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

THE CASE

Teleland – Measures Affecting Telecommunications Services

by

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1. ***Teleland*** is a developing country WTO Member. The Government of Teleland has made specific commitments in telecommunications services, listing limitations on market access and national treatment in the sector, and committed to the Reference Paper on telecommunications regulatory principles (*See* Attachment I of the Case).

2. Teleland has three fixed-line operators, of which TeleCom is the only one at this time with an international gateway. Teleland has three mobile telephone operators, none of whom has an international gateway. Since 2005, the total number of mobile telephone subscribers in Teleland has exceeded the total number of fixed telephone subscribers. The domestic market shares of the three existing mobile operators in Teleland are as follows:

2G Mobile Operators	Frequency (Band)	Market Shares
T-GlobalTone	895 MHz to 915 MHz	39%
T-Net	940 MHz to 960 MHz	31%
T-Mobility	1805 MHz to 1850 MHz	30%

3. ***Digiland*** is a developed country WTO Member with a high level of competition in both the fixed and mobile telephone markets. It maintains a receiving-party-pays (RPP) mobile telephone regime. The end-user international calling rates in Digiland are below $ .10 Digiland dollars (equivalent to US$ .075). In recent years, the volume of Digiland-outbound international calls terminated on the mobile networks in Teleland has been rapidly increasing.

4. Teleland follows a calling-party-pays (CPP) mobile telephone regime. Each of Teleland's mobile network operators charges Teleland's fixed operators a mobile

termination rate for interconnecting calls to their networks, whether domestic or from abroad; Teleland's fixed operator (i.e. TeleCom) charges Digiland's fixed operators a mobile settlements rate for the international calls that must be terminated in mobile networks in Teleland; and Digiland's fixed operators, in turn, charge their own customers a mobile surcharge for international calls placed to mobile telephones in Teleland.

5. The mobile settlements rates charged by TeleCom to Digiland's fixed operators supplying cross-border calls to mobile phones in Teleland have two components. The first component is the rate for passing through the TeleCom facilities. This rate charged by TeleCom is typical for the international market place and not disputed in this case. The second component of the international mobile settlements rates charged by TeleCom to Digiland's fixed operators is the charges that TeleCom pays Teleland's mobile operators to terminate traffic. These rates are equal to the mobile termination rates that T-GlobalTone, T-Net and T-Mobility charge TeleCom, which are approximately $10 Teleland dollars (equivalent to US$ .25) per minute. Although T-GlobalTone, T-Net and T-Mobility have voluntarily reduced their mobile termination rates by between 7-12% over the past three years, their rates remain higher than those in some neighboring countries with a CPP regime. In addition, the mobile termination rates in Teleland are approximately 8 times higher than charges for interconnection to the fixed network.

6. On 1 December 2006, the Teleland Communications Commission (TCC, the independent regulator of Teleland's telecommunications) issued the Regulation on Universal Services, which became effective immediately, that requires Teleland operators to impose a surcharge on all incoming international calls: $12 Teleland dollars per minute for terminating on a fixed network, and $8 Teleland dollars per minute for terminating on a mobile network. The surcharge is added to the settlement rates charged to Digiland operators terminating calls in Teleland.

7. The purpose of this surcharge is to fund the Government's "Universal Teleland Project"– a universal services program for building broadband access for schools, libraries and hospitals in Teleland. As of the end of 2006, the broadband penetration rate in Teleland was around 17% compared with an average penetration rate in developed countries of 52%. Intended to help bridge this "digital divide", the funding of the Project comes largely from the surcharge on incoming international calls. Operators in Teleland also have universal services obligations, including, among other things, a contribution of 1% of annual

revenues. A small portion of the funds contributed is allocated to the Project, with the remainder directed into the pre-existing general universal service fund, which is used to promote the extension of telecommunications into rural areas.

