia* to argue that the GATS applied to these services and continued to apply when Aquitania adopted its law of 2011. *Aquitania* would argue that the law of 2011 prohibited the private and commercial supply of these services and hence that the GATS would no longer cover these activities when *Commercia* initiated the dispute in 2013.

While it is generally accepted that the privatisation of a former public monopoly may subject certain activities to the scope of the GATS which have hitherto been exempted and therefore increase the scope of the GATS¹², it is unclear whether governments may also reduce the scope of the GATS by prohibiting the provision of a service on a commercial and competitive basis, in particular in sectors where specific commitments have been undertaken. Apparently, this question has not yet been discussed extensively in the literature. As a consequence, the teams would have to rely on their own arguments.

¹² Zdouc JIEL 1999



Aquitania could argue that the definition of Article I:3 (b) and (c) GATS protects the sovereign right of a state to submit or withdraw certain activities from the market, while *Commercia* could point out that this sovereign right can only be exercised without violating existing GATS commitments. Hence, a WTO Member which made specific commitments in a certain services sector may not remove these services from the scope of the GATS in a manner which violates the agreement. *Commercia* may also argue that the procedures under Article XXI allow a Member to modify or withdraw commitments without diminishing other Members rights under the commitments. Finally, *Commercia* could point to Article VIII:4 of the GATS which provides that, if a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, GATS Article XXI shall apply.

(2) Trade in services

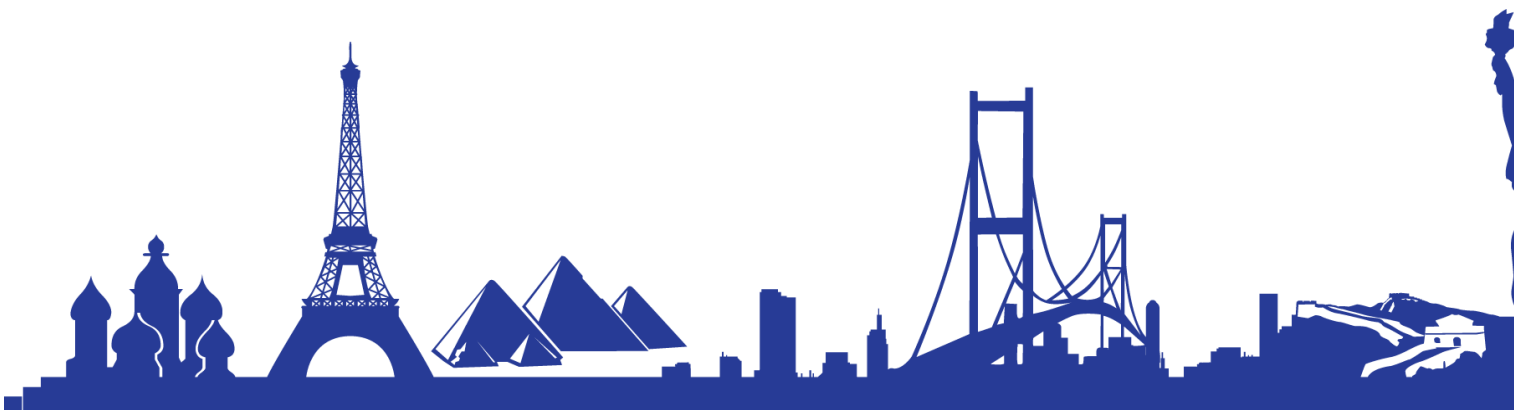
Once it has been established that water distribution and sewage treatment services in *Aquitania* are services within the meaning of the GATS, it needs to be established if there is “trade in” these services. Trade in services is defined on the basis of the four modes of supply (Article I:2 GATS). The facts of the case and the relevant legal framework concern to the supply of services in the territory of one Member (= *Aquitania*) by a service supplier of another Member (= *Commercia*), hence through commercial presence (= Mode 3 of the GATS, Art. I:2(c) GATS). Commercial presence is defined in the GATS as “any type of business or professional establishment, including through the constitution, acquisition or maintenance of a juridical person (...) within the territory of a Member for the purpose of supplying a service” (Art. XXVIII (d) GATS).

It should be noted that for the purposes of GATS, *Avanti SA*, though established under the laws of *Aquitania* is a foreign service supplier. Article XXVIII (m) GATS defines a juridical person of another Member either as a juridical person which is constituted under the law of that other Member or in the case of commercial presence owned or controlled by juridical persons of that other Member. As *Avanti SA* is 100% owned by *Avanti Ltd* a juridical person of *Commercia*, it qualifies as a foreign service supplier.

Consequently, the facts of the case also relate to trade in services. Both parties may briefly address this question as an element of their analysis of Art. I GATS. However, they should not spend much time on this aspect.

c) Affecting

In *EC – Bananas III* the Appellate Body held that “the use of the term ‘affecting’ reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word



‘affecting’ implies a measure that has ‘an effect on’, which indicates a broad scope of application.”

Commercia could argue that the Water and Sewage Law of 2011 affects trade in services, because it prohibits the supply of these services for domestic and foreign private companies. *Aquitania* would maintain that the supply of water and sewage services on the basis of the Water and Sewage Law of 2011 does not amount to trade in services because it amounts to a service "supplied in the exercise of government authority" pursuant to Article I:3(b)". Hence, the law cannot affect trade in services.

d) Summary

Summarising its arguments regarding the scope, *Commercia* will claim that the Water and Sewage Law of 2011 falls into the scope of the GATS while *Aquitania* will try to show that it does not, mostly relying on Art. I:3(b) and (c) GATS. While the Appellate Body has interpreted the GATS as having a broad scope of application in respect of measures directly and indirectly affecting trade in services it has not yet rules on the issue of services supplied in the exercise of governmental services.

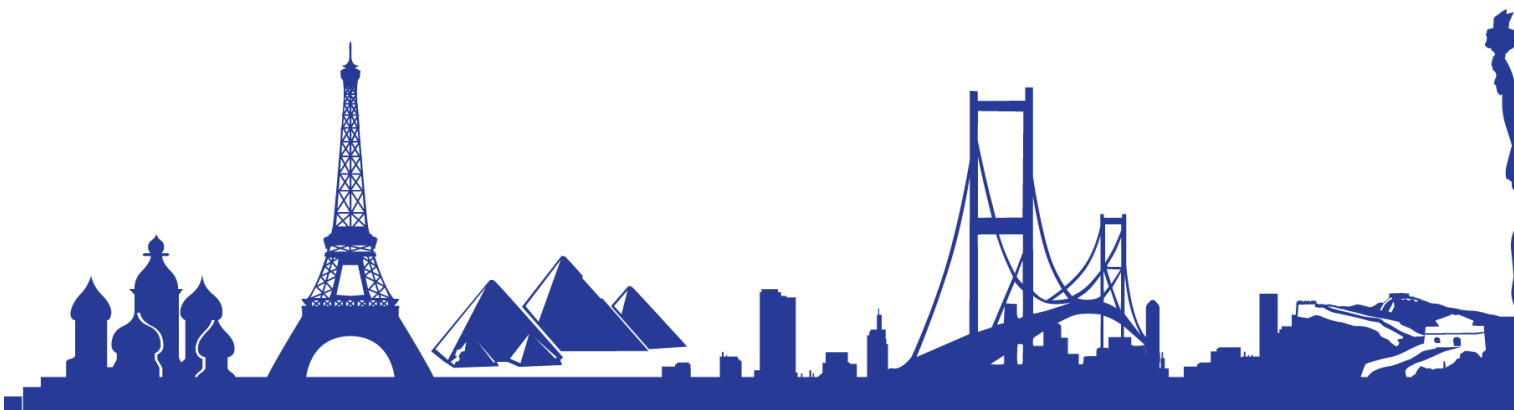
2. Violation of Specific Commitments

Commercia will show that *Aquitania* violated its GATS commitments, while *Aquitania* will argue that even if the 2011 law is covered by the GATS, it did not violate the GATS. *Commercia* claims a violation of Art. XVI and XVII GATS. As the Terms of Reference of the Panel are based on *Commercia*'s claims, teams should not address any other substantive violations of the GATS.

a) Coverage of Specific Commitments

Market access and national treatment are obligations of the GATS which only apply to sectors with specific commitments and only subject to any limitations or conditions made in the commitments. Before addressing the substantive scope of Articles XVI and XVII, teams would need to address the scope of the commitments.¹³ Hence, *Commercia* needs to argue that *Aquitania* made commitments in the relevant sectors (water distribution and sewage

¹³ Appellate Body Report, US - Gambling, para. 143; Panel Report, China – Publications and Audiovisual Products, para. 7.1354; Panel Report China – Payment Services, para 7.513



collection and treatment) while *Aquitania* will try to show that it did not make such commitments.

(1) Standards of interpretation

In a number of GATS cases, the WTO Appellate Body held that Schedules of Specific Commitments are to be interpreted on the basis of the general principles of treaty interpretation (Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969) because they form an integral part of the agreement (Art. XX GATS)¹⁴ This includes the ordinary meaning of the terms of the commitments, their context (i.e. other parts of the schedule, the GATS text and schedules of other WTO Members) as well as the object and purpose of the GATS. In addition, supplementary means of interpretation, such as the preparatory work of the schedules can be used.

In practice, the wording and the context of the commitments have been more useful than the object and purpose. However, the Services Sectoral Classification List (so called W/120-list)¹⁵ as incorporated into the Scheduling Guidelines of 1993 and of 2001 has been a key interpretative tool so far. The Appellate Body considered that the W/120 list and the 1993 Scheduling Guidelines were part of the preparatory work of the schedules of Members and hence a supplementary means of interpretation (Art. 32 Vienna Convention).¹⁶ Due to Aquitania's accession to the WTO in 2005, the correct version of the Scheduling Guidelines would be the 2001 version. It should be noted that the Appellate Body was silent in *US – Gambling* about the nature of the 2001 Scheduling Guidelines in terms of schedule interpretation. An important difference is that the 2001 Scheduling Guidelines were formally adopted by the Council for Trade in Services. Hence, it could be argued that the 2001 Guidelines are in fact subsequent practice according to Art. 31:3 (b) of the Vienna Convention, because they are based on a decision of the parties to the treaty. Yet, since Aquitania joined only in 2005, the 2001 Scheduling Guidelines would still be preparatory work for the accession agreement. In any case; it should be noted, that the sectoral classification list is identical in both versions. Hence, teams may not need to discuss this issue too deeply.

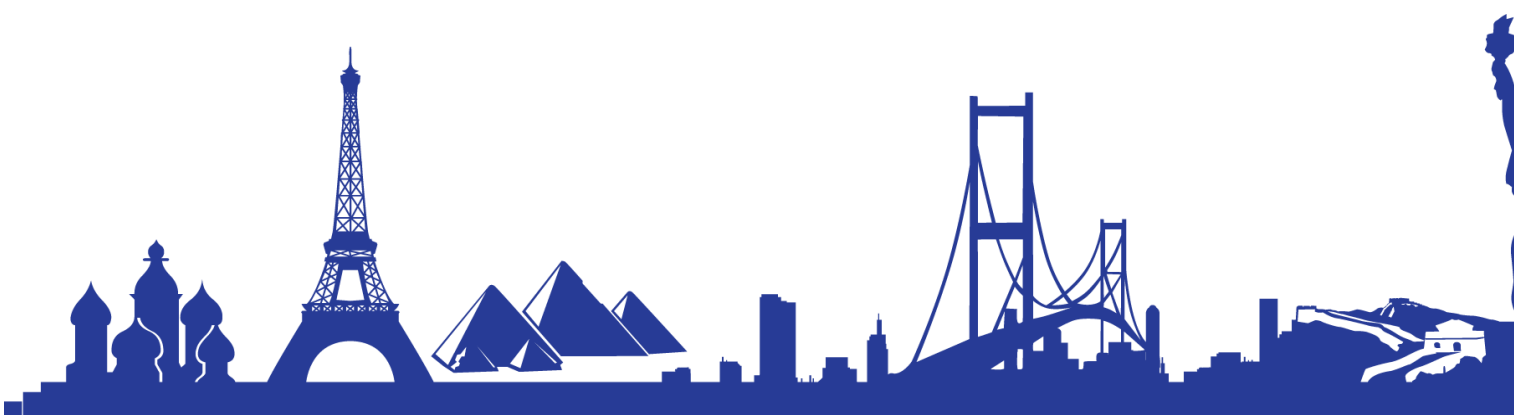
This W/120-list contains a list of services sectors based on the provisional UN Central Production Classification (CPC prov.).¹⁷ If there is no indication to the contrary, a Member

¹⁴ Appellate Body Report, *US — Gambling*, para. 159.

¹⁵ GATT Document MTN.GNS/W/120 of 10 July 1991, available at http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc.

¹⁶ Appellate Body Report, *US — Gambling*, paras. 196 ff. See also Panel Report, *China — Publications and Audiovisual Products*, para. 7.923.

¹⁷ Provisional Central Product Classification, available at



can be assumed to have relied on the W/120-list. In this respect the Appellate Body confirmed that “unless otherwise indicated in the Schedule, Members were assumed to have relied on W/120 and the corresponding CPC references”.¹⁸ The corresponding CPC references are descriptions of sectors and subsectors of services using a digital system. Both teams will have to rely on these classifications which are as follows:

W/120-list

| SECTORS AND SUB-SECTORS | CORRESPONDING CPC |
|------------------------------------|-------------------|
| 6. ENVIRONMENTAL SERVICES | |
| A. Sewage services | 9401 |
| B. Refuse disposal services | 9402 |
| C. Sanitation and similar services | 9403 |
| D. Other | |

UN CPC Prov

Group: 940 - Sewage and refuse disposal, sanitation and other environmental protection services

- 9401 - Sewage services
- 9402 - Refuse disposal services
- 9403 - Sanitation and similar services
- 9404 - Cleaning services of exhaust gases
- 9405 - Noise abatement services
- 9406 - Nature and landscape protection services
- 9409 - Other environmental protection services n.e.c.

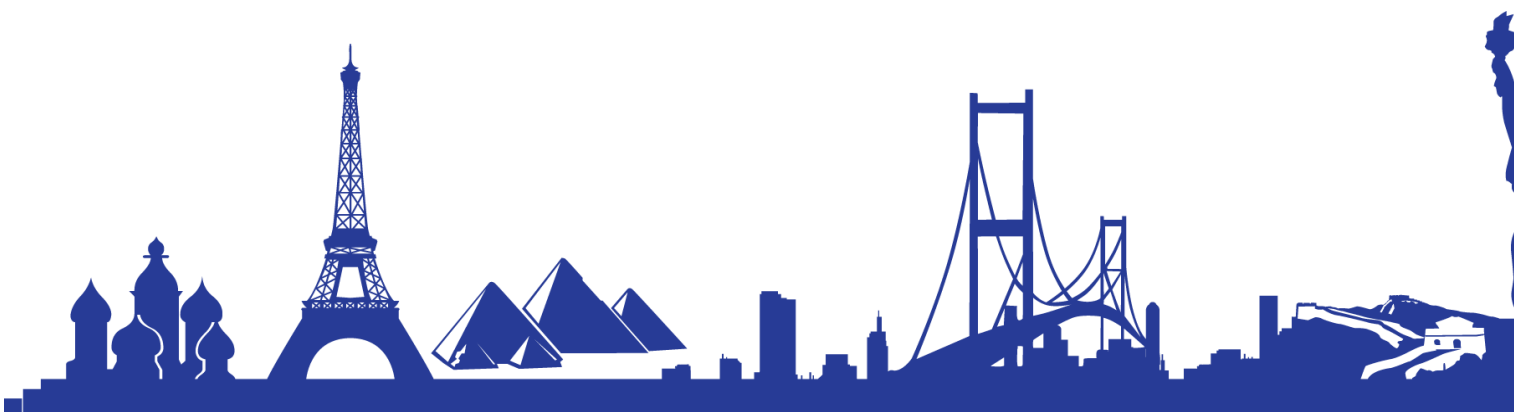
(2) Sewage collection and treatment services

The analysis of Aquitania’s schedule should differentiate between water distribution and sewage services.

Aquitania’s commitments include Sector 6 (Environmental Services), subsector A “Sewage and related services”. The ordinary meaning of this commitment suggests that sewage collection and treatment services are covered by Aquitania’s commitments. Aquitania’s commitments also correspond to the relevant element of the W/120-list. As Aquitania’s

<http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1>

¹⁸ Appellate Body Report, US — Gambling, para 205.



schedule does not contain any other indication, this list may be used as a basis to interpret the schedule.

Sewage is listed as Sector 6.A and defined as CPC 9401 which covers “Sewage removal, treatment and disposal services.” It is therefore relatively clear that Aquitania made commitments in this sector. *Commercia* should not find much difficulty in making in that claim. *Aquitania* may well concede this point.

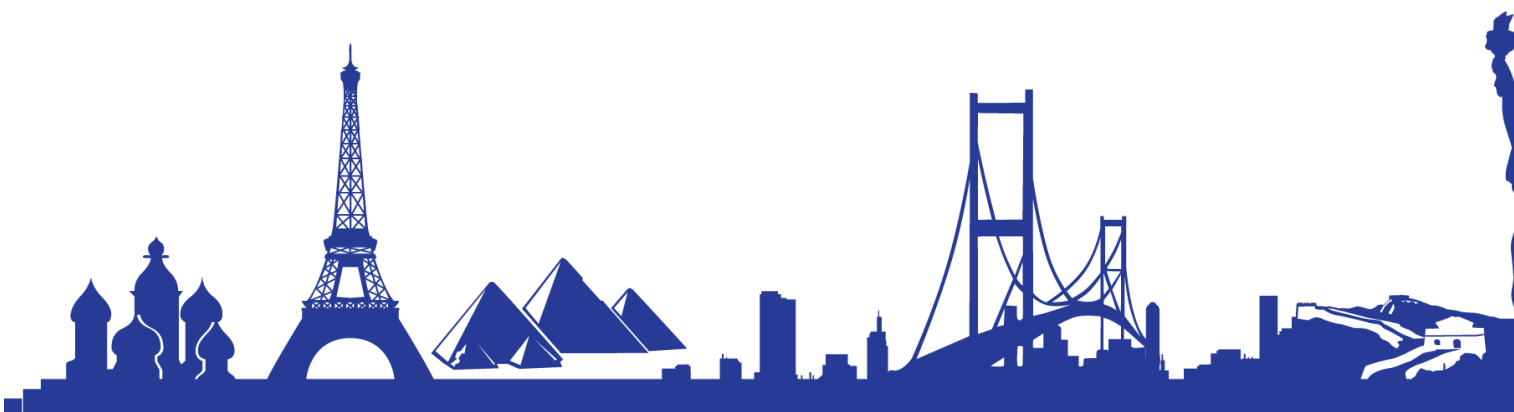
(3) Water distribution services

Water distribution services are not explicitly listed in Aquitania’s schedules and are also not mentioned in the W/120-list. *Aquitania* could therefore make a *prima facie* argument suggesting that it did not make commitments concerning water distribution services.

Commercia will try to rebut this interpretation of the commitments. It could base this claim on three arguments: Water distribution services could arguably be covered by the concept of “sewage-related services” (subsector 6.A.), or under the commitment concerning subsector 6.D. “Other (environmental services)”, or else under subsector 4.E. “Other distribution” services. In order to support these arguments *Commercia* would need to rely on the ordinary meaning of the terms and their context including the schedules of other WTO Members.

While some support for the argument that water distribution services could be covered by these commitments exists, *Aquitania* will point to the definition of CPC 9401 (sewage) which states that “collection, purification and distribution services of water” are classified in subclass 18000 (Natural water).¹⁹ This strongly suggests that sewage and water distribution are to be distinguished and that water distribution should not be considered as related to sewage under the classification used by Aquitania. In addition, Aquitania could point out that the definition of “other environmental services” (subsector 6.D) seems to encompass CPC sectors 9404 -9406 which include cleaning services of exhaust gases, noise abatement services, nature and landscape protection services and "other environmental protection services not elsewhere classified" (CPC 9409) such as “acidifying deposition ("acid rain") monitoring, controlling and damage assessment services”. Even though this is an open-ended list, the examples have an illustrative function. Hence, services covered under the category “other” should have some similarity to those mentioned in the illustrative list.

¹⁹ Mireille Cossy, Water Services in the WTO, in; in: Edith Brown Weiss et al. (eds), Fresh Water and International Economic Law, 2005, p. 123.



Based on these considerations it seems most likely that a WTO panel would hold that Aquitania made commitments in sewage collection and treatment services, but not in water distribution services.

b) Market Access

(1) Contents of Article XVI GATS

Article XVI GATS contains the market access obligation. The general principle is laid down in paragraph 1:

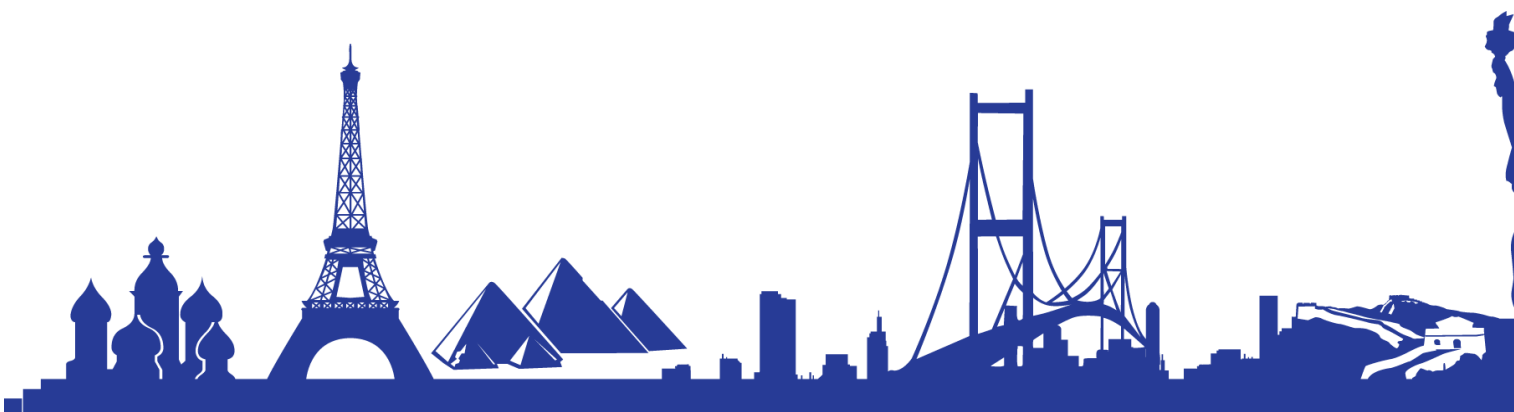
“With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.”

Article XVI:2 GATS further specifies this standard. It states:

“In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test⁹;
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.”

⁹ Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.



The relationship between paragraphs 1 and 2 of Art. XVI GATS has been clarified in *US – Gambling*. According to the Panel the purpose of the second paragraph of Article XVI “is to define the types of limitations and measures which shall not be maintained or adopted in scheduled sectors or sub-sectors, unless otherwise indicated in the relevant Member's schedule.”²⁰ More specifically, the Panel also referred to the 1993 Scheduling Guidelines which state:

“A Member grants full market access in a given sector and mode of supply when it does not maintain in that sector and mode any of the types of measures listed in Article XVI. The measures listed comprise four types of quantitative restrictions (subparagraphs a-d), as well as limitations on forms of legal entity (subparagraph e) and on foreign equity participation (subparagraph f). The list is exhaustive (...).”²¹

The Panel summarised this view as follows:

“The ordinary meaning of the words, the context of Article XVI, as well as the object and purpose of the GATS confirm that the restrictions on market access that are covered by Article XVI are only those listed in paragraph 2 of this Article.”²²

As a consequence, both teams should focus their analysis of Article XVI and their arguments on the measures listed in paragraph 2 of that Article.

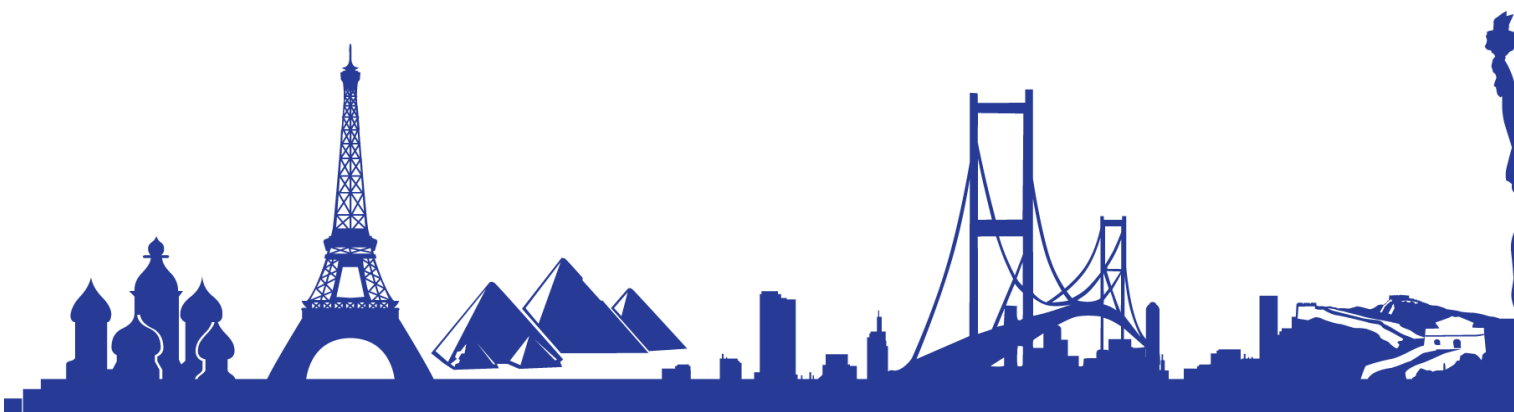
(2) Scope of the market access commitment of Aquitania

Aquitania made the following commitment in the relevant sector 6.A regarding market access: “None, except that a concession is required” and “None” regarding national treatment. The language of the commitments is interpreted in accordance with the standards of treaty interpretation. The Scheduling Guidelines (of 2001) are – again – important for the interpretation of the schedules. “None“ means that a Member maintains no limitations regarding its commitments, i.e. a full commitment. Aquitania qualified its commitment regarding market access with the condition “except that a concession is required”. According to the GATS standard of scheduling, this constitutes a commitment with limitations. This raises the question to which extend this condition limits the scope of Aquitania's commitments.

²⁰ Panel Report, *US – Gambling*, para 6.293.

²¹ Scheduling Guidelines 1993, para. 4.

²² Panel Report, *US – Gambling*, para. 6.318. See also Panel Report, *China – Payment Services*, para. 7.630



Aquitania could argue that the reference to a concession means that market access is only granted to those companies which have been granted a concession. *Aquitania* could base this argument on the ordinary meaning of the term “concession” which refers to a specific right granted by the government to a company. It is hence clear that the requirement of a concession indicates that the government preserves the right not to grant concessions or to grant concessions only to specific types of companies. *Aquitania* could argue that a concession usually establishes exclusive rights and thus falls under Article XVI:2(a) or that a concession usually requires certain type of legal entity and thus falls under Article XVI:2 (e). *Aquitania* could also point out that other WTO Members refer to concessions in their commitments and made similar references as *Aquitania*. *Aquitania* could therefore claim that the 2011 law does not violate its market access commitments as the law enables companies with a concession to supply the service.

Commercia will reject these arguments. It may point out that the Scheduling Guidelines state that “The entry should describe each measure concisely, indicating the elements which make it inconsistent with Articles XVI or XVII.”²³ Hence, any limitations need to refer to specific measures which would otherwise violate the market access obligations. As concessions are not mentioned in Article XVI:2 GATS, *Commercia* could claim that the conditions do not limit the market access commitment of *Aquitania*. In addition, *Commercia* could argue that an interpretation of the term “concession is required” which would allow the government to freely grant or withhold concessions would effectively render the commitment meaningless, because it would mean that the government’s right to grant or not to grant market access is unlimited.

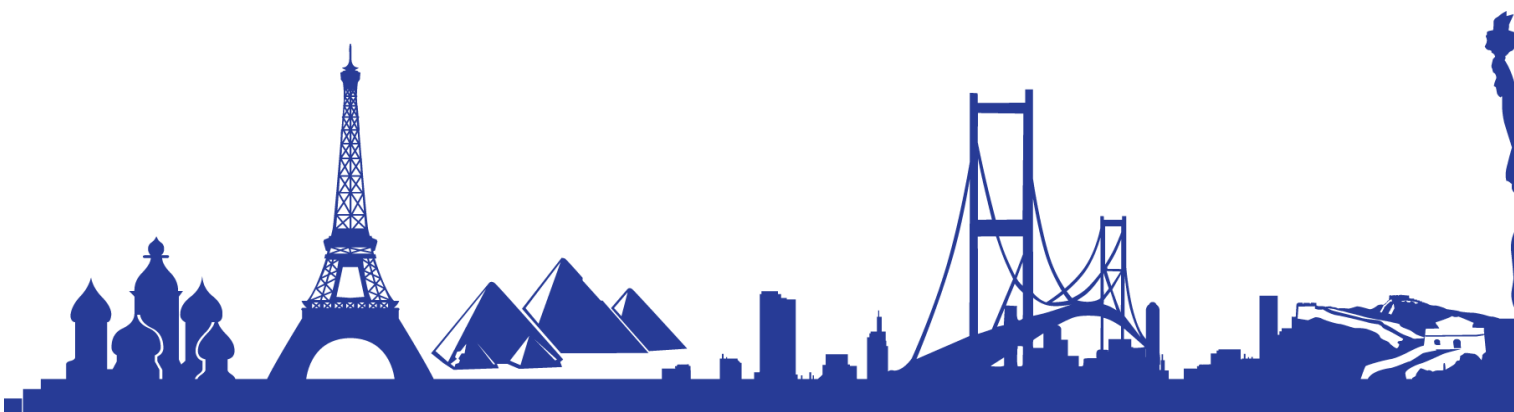
In this context, *Commercia* could also rely on the Appellate Body’s approach in *US – Gambling*. Citing approvingly the Panel, the Appellate Body stated

“[Article XVI:2(a) GATS] was not drafted to cover situations where a Member wants to maintain full limitations. If a Member wants to maintain a full prohibition, it is assumed that such a Member would not have scheduled such a sector or subsector and, therefore, would not need to schedule any limitation or measures pursuant to Article XVI:2.”²⁴

Based on this, *Commercia* could argue that if *Aquitania* wanted to maintain full discretion regarding the granting of concessions it should not have scheduled any commitments at all. Furthermore, *Commercia* could claim that the reference to schedules of other WTO Members which list concessions as market access limitations cannot alter the meaning of Article XVI:2 GATS. *Commercia* could also point out that some Members such as the US combine a

²³ Scheduling Guidelines 1993, para 25; Scheduling Guidelines 2001, para. 44.

²⁴ AB Report, *US Gambling and Betting*, para. 234.



reference to concessions with a quantitative restriction of the number of available concessions which would amount to a proper limitation. In conclusion, *Commercia* will therefore claim that *Aquitania*'s condition does not limit the scope of its market access commitments.²⁵

(3) Assessment of Section Two (A) of the Water and Sewage Law of 2011

Assuming that *Aquitania* made a full market access commitment concerning mode 3 in sewage services, both teams will address the question whether the Water and Sewage Law of 2011 violates this commitment. As pointed out above, this would require that the law amounts to one of the six limitations listed under Article XVI:2 GATS. In addition, both teams may address the question whether the law 2011 applies to a "regional subdivision" of *Aquitania*.

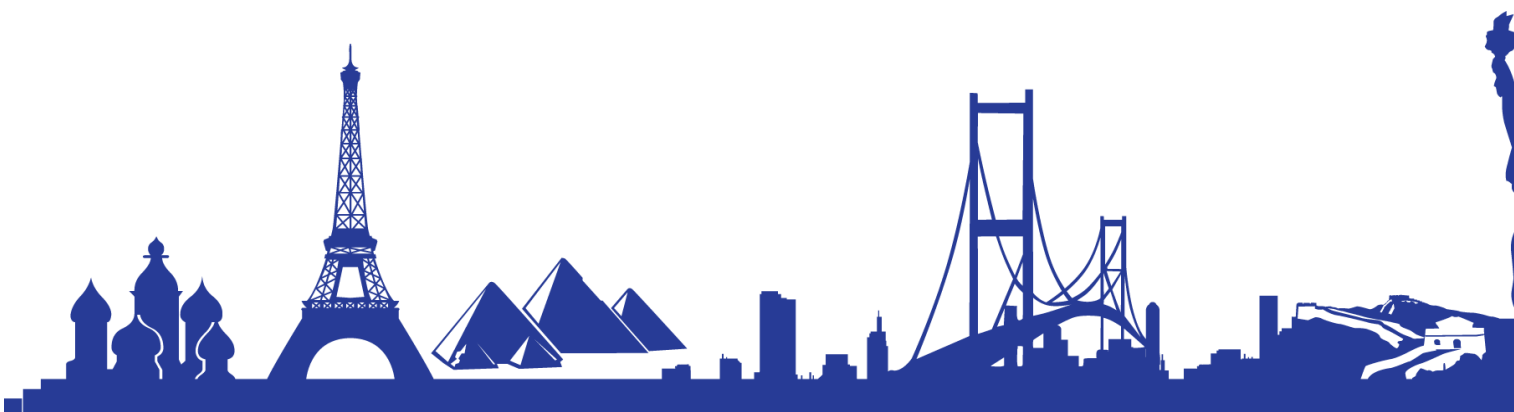
(i) Article XVI:2 (a) GATS

Commercia could argue the law imposes a public monopoly and hence violates Article XVI:2 (a) GATS which holds that Members may not maintain or adopt "limitations on the number of service suppliers whether in the form of (...) monopolies (...)". *Commercia* would recall that the law states that "the collection, purification, treatment and distribution of drinking water to households and commercial entities and the collection and treatment of sewage from households and commercial entities will be operated by a public company which is owned and controlled in its entirety by the Provincial Government" (emphasis added). As the law only allows a public company to supply these services it establishes a public monopoly which violates Article XVI:2 (a) GATS.

Aquitania could reply that the law only requires the service supplier to be constituted in a specific form (a public company), but that the law does not restrict the number of service suppliers to one (= a monopoly). As the law is silent on the number of public companies which can supply the service, it does not violate Article XVI:2 (a) GATS.

In reply, *Commercia* could point out that the law was implemented in a manner which constitutes a monopoly, because only *Aguas Tertias* was awarded a concession. *Commercia* would recall that the term monopoly in Article XVI:2 (a) GATS was defined by the Appellate Body with reference to Article XXVIII (h) of the GATS which holds that monopoly supplier of a service is "any person, public or private, which in the relevant market of the territory of a

²⁵ Even though the Scheduling Guidelines clearly stipulate that Members should only schedule measures which are inconsistent with Articles XVI and XVII GATS, many WTO Members have scheduled measures which are not inconsistent. These "scheduling mistakes" are not relevant context, but misunderstandings of the applicable law.



Member is authorized or established formally or in effect by that Member as the sole supplier of that service” (emphasis added).²⁶ Hence, even if the 2011 law does not establish a de jure monopoly, its implementation led in fact to a monopoly.²⁷ *Commercia* could support this line of argument by pointing to the fact that the 2011 law effectively limits the number of service suppliers and is hence quantitative nature which is a key element of an analysis under Article XVI GATS.²⁸

Aquitania, in turn, could reject this interpretation by claiming that this interpretation is flawed because Article XVI:2 (a) GATS specifically refers to the “form” of a measure and not its effect. *Aquitania* would also point out that the Appellate Body specifically stated that “(...) the words “in the form of” should [not] be ignored or replaced by the words “that have the effect of””.²⁹ Finally, and as a last resort *Aquitania* could suggest that the Appellate Body erred in *US – Gambling* when interpreting Article XVI:2 (a) GATS and that it should reverse its interpretation in the present case, in particular since it is not clear. *Aquitania* could refer to critical views in the literature³⁰ and invite the Appellate Body to reconsider its approach.

In addition and more generally, *Aquitania* could argue that its measure is aimed at regulating water and sewage services and not at restricting the access to markets. As a regulatory measure it should therefore fall outside of Article XVI GATS.³¹ *Aquitania* would claim that the GATS does not restrict “the right to regulate and to impose new regulations” (see GATS preamble). It could also point out that regulating public services such as water and sewage services has been recognised as a vital element of the right to regulate by an international investment arbitration tribunal.³² *Aquitania* would, however, need to clarify that it only cites this decisions by way of illustration and to suggest that the WTO panel might take a similar interpretative approach.

Commercia would reject the argument that the Water and Sewage Law of 2011 is a regulatory measure. Furthermore, it would argue that the right to regulate can only be exercised in the framework of the GATS obligations of a Member state.

²⁶ AB Report, *US - Gambling*, para. 228.

²⁷ Teams could also separately address the 2011 law and its implementation as two measures. However, *Commercia*’s claim suggests that it considers the 2011 law to be the “measure” which is consistent with *Aquitania*’s GATS obligations.

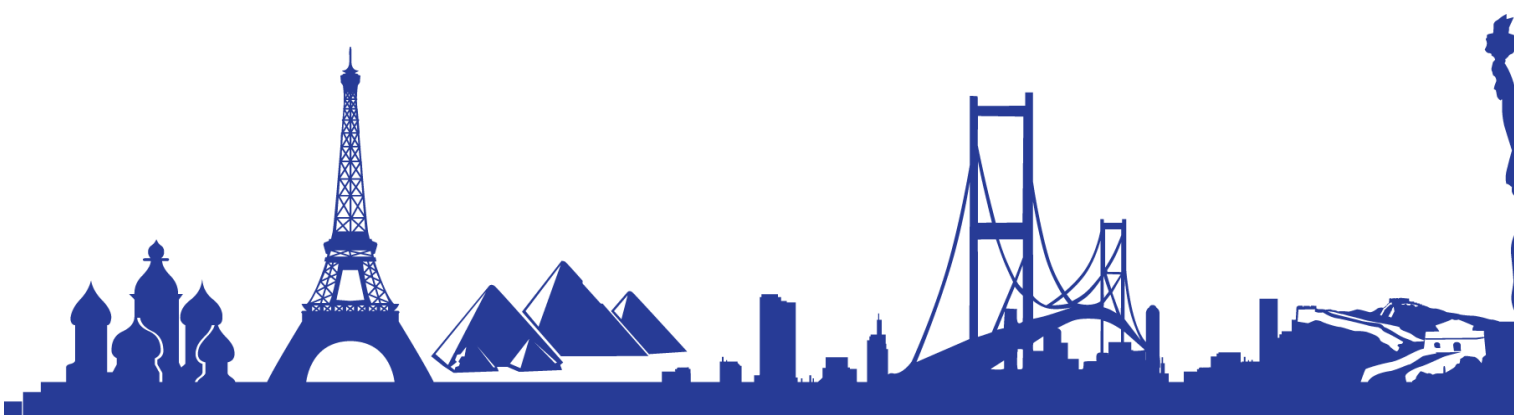
²⁸ Panel Report *China Payment Services*, para. 7.593.

²⁹ AB Report, *US - Gambling*, para. 232.

³⁰ Federic Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique*, *JIEL* 2006, 117.

³¹ For a similar argument see Joost Pauwelyn, *Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS*, *WTR* 2005, 131.

³² *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 216.



(ii) Article XVI:2 (e) GATS

Commercia could also argue that Section Two (A) of the Water and Sewage Law of 2011 violates Article XVI:2 (e) GATS which prohibits “measures which restrict or require specific types of legal entity (...) through which a service supplier may supply a service”. *Commercia* would claim that a public company as mentioned in Section Two A of the 2011 law constitutes a “specific type of legal entity”. As this term has not yet been interpreted by the Appellate Body *Commercia* would need to develop its own interpretation based on the standards of treaty interpretation. *Commercia* could point to the open wording of Article XVI:2 (e) GATS which is not restricted to specific types of legal entities such as companies based on stocks or limited liability companies.

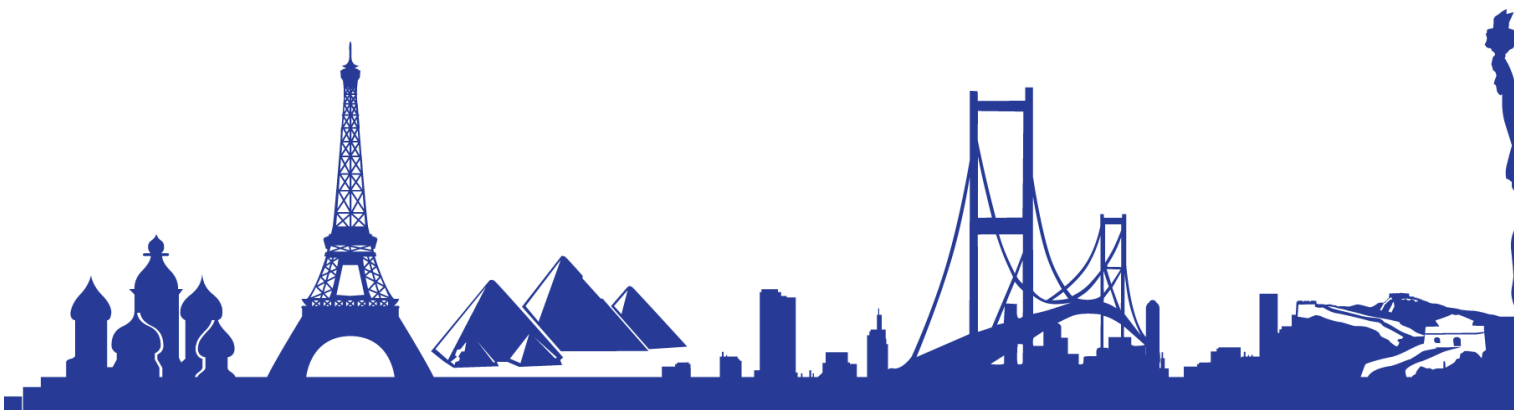
Aquitania would reject this interpretation. Developing a narrower view *Aquitania* could argue that the term “type of legal entity” refers to generic forms of commercial establishment which are open to all economic actors. Contrary to this, a public company is a type of entity which can only be established by the state or other public entities. *Aquitania* could support this interpretation with reference to the examples used in the Scheduling Guidelines to illustrate the meaning of Article XVI:2(e) GATS. These examples include references to representative offices, subsidiaries and partnerships, but do not mention public companies.³³

(iii) Regional subunit

In order to complete its claim under Article XVI:2 GATS *Commercia* would also have to point out that the limitations mentioned in Article XVI:2 GATS do not only cover restrictions which apply at the national level, but, according to the chapeau of Article XVI:2, they also apply to measures maintained or adopted on the basis of a “regional subdivision”. *Commercia* would claim that the 2011 law is a provincial law which therefore applies to the whole province, which can be considered a “regional subdivision”. Even though this term has not yet been interpreted in case law it seems relatively straightforward that entities such as the provinces of *Aquitania* – a federal state – are regional subdivisions

Aquitania could reject this argument by claiming that the effects of the law are – if anything – public monopolies at the local (municipal) and not the provincial level. *Aquitania* would argue that the Water and Sewage Law of 2011 does not require that the public company supplies services to the whole province. Even though, *Agua Tertias* is – de facto – the only service provider in *Nova Tertia*, the law does not prohibit the establishment of local (municipal) companies. *Aquitania* will claim that a monopoly which is restricted to the

³³ Scheduling Guidelines 2001, para. 12.



territory of a city cannot be considered to be a monopoly which exists at a “regional subdivision”. To support this argument Aquitania would point to the difference between the wording of Article XVI:2 GATS (“either on the basis of a regional subdivision or on the basis of its entire territory”) and Article I:3(a) GATS (“central, regional or local governments and authorities”).

Commercia could reply that this is a hypothetical argumentation because the Water and Sewage Law of 2011 is currently applied in such a way that Aguas Tercias is the public monopoly supplier in the entire province.

(4) Summary

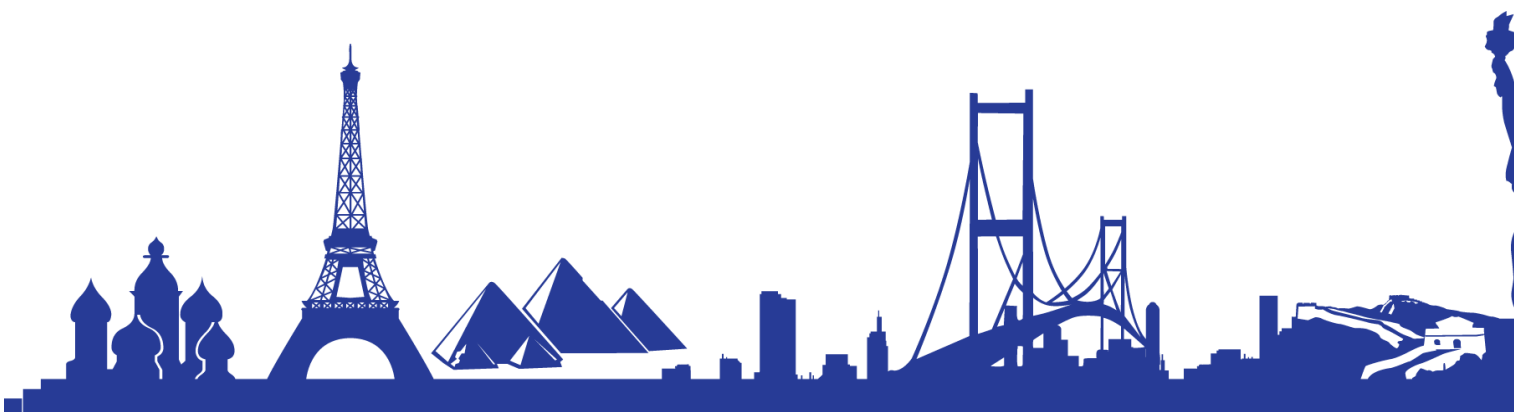
In sum, *Commercia* will maintain that the Water and Sewage Law of 2011 violates Article XVI:2 (a) and (e) GATS while *Aquitania* will reject these claims. It would seem that a panel will be more likely to follow the arguments of *Commercia* regarding this claim.

c) National Treatment

Commercia claimed that the Water and Sewage Law of 2011 violated the national treatment obligation of *Aquitania*. Article XVII GATS on national treatment holds:

- “1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.¹⁰
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.”

¹⁰ 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.



The sequence of analysis of a national treatment violation was outlined by the Panel in *China–Publications and Audiovisual Products*:

“The wording of Article XVII indicates that we need to determine: whether the services at issue, i.e. the wholesale services supplied through commercial presence, are inscribed in China’s Schedule; the extent of China’s national treatment commitments, including any conditions or qualifications, with respect to these services entered in its Schedule; whether the measures at issue affect the supply of these services; and whether these measures accord less favourable treatment to service suppliers of other Members, in comparison with like domestic suppliers.”³⁴

The first element of this test, whether the services at issue are inscribed in Aquitania’s schedule has already been discussed above (D.II.2.a)(2) and (3)). The same is true concerning the third element, whether the measure affects trade in service (D.II.1.). It is hence sufficient to focus on the second and fourth element of the test.

(1) Extent of Aquitania’s national treatment commitment

In mode 3, Aquitania made the following national treatment commitment in Sector 6.A: “None”. This indicates a full national treatment commitment. However, Article XX:2 GATS needs to be considered as well. It holds

“Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.”

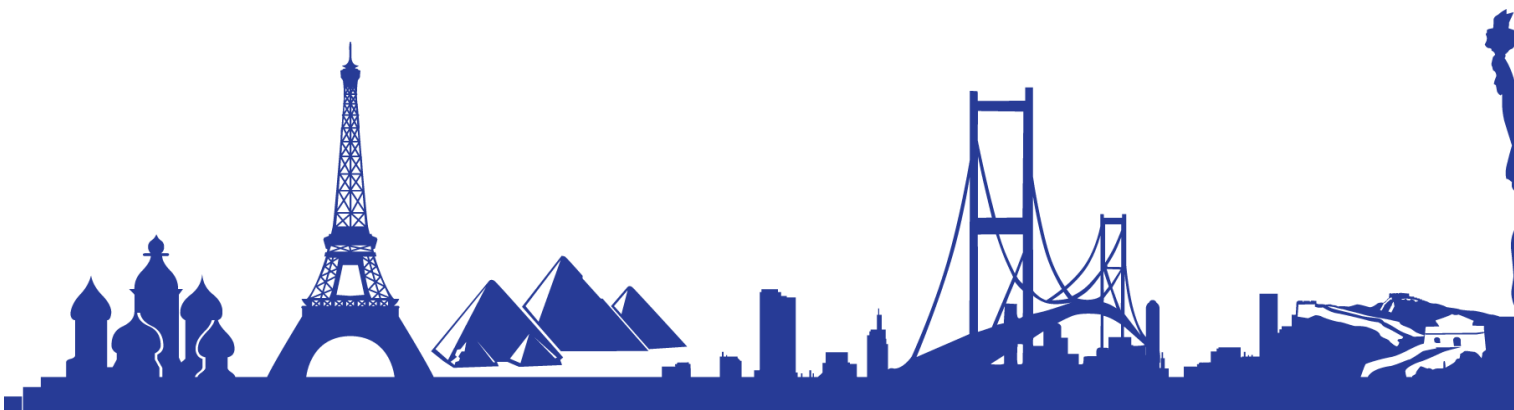
As a consequence, the condition “except that a concession is required” which is mentioned in the market access column of Aquitania’s schedule shall be considered to provide a condition for the national treatment condition as well.³⁵ The teams may therefore refer to the arguments they made in relation to this condition in the context of the discussion of the market access commitment.

(2) Treatment less favourable in comparison with like domestic suppliers

In order to determine whether the 2011 law provides treatment to foreign services and service suppliers which is less favourable than the treatment accorded to like domestic services and

³⁴ Panel Report, *China - Publications and Audiovisual Products*, para. 7.944. See also Panel Report, *China – Payment services*, para 7.641

³⁵ See for a similar argument Panel Report, *China – Payment services*, 7.658



service suppliers, two aspects need to be considered: First, whether the services or suppliers are “like” and second, whether there is treatment less favourable.³⁶

(i) Like services and service suppliers

The concept of likeness has been addressed in a number of GATS cases, but there is not (yet) a single uniform interpretation of the term. In general, determinations of “like services”, and “like service suppliers”, should be made on a case-by-case basis.³⁷

The panel in *China – Payment Services* addressed the issue of “like services”. It stated:

“We deduce from these provisions (*i.e. paragraphs 2 and 3 of Art. XVII*) that Article XVII seeks to ensure equal competitive opportunities for like services of other Members. These provisions further suggest that like services are services that are in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market). Indeed, only if the foreign and domestic services in question are in such a relationship can a measure of a Member modify the conditions of competition in favour of one or other of these services.”³⁸

Regarding the likeness of service suppliers the panel in *EC — Bananas III* stated: “(...) [T]o the extent that entities provide these like services, they are like service suppliers.”³⁹ In *China – Payment Services* the panel was reluctant to fully support this statement. The panel agreed “that the fact that service suppliers provide like services may in some cases raise a presumption that they are “like” service suppliers.” However, the panel also held that “in the specific circumstances of other cases, a separate inquiry into the “likeness” of the suppliers may be called for.”⁴⁰

In *China–Publications and Audiovisual Products*, the Panel discussed the consequences of a measure which only uses origin as the basis for a difference in treatment between domestic service suppliers and foreign suppliers. The Panel held:

“When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the “like service suppliers” requirement is met, provided there will, or can, be domestic and foreign suppliers that

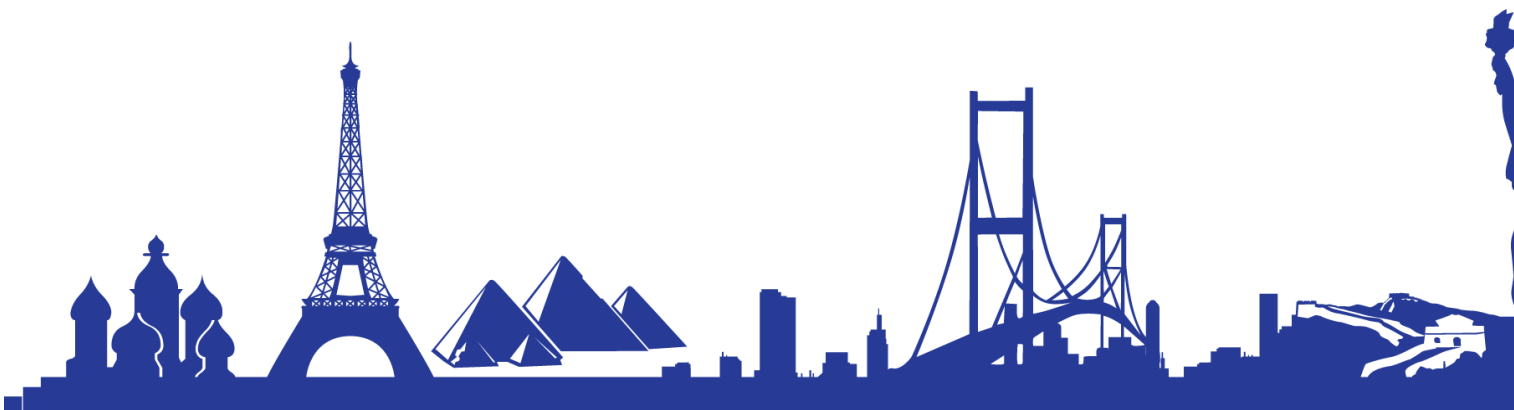
³⁶ Markus Krajewski and Maika Engelke, Article XVII, paras 15 et seq., in: Rüdiger Wolfrum and Peter-Tobias Stoll (eds), *WTO-Trade in Services*, 2008.

³⁷ Panel Report, *China – Payment Services*, para 7.701.

³⁸ Panel Report, *China – Payment Services*, para 7.700.

³⁹ Panel Report, *EC - Bananas III*, para. 7.322

⁴⁰ Panel Report, *China – Payment Services*, para 7.705.



under the measure are the same in all material respects except for origin. (...) We observe that in cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether service suppliers on either side of the dividing line are, or are not, “like”.⁴¹

Commercia could claim that the services provided by private foreign commercial service suppliers, such as Avanti, are the same as those provided by public companies, such as Aguas Tertas. In both cases, the services concerned are water distribution and sewage collection and treatment services. Hence, the services are like.

Aquitania could reject this claim by referring to the underlying rationale of likeness as stated by the panel in *China – Payment Services*. It would argue that there is generally no competitive relationship between different water and sewage services as consumers cannot choose which service they buy. **Commercia** might rebut this argument by stating that in cases involving concessions for water distribution and sewage treatment services the relevant comparison should not be competition in the market, but competition for the market. **Commercia** could argue that the services at issue were offered to the city of Tertia which chose the concession-holder on the basis of a public tender.

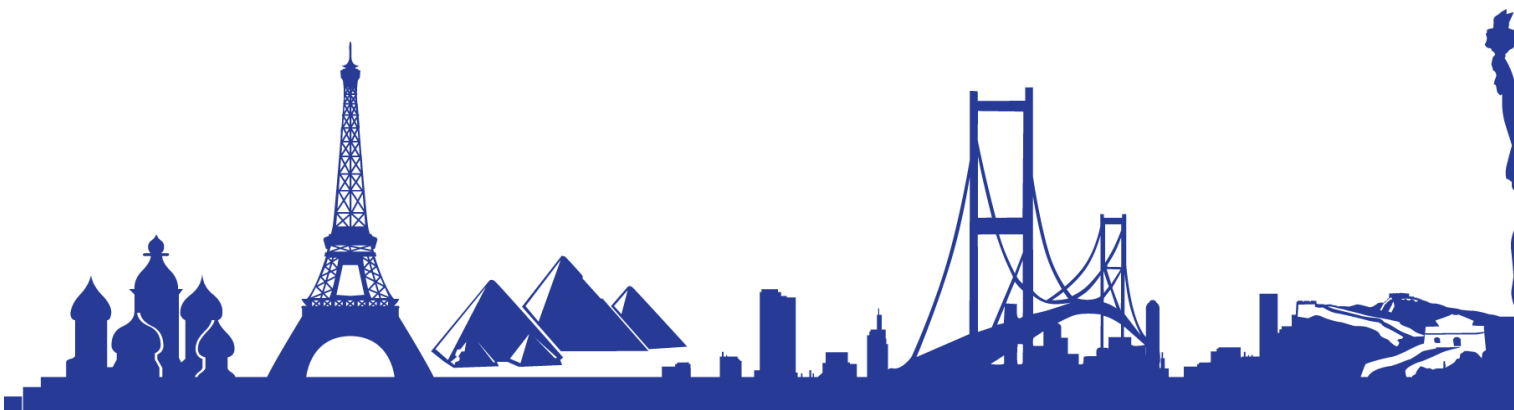
Regarding the likeness of service suppliers **Commercia** could base its arguments on the approach developed in *EC – Bananas III*. It would argue that in the case at hand, private foreign commercial service suppliers, such as Avanti, provide the same service as public companies, such as Aguas Tertas. Hence foreign and domestic service suppliers are like.

Aquitania will reject this argument. It will criticise the Panel’s reasoning in *EC – Bananas III* as too broad and general citing criticism voiced in the literature⁴² and rely on the approach suggested in *China – Payment Services*. **Aquitania** will point out that its measure does not distinguish on the basis of origin. Hence, as stated by the Panel, a “more detailed analysis would be required.” For this analysis, **Aquitania** could not only cite the *China - Payment services* panel but also refer to analyses of the term “likeness” in the literature on GATS.⁴³ It could argue that a public company referred to in Section Two (A) of the Water and Sewage Law of 2011 differs from private commercial companies in a number of ways: Public companies are non-profit companies and pursue public interests, they are constituted by law and not on the basis of the free will of private individuals and their management is appointed

⁴¹ Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

⁴² Geatan Verhoosel, *National Treatment and WTO Dispute Settlement - Adjudicating the Boundaries of Regulatory Autonomy*, 2002, p. 61 and Zdouc, *JIEL* 2 (1999) 2, 295, 332.

⁴³ See Mireille Cossy, *Some Thoughts on the Concept of ‘Likeness’ in the GATS* and Joost Pauwelyn, *Comment: The Unbearable Lightness of Likeness*, in: Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services* (Cambridge Univ. Press 2008).



by the government. Aquitania will suggest that a public company is unlike domestic and foreign private commercial companies. In other words, Aquitania would argue that its law does not discriminate between foreign and domestic companies supplying water and sewage services, because the law prohibits both foreign and domestic private companies to supply these services. Hence, Article XVII does not apply to the Water and Sewage Law of 2011.

Both sides would also need to address the difficult question whether Art. XVII GATS employs a broad or narrow cumulative test or a disjunctive test with regards to services and service suppliers.⁴⁴ According to a broad cumulative approach, Article XVII GATS would cover a measure which affected either like services *or* like service suppliers. Under a narrow cumulative test a complaining party would need to demonstrate both likeness of services and likeness of service suppliers. Under a disjunctive test, WTO panels and the Appellate Body would first need to decide whether the measure in question concerns a service or a service supplier and determine whether there is a violation of Article XVII on that basis.

Commercia could advance the view that the broad cumulative approach is appropriate and argue that it is sufficient to show that the Water and Sewage Law of 2011 affects like services. It would again point to the likeness of the services and claim that even if the service suppliers at issue are unlike, the services are like.

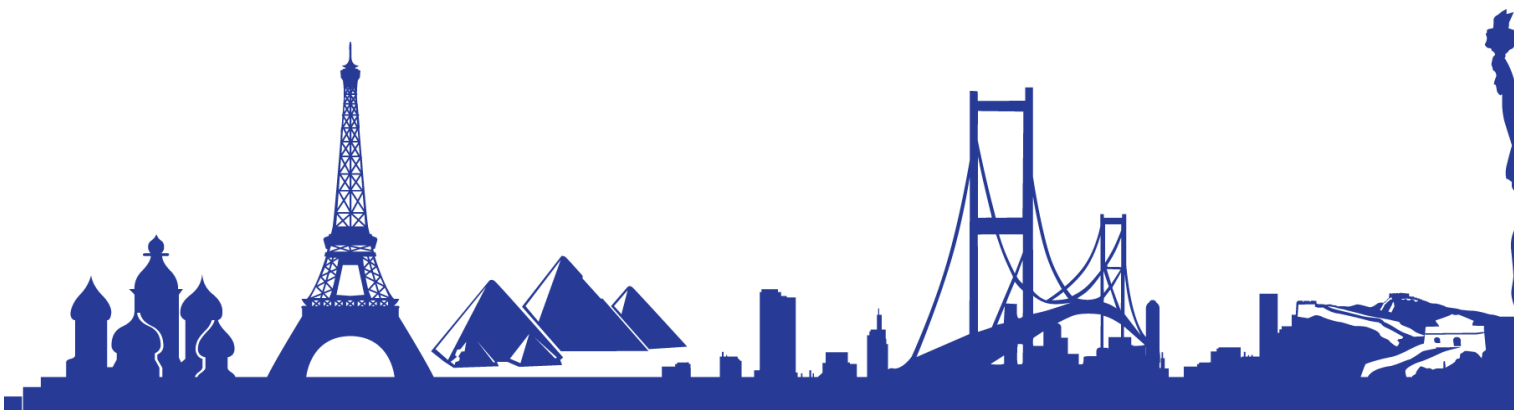
Aquitania could rely on the narrow cumulative approach and argue that the likeness of services is not sufficient. Aquitania could also apply the disjunctive approach and point out that the measure at stake relates to the service supplier and not to the service. Hence, the likeness of the service supplier is necessary which Aquitania already rejected.

(ii) Treatment less favourable

Assuming that a domestic public company such as Aguas Tercias and foreign private companies such as Avanti are like service suppliers, it would be necessary to show that the Water and Sewage Law of 2011 treats the foreign service supplier “no less favourable”. The Panel in *China - Publications and Audiovisual Products* held with regards to this element of Article XVII GATS less favourable treatment in terms of Article XVII “is to be assessed in terms of the ‘conditions of competition’ between like services and services suppliers, as specified in Article XVII:3 of the GATS.” The Panel found:

“[A] measure that prohibits foreign service suppliers from supplying a range of services that may, subject to satisfying certain conditions, be supplied by the like domestic supplier cannot constitute treatment “no less favourable”, since it deprives

⁴⁴ Markus Krajewski, *National Regulation and Liberalization in Services*, 2003, p. 106–107.



the foreign service supplier of any opportunity to compete with like domestic suppliers. In terms of paragraph 3 of Article XVII, such treatment modifies conditions of competition in the most radical way, by eliminating all competition by the foreign service supplier with respect to the service at issue.”⁴⁵

Based on this standard, *Commercia* would claim that the Water and Sewage Law of 2011 prohibits foreign service suppliers from supplying water distribution and sewage treatment and collection services which a like domestic supplier is allowed to supply. Hence competition between domestic and foreign service suppliers is completely eliminated which constitutes a violation of Article XVII GATS.

It would be difficult for *Aquitania* to reject this analysis which is why it would maintain that a domestic public company such as Aguas Tercias and a foreign private company such as Avanti are not like service suppliers. As they are not “like”, the standard of Article XVII:3 GATS is not applicable.

(3) Summary

The assessment of the Water and Sewage Law of 2011 under Article XVII GATS depends predominantly on the determination of likeness. The guidance by WTO case law on this matter is limited which is why it is difficult to predict a potential decision of a WTO panel on this issue.

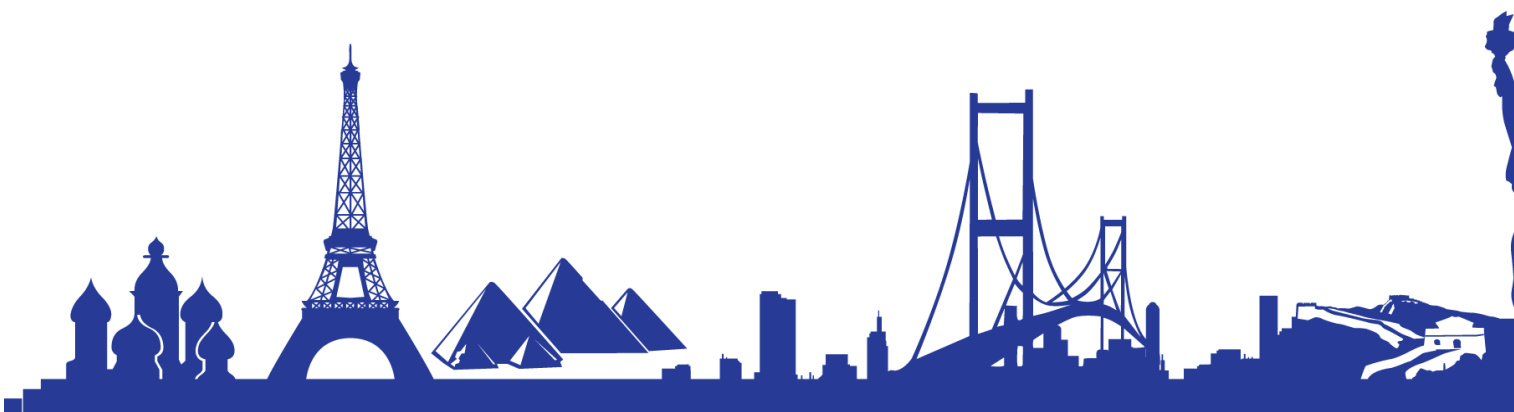
3. General Exceptions

If the Water and Sewage Law of 2011 violates the specific commitments of Aquitania, the country may justify these violations on the basis of the general exceptions of Article XIV GATS which reads as follows:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order⁵;
- (b) necessary to protect human, animal or plant life or health;

⁴⁵ Panel Report, China — Publications and Audiovisual Products, paras. 7.978–7.979.



- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
- (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;
- (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.”

⁵ The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

The Appellate Body in *US - Gambling* elaborated on the similarities between Article XX GATT and Article XIV GATS and found previous decisions under Article XX GATT relevant for the analysis under Article XIV GATS.⁴⁶ In particular, the Appellate Body applied the same two-tier analysis to Article XIV GATS as to Article XX GATT. The Appellate Body stated:

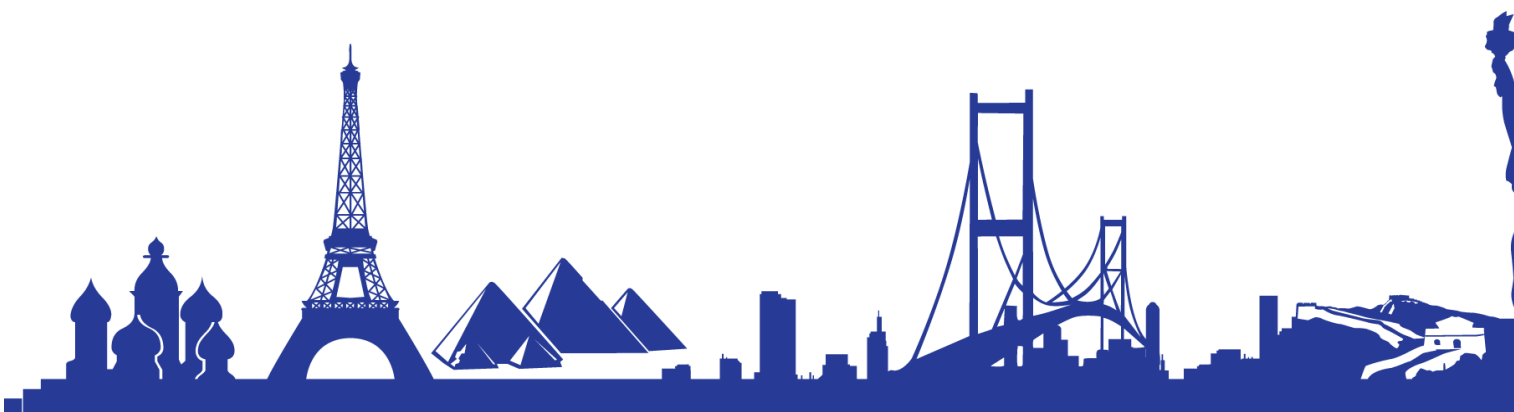
“A panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. This requires that the challenged measure address the particular interest specified in that paragraph and that there be a sufficient nexus between the measure and the interest protected. The required nexus - or ‘degree of connection’ - between the measure and the interest is specified in the language of the paragraphs themselves, through the use of terms such as “relating to” and ‘necessary to’. 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.”⁴⁷

a) Justification on the basis of one of the paragraphs of Article XIV GATS

In its claims, Aquitania relies on Art. XIV (a) and (b) GATS which is why it is sufficient to focus on these two paragraphs.

⁴⁶ Appellate Body Report, *US - Gambling*, para. 291.

⁴⁷ Appellate Body Report, *US - Gambling*, para. 292.



(1) Article XIV (a) GATS

Under Article XIV (a) GATS Aquitania would need to establish a prima facie case that Section Two (A) of the Water and Sewage Law of 2011 is “necessary to protect public morals or to maintain public order”. In *US - Gambling* the Panel identified two elements that a Member invoking Article XIV (a) had to demonstrate: “(a) the measure must be one designed to “protect public morals” or to “maintain public order”; and (b) the measure for which justification is claimed must be “necessary” to protect public morals or to maintain public order.”⁴⁸

(i) Public morals and public order

The meaning of the terms “public order” and “public morals” has been analysed by the Panel and the Appellate Body in *US – Gambling*. On this basis, the following aspects need to be recalled: First, the meaning of public morals and public order vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values in a Member. Further, Members have the right to determine the level of protection that they consider appropriate. Members should hence “be given some scope to define and apply for themselves the concepts of ‘public morals’ and ‘public order’ in their respective territories, according to their own systems and scales of values.”⁴⁹ Specifically, the term “public morals” denotes “standards of right and wrong conduct maintained by or on behalf of a community or nation”⁵⁰ while the term “public order” refers to the “preservation of the fundamental interests of a society, as reflected in public policy and law.”⁵¹ However, as stated in footnote 5 of the GATS the public order exception may be invoked only where “a genuine and sufficiently serious threat is posed to one of the fundamental interests of society”.

Aquitania has not specifically mentioned which aspect of Article XIV (a) GATS it relies on. However, its references to the universal service obligation as “a fundamental value of the Aquitanian society” and a reflection of “Aquitania’s human rights obligations” suggest that Aquitania is claiming the public order exemption rather than the public morals exemption.

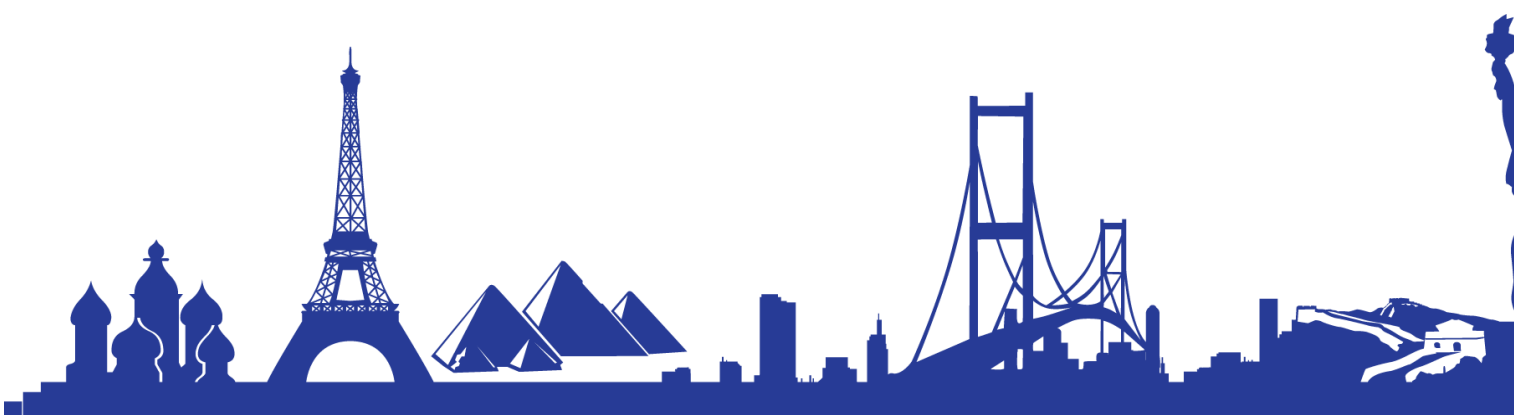
In order to defend its law on the basis of the public order exemption, *Aquitania* would point out that the universal service obligation has been an important element of its national

⁴⁸ Panel Report, *US - Gambling*, para. 6.455.

⁴⁹ Panel Report, *US - Gambling*, para. 6.461

⁵⁰ Panel Report, *US - Gambling*, para. 6.465. See also Panel Report, *China – Audiovisual Products*, para. 7.759 and Panel Report, *EC – Measures Prohibiting the Importation and Marketing of Seal Products*, para. 7.380

⁵¹ Appellate Body Report, *US - Gambling*, para. 296.



development strategy for many decades. Furthermore, it would also recall that this obligation was enshrined both in the pro-privatisation law of 2003 and the law reversing privatisation in 2011. This indicates that the imposition of universal service obligations is reflected in Aquitania's laws and policies as required by footnote 5 of the GATS.

(ii) Human rights

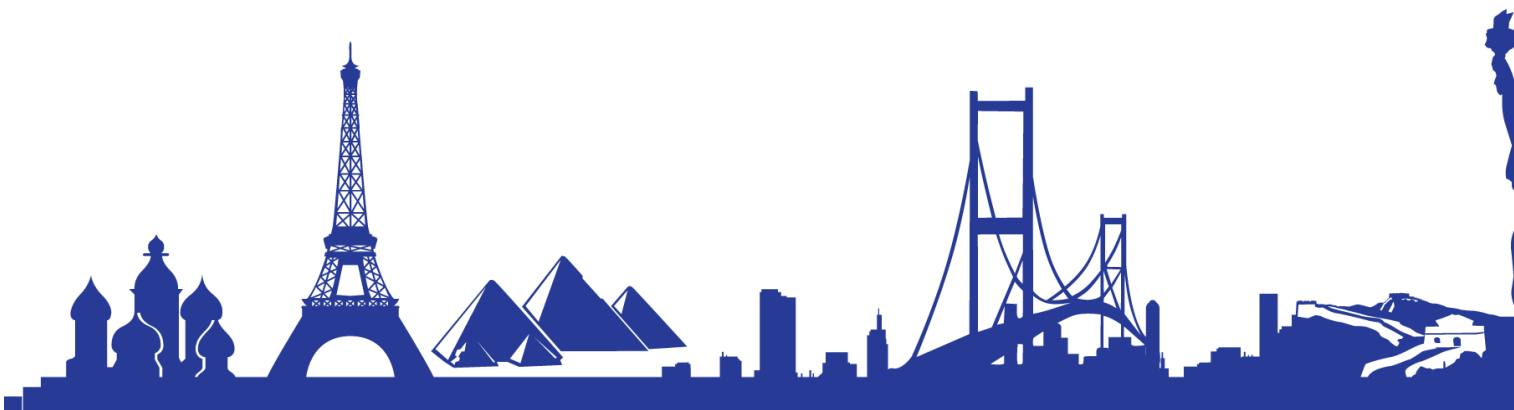
In addition, Aquitania could refer to international human rights treaties and documents concerning the right to water.⁵² When referring to its human rights obligations Aquitania would need to show how these can be used in the context of WTO dispute settlement proceedings. The relationship between WTO law and human rights obligations is complex and subject to intensive academic and political debates. It should be noted at the outset, that Panels and the Appellate Body have not yet addressed this relationship. In this context, a number of aspects need to be distinguished: The first concerns issues of jurisdiction. There is some debate on the question whether WTO dispute settlement organs have jurisdiction to decide on human rights claims. International human rights treaties are not "covered agreements" in the meaning of Article 1.1 DSU. Hence, WTO bodies would not apply human rights treaties directly in any case. Moreover, if claims were based solely on human rights obligations, a panel would decline jurisdiction. This is however not relevant in the case at hand.

If Aquitania claims that its human rights obligations prevent it from following its WTO obligations, Aquitania would need to show that there is a formal conflict between the two obligations and that the human rights obligations trumps its WTO obligation. In other words, Aquitania would need to argue that by following its GATS obligations, it cannot but violate its human rights obligations. Due to the lack of a formal rule of superiority between human rights and other international legal obligations - with the possible exception of *jus cogens* - this argument would be difficult to make and in fact Aquitania does not make that argument either.

Instead, Aquitania cites its human rights obligations as a supporting argument in the context of Article XIV GATS. Aquitania therefore claims that its human right obligations should be used to interpret the relevant provisions of WTO law. Aquitania argues that human rights can be used as context of WTO law and thus serve as interpretative tools on the basis of Article 31:3(c) of the Vienna Convention on the law of treaties.⁵³ Consequently, it could be argued that international human rights obligations of a WTO Member form an element of its public

⁵² On the right to water see Stephen C. McCaffrey, *The Human Right to Water*, in: Edith Brown Weiss et al. (eds), *Fresh Water and International Economic Law*, 2005, p. 93 et seq.

⁵³ See Joost Pauwelyn, *Human Rights in WTO Dispute Settlement*, in: Thomas Cottier et al. (eds), *Human Rights and International Trade*, 2005, p. 205 at 212 et seq.



order. Aquitania could also cite a recent investment arbitration tribunal which explicitly recognised that treaties on human rights and the right to water in particular need to be recognised when interpreting international investment law obligations.⁵⁴

In order to make a human rights argument, Aquitania would need to show the legal basis for a human right to water, in particular the right to sanitation, and argue that the universal service obligation aims at fulfilling the obligations of such a human right. It is generally accepted that a right to water can be derived from Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.⁵⁵ The right to water is also enshrined in Art. 14 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women and Article 24 (2) paragraph 2, of the Convention on the Rights of the Child. Finally, Resolution 64/292, the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of all human rights.⁵⁶

One element of the right to water and sanitation is the notion of accessibility which requires states to ensure that water and water facilities and services have to be accessible to everyone without discrimination within the jurisdiction of the state.⁵⁷ A universal service obligation would be a typical instrument of ensuring accessibility of water and sanitation services in this meaning.⁵⁸ Hence, a universal service obligation could be seen as an instrument to fulfil human rights obligations.

Commercia could reject the public order exemption by arguing that the universal service obligation may be an important policy objective of Aquitania, but it failed to show that it is really aimed at preventing a genuine and sufficiently serious threat to one of the fundamental interests of society. *Commercia* could also claim that the GATS generally does not prohibit Members from fulfilling their human rights obligations, but that they have to do so in accordance with their GATS obligations.

Considering that WTO jurisprudence grants Members the right to determine the level of protection that they consider appropriate it seems likely that a panel would accept that Aquitania can rely on the public order exemption when pursuing a policy aimed at universal service regarding water and sanitation.

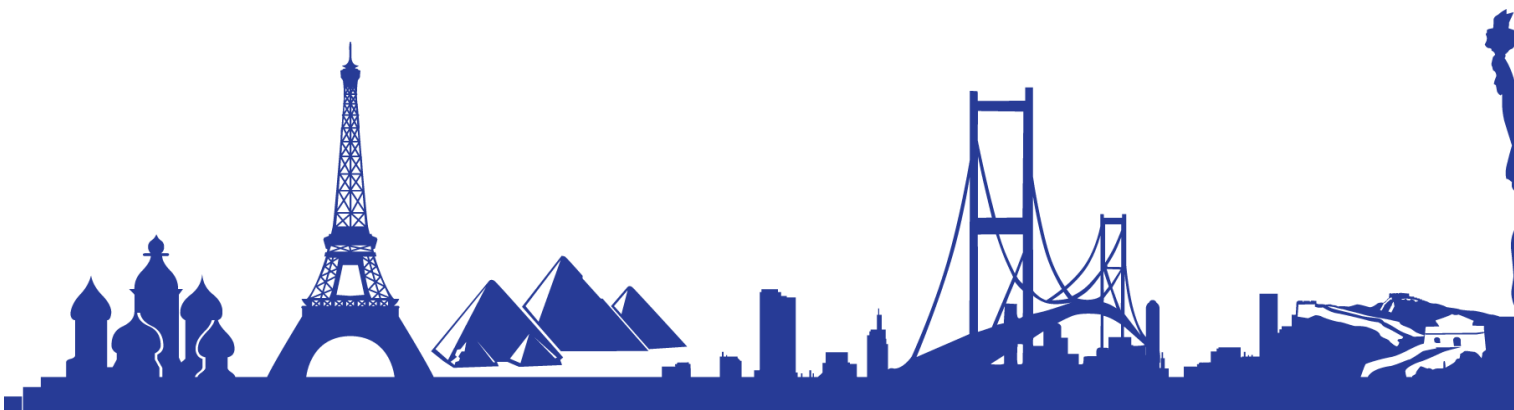
⁵⁴ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award of 21 June 2011, paras 228 et seq.

⁵⁵ See Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) - The right to water, para 4, UN Doc E/C.12/2002/11, 20 January 2003.

⁵⁶ UNGA, The human right to water and sanitation, Resolution adopted on 28 July 2010, A/RES/64/292.

⁵⁷ General Comment No. 15, para. 12

⁵⁸ See Elisabeth Tuerk et al., GATS and its Impact on Private Sector Participation in Water Services, in: Edith Brown Weiss et al. (eds), *Fresh Water and International Economic Law*, 2005.



(iii) Necessary

The term “necessary” in Article XIV GATS and Article XX GATT has been interpreted by numerous GATT 1947 and WTO panels and the Appellate Body. In *US – Gambling*, the Appellate Body recalled that the standard of “necessity” is an objective standard and that the assessment required a process of “weighing and balancing a series of factors”.⁵⁹ This requires that a WTO-consistent alternative measure which the Member concerned could “reasonably be expected to employ” is available or that a less WTO inconsistent measure is “reasonably available”.⁶⁰

The Appellate Body described the specific steps in the process of weighing and balancing as follows:

“The process begins with an assessment of the ‘relative importance’ of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be ‘weighed and balanced’. The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel’s determination of the ‘necessity’ of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.

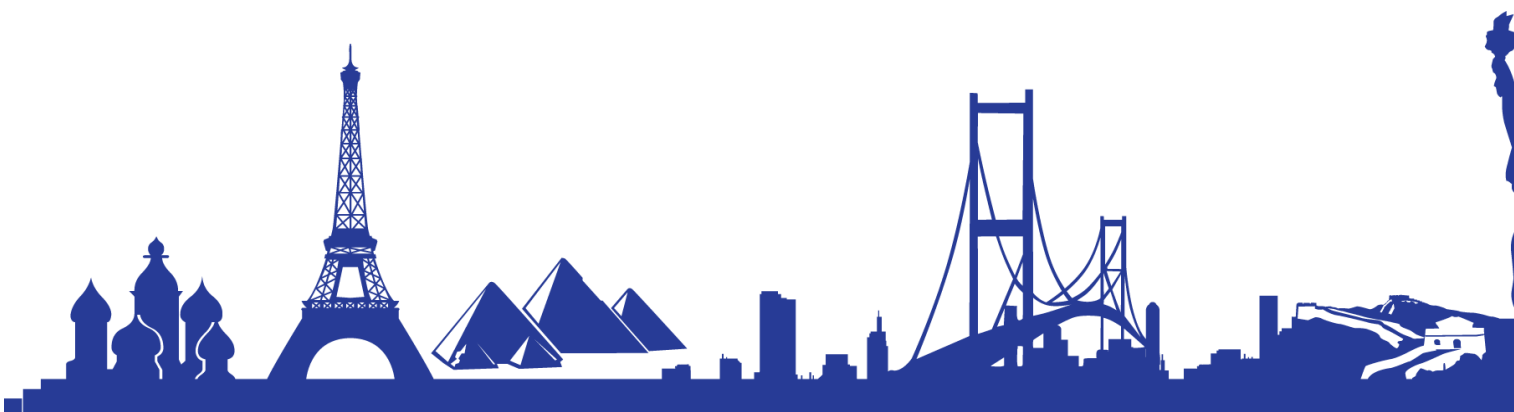
A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this ‘weighing and balancing’ and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is ‘necessary’ or, alternatively, whether another, WTO-consistent measure is ‘reasonably available’.”⁶¹

Based on this standard, *Commercia* could identify a number of alternative measures. In particular, it could suggest that a universal service obligation could be imposed by regulatory or contractual means not only to a public company, but also to private companies. For example, a general law could require all water and sewage service providers to extend their services to all households and companies under certain conditions. Alternatively, such an obligation could be included in a contract signed between the company and the respective authority following the example of the contract between Avanti and the City of Tertialia.

⁵⁹ Appellate Body Report, *US - Gambling*, para. 304.

⁶⁰ Appellate Body Report, *US - Gambling*, para. 304 et seq with references to the case law.

⁶¹ Appellate Body Report, *US - Gambling*, para. 306 et seq with references to the case law..



Commercia would claim that both options are reasonably available to Aquitania, because it used both instruments in the past already. Commercia could also refer to the fact that the record of Aguas Tercias was less than satisfactory when it came to the universal service obligation and that therefore the public monopoly is in fact not a measure which effectively serves the policy of universal access.

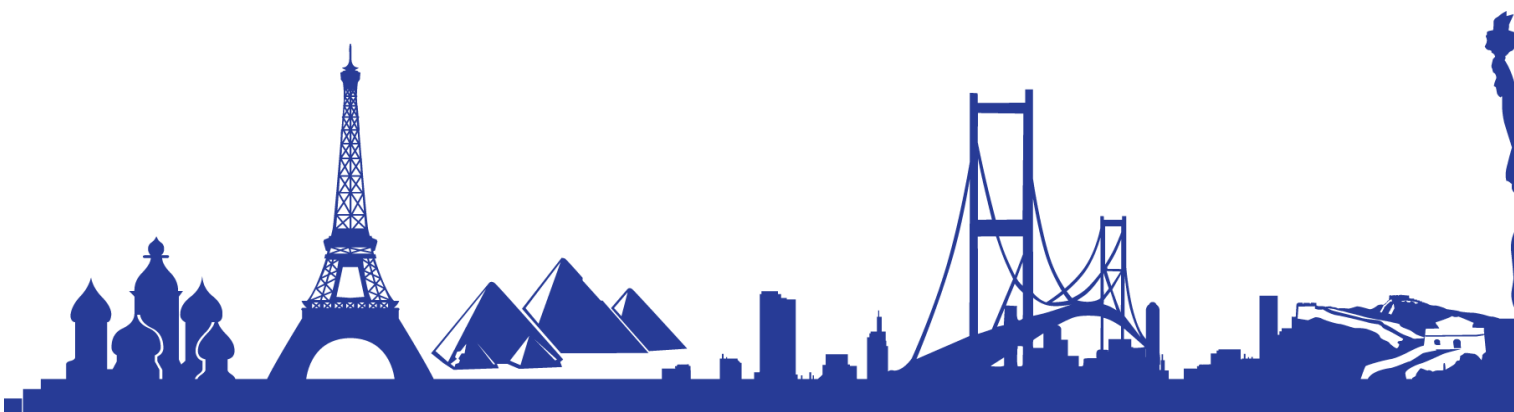
Aquitania could reject this argumentation. First, it would claim that the policy of universal access to water and sanitation is of the highest importance as it is aimed at the realisation of a human right. Second, it would argue that the provision of water and sewage services through a public company enables the responsible authorities to directly react to the needs of the population as required by the human right to water. Hence, any alternative measures would need to be at least as effective as the supply of these services by a public company.

Replying to the proposals of alternative measures suggested by Commercia, Aquitania could point out that the past showed that the imposition of a universal service obligation on a private company failed, because such a company needs to make a profit and is not predominantly interested in pursuing public policy goals. Aquitania could also cite examples of failed water privatisation projects in other countries which showed that the imposition of a universal service obligation on a private commercial company is less suitable to address the needs of universal access to water and sanitation than the provision of these services through a public entity.

It should be noted that the empirical evidence of water privatisation in developing countries is mixed.⁶² There is neither a clear case that privatisation will always lead to better results in terms of access nor does the provision of water and sanitation services through public companies always score better. Both sides should refer to empirical studies, but should be cautious in drawing general conclusions.

Considering the discretion WTO Members have in determining the relative importance of the policy goal they are pursuing and the unclear empirical evidence on the impact of water privatisation versus the public supply of water, it seems possible that a panel would accept Aquitania's justification on the basis of the public order exemption. It is, however, equally plausible to assume that a panel would not consider the Water and Sewage Law of 2011 "necessary" in the meaning of Article XIV (a) GATS.

⁶² George Clarke, Katrina Kosec and Scott Wallsten, Has private participation in water and sewerage improved coverage? Empirical evidence from Latin America, *Journal of International Development* 21, 327–361 (2009). See also Philippe Marin, *Public-Private Infrastructure Advisory Facility: Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries*, Worldbank 2009; Emanuele Lobina and David Hall, *Problems with private water concessions: a review of experience*, Public Services International Research Unit (PSIRU), University of Greenwich, 2003.



(2) Article XIV (b) GATS

In addition to its claims concerning the universal service obligation, Aquitania also referred to environmental dangers associated with sewage leaks which could only be addressed by significant public investments which a private company is not willing to undertake. Consequently, Aquitania might also try to defend its measure on the basis of Article XIV (b) GATS.

Article XIV (b) GATS has not yet been interpreted by a WTO panel or the Appellate Body. However, the jurisprudence concerning Article XX (b) GATT can be applied *mutatis mutandis*. The sequence of analysis is similar as under Article XIV (a) GATS. First, the measure must be designed to protect human, animal or plant life or health. Second, the measures must be necessary to fulfil one of these objectives.⁶³

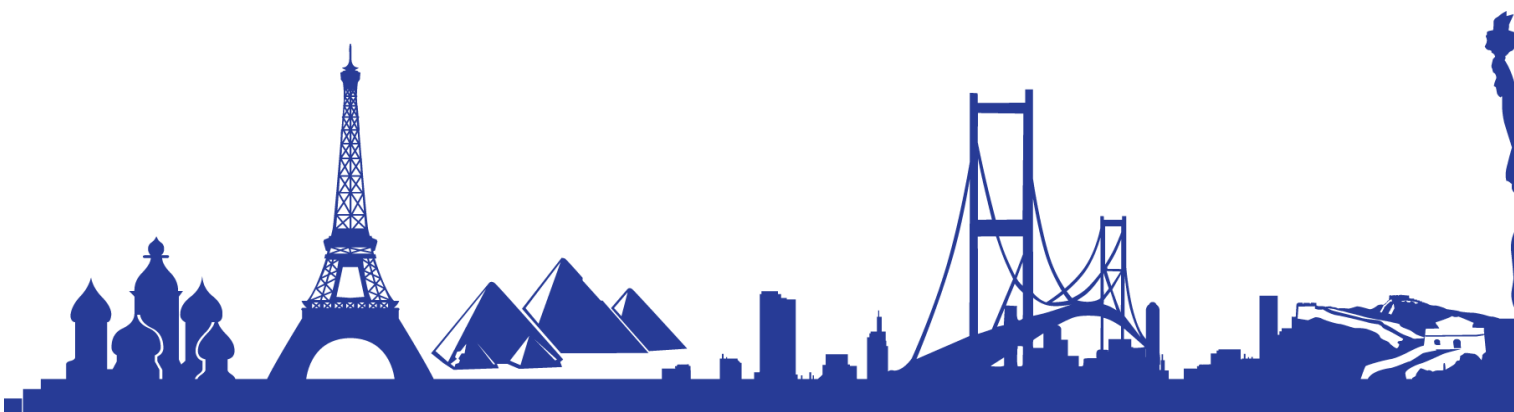
(i) Human health

Aquitania could point out that the Provincial Legislature specifically referred to threats to human health when adopting the Water and Sewage Law of 2011 by stating that under-investment in the network and infrastructure “can endanger human health and the environment”. The Parliament also held that these challenges can be better met by a public company closely controlled by the Provincial Government. In this context, Aquitania would stress the great importance of human health and its right to determine the standard of protection it would like to achieve. Sewage leaks can pose significant risks to human health as sewage could endanger fresh water or could pollute the earth surface. Unprotected contacts with sewage could lead to the spread of various diseases. A policy aimed at reducing sewage leaks could therefore be considered to be a policy aimed at the protection of human health.

Commercia could argue that the reference to human health by the Provincial Legislature is not genuine and should not be considered to be valid. Commercia might point out that the sewage leaks existed both during the time of the supply of sewage services by a public company and by a private company. However, these arguments are more relevant regarding the necessity of the measure. Commercia might therefore also concede that the measure aims at protecting human health, but would stress that the measure is not necessary in the meaning of Art. XIV (b) GATS.

(ii) Necessary

⁶³ See e. g. Panel Report, US - Gasoline, para. 6.20 concerning Art. XX (b) GATT.



Regarding the standards of the “necessity test” reference can be made to the analysis above. Hence, both sides would have to address the question whether the imposition of certain performance standards on a private commercial supplier would be less effective than the supply of the water by a public company.

As with the imposition of universal service obligation, there is no clear evidence that the supply of water and sewage services by a private commercial company necessarily implies greater health or environmental problems than a public company or vice versa. Moreover, the facts of the case suggest that it is unclear whether during Avanti’s concession the problems actually increased or decreased. The facts of the case also indicate that leakages created led to environmental problems when Aguas Tercias was in charge. In light of this uncertainty, *Commercia* might argue that Aquitania had not made a prima facie case that its law of 2011 is in fact necessary. *Aquitania* would reject this and recall its position that Avanti failed to make the necessary improvements which supported its general perception of the performance of a private commercial company.

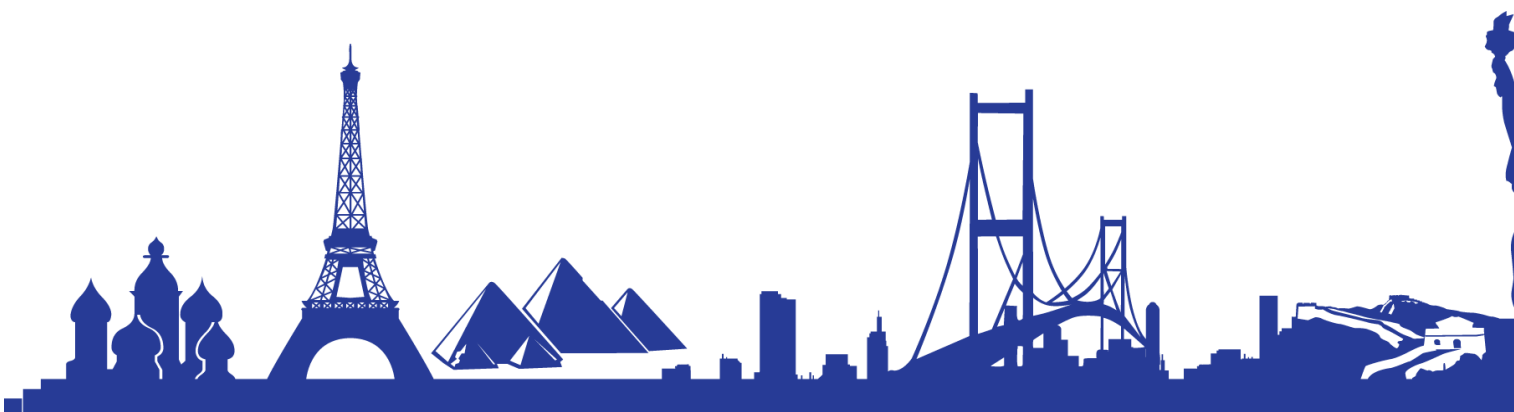
b) Chapeau of Article XIV GATS

If Aquitania convinces the panel that the Water and Sewage Law of 2011 pursues the objectives of Article XIV (a) and / or Article XIV (b) GATS, the law would also need to be assessed on the basis of the chapeau of Article XIV GATS.

In *US - Gambling* the Appellate Bods stated that the focus of the chapeau is on the application of a measure already found by the Panel to be inconsistent with its obligations under GATS but falling within one of the paragraphs of Article XIV. It further noted that 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.⁶⁴

The facts of the case do not suggest that the Water and Sewage Law of 2011 has been applied in different manners. Indeed, the only application of the law was the re-installation of Aguas Tercias. *Aquitania* will maintain that this single application of the measure is neither arbitrary nor discriminatory and therefore meets the requirements of the Chapeau. *Commercia* could try to challenge this perspective by claiming that the selection of Aguas Tercias as the public service provider should have been based on a public tender. However, public tenders are usually not employed when a public company is entrusted with the fulfilment of a public

⁶⁴ Appellate Body Report, *US - Gambling*, para. 339.



service. It is therefore likely that a WTO panel would not consider the application of the Water and Sewage Law of 2011 to be a violation of the chapeau of Article XIV GATS.

c) Summary

In sum, Commercia will argue that the Water and Sewage Law of 2011 is not necessary to protect public order or human health in Aquitania and therefore not justifiable on the basis of Article XIV GATS. In particular, Commercia will argue that less trade restrictive alternatives could be used by imposing universal service obligations and performance requirements on a private company. Aquitania will claim that these alternative measures do not lead to the same level of protection. In addition, the application of the Water and Sewage Law of 2011 meets the standards of the chapeau. Hence the Water and Sewage Law of 2011 can be justified on the basis of Article XIV GATS.

III. Summary of the Claims

Commercia could claim:

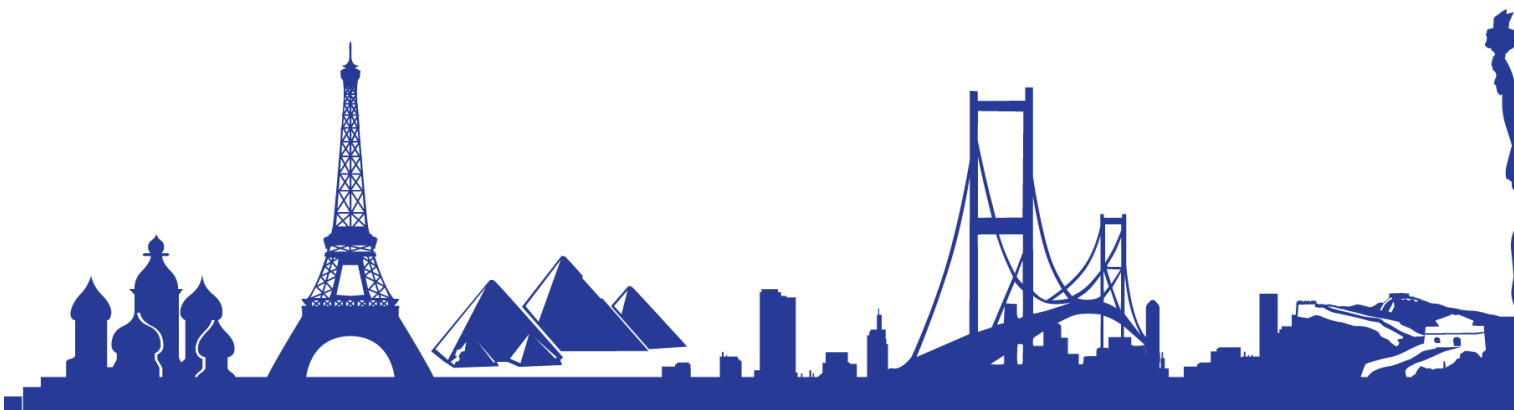
(1) The Panel has jurisdiction because the choice of forum clause of Article 2005:6 OFTA is not applicable. Even if applicable the provision cannot exclude the jurisdiction of a WTO panel because a WTO Member has a right to a panel under the rules of the DSU.

(2) The 2011 Water and Sewage Law falls under the scope of the GATS because it affects trade in services. Water distribution and sewage services cannot be considered as a service supplied in the exercise of governmental authority, because the services are supplied on a commercial basis.

(3) Aquitania made commitments in sewage services, because its schedule corresponds to the relevant categories of the W/120-list and the CPC. Aquitania also committed water distribution services as “other environmental ” or “sewage related” services.

(4) Section Two (A) of the 2011 Water and Sewage Law establishes a public monopoly for water and sewage services and therefore constitutes a monopoly in violation of Article XVI:2(a) GATS. Furthermore, the requirement of a public company as service provider is the requirement of a specific type of legal entity in violation of Article XVI:2(e) GATS.

(5) Section Two A of the 2011 Water and Sewage Law also treats foreign services and service suppliers less favourable than like domestic services and suppliers, because private



and public companies provide the same services. Hence, Aquitania violates Article XVII GATS.

(6) The violations of the specific commitments cannot be justified on the basis of Article XIV (a) or (b) GATS, because a public monopoly or public company as supplier is not necessary to protect the public order or human health.

Aquitania could claim

(1) The Panel lacks jurisdiction because Comercia is precluded from access to the WTO dispute settlement mechanism on the basis of Article 2005:6 OFTA. This provision prevents recourse to the DSU if the complaining party turned to the OFTA dispute settlement system first.

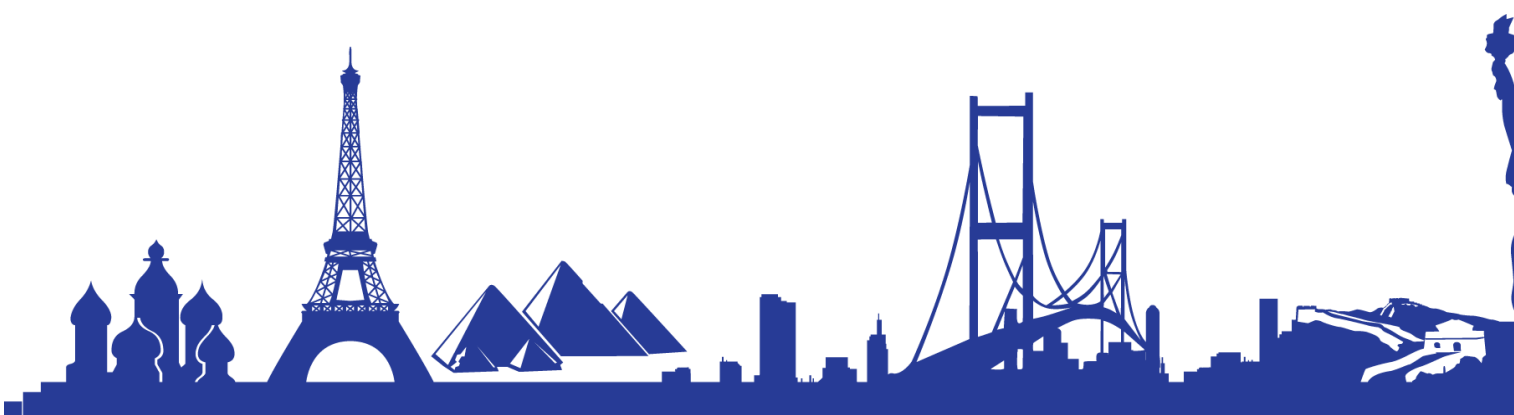
(2) Section Two (A) of the 2011 Water and Sewage Law does not affect trade in services as water distribution and sewage services are neither supplied on a commercial basis nor in competition with one or more service suppliers. Hence, Article I:3 (b) excludes this measure from the scope of the GATS.

(3) Aquitania made no commitments in water distribution as this subsector is neither explicitly nor on the basis of the sectoral classification list included in its schedules.

(4) Section Two (A) does not establish a public monopoly or specific type of legal entity. It only regulates the conditions of supplying water distribution and sewage services and hence does not violate Article XVI:2 GATS.

(5) Foreign commercial companies and domestic public companies are not like service suppliers. Hence, Aquitania does not treat foreign services and service suppliers less favourable than like domestic services and supports.

(6) Universal service obligations contribute to the fulfilment of the right to water and are part of the public order of Aquitania. Alternative measures do not lead to the same level of protection of this policy goal. Hence, Section Two (A) of the 2011 law is necessary to protect public order and can be justified on the basis of Article XIV (a) GATS. Public companies are also better suited to reduce sewage leaks which is why the law can also be justified on the basis of Article XIV (b) GATS.



Annex - Schedule of Aquitania

The following parts of Aquitania's GATS Schedule are relevant to the case:

| Sector or subsector | Limitations on market access | Limitations on national treatment |
|---|--|---|
| 3. CONSTRUCTION AND RELATED ENGINEERING SERVICES A. General construction work for buildings B. General construction work for civil engineering C. Installation and assembly work D. Building completion and finish work E. Other except special trade construction work | 1) Unbound* 2) Unbound* 3) Only in the form of joint ventures, with foreign majority ownership permitted 4) Unbound | 1) Unbound* 2) Unbound* 3) None 4) Unbound |
| 4. DISTRIBUTION SERVICES A. Commission agents' Services B. Wholesale trade services C. Retailing services D. Franchising E. Other | 1) Unbound 2) None 3) Only in the form of joint ventures, with foreign majority ownership permitted 4) Unbound | 1) Unbound 2) None 3) None 4) Unbound |
| 6. ENVIRONMENTAL SERVICES A. Sewage and related services B. Refuse disposal services C. Sanitation and similar services D. Other | 1) Unbound 2) None 3) None, except that a concession is required 4) Unbound | 1) Unbound 2) None 3) None 4) Unbound |

* Unbound due to lack of technical feasibility