8. Prior to 1 January 2007, an Amendment to the Telecommunications Act of Teleland was passed by the Legislature, which became effective immediately. The Amendment stipulates that "the TCC, subject to availability of spectrum/frequency, may decide when to open the mobile telecommunications services sector and the number of additional licenses to extend, if any, on the basis of an analysis of the relevant markets".

9. TCC has not yet officially issued a decision on when to further open the mobile markets. In addition, it has not commenced work to determine spectrum/frequency availability and therefore has made no decision on how many additional licenses it will issue if it decides to open the market further. However, Teleland contends that it is currently drafting rules to govern the granting of additional licenses for mobile telecommunications services.

10. On 1 February 2007, TCC issued the Regulation on Number Portability, which enables subscribers to retain their existing telephone numbers when switching from the original mobile telephone operator to another. Under the Regulation, mobile operators are required to collectively enter into a contract with a data management company to administer the Database (the "Database Administrator Services"). The Database Administrator Services allow mobile operators to exchange wireless port requests. The Database contains all information on subscribers who keep their existing numbers when changing operators, as well as other data technically necessary for the functioning of number portability. The Regulation also stipulates that this contract must be approved by the Ministry of Communications (MOC).

11. On 1 May 2007, T-GlobalTone, T-Net and T-Mobility entered into a contract for the cross-border supply of Database Administrator Services with DigiStar, a leading company in Digiland specializing in database management of number portability. The MOC rejected the contract. The MOC based this decision on the principles set forth in the Data Protection Act of Teleland, pursuant to which Database Administrators and their servers must be physically located in the territory of Teleland to ensure an adequate level of protection of privacy and personal data.

12. Following consultations between Digiland and Teleland that failed to resolve the dispute over these issues, Digiland requested the establishment of a panel at a

meeting of the WTO Dispute Settlement Body. In its request, Digiland makes the following claims:

a) The Government of Teleland’s failure to ensure that T-GlobalTone, T-Net and T-Mobility, through TeleCom, provide interconnection to Digiland’s basic telecommunications suppliers on a cross-border basis with cost-based rates and reasonable terms and conditions is inconsistent with its obligations under Sections 1.1, 2.1 and 2.2 of its scheduled Reference Paper commitments, and Sections 5(a) and (b) of the GATS Annex on Telecommunications.

b) The Regulation on Universal Services is inconsistent with Article XVII of the GATS and Section 3 of Teleland's scheduled Reference Paper commitments.

c) The Amendment to the Telecommunications Act is inconsistent with Articles XVI:1, XVI:2(a) and XVI:2(c) of the GATS.

d) The Decision of the MOC regarding database management of number portability, based on the Data Protection Act, is inconsistent with Articles VI:1, VI:5, XVI:1, XVI:2(a), XVI:2(c) and XVII of the GATS.

ATTACHMENT I

TELELAND - SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons			
Sector or subsector	**Limitations on market access**	**Limitations on national treatment**	**Additional commitments**
I. HORIZONTAL COMMITMENTS			
ALL SECTORS INCLUDED IN THIS SCHEDULE	Presence of natural persons (details omitted)	Presence of natural persons (details omitted)	
II. SECTOR-SPECIFIC COMMITMENTS			
1.BUSINESS SERVICES			
B. Computer and related services (841, 842, 843, 844, 845, 849)	(1) None. (2) None. (3) None. (4) Unbound except as indicated in the horizontal section.	(1) None. (2) None. (3) None. (4) Unbound except as indicated in the horizontal section.	

2. COMMUNICATION SERVICES			
C. Telecommunication services			
(A) BASIC TELECOMMUNICATION SERVICES (Facilities-based and public switched telecom services)			
(a) Voice telephone services (7521) (b) Packet-switched data transmission services (7523**) (c) Circuit-switched data transmission services (7523**) (d) Telex services (7523**) (e) Telegraph services (7522) (f) Facsimile services (7521**, 7529**) (g) Private leased circuit services (7522**, 7523**) (o) Others	(1) None (2) None. (3) None except for Mobile Telecommunications Services: --By 1999 three mobile operators will be licensed. No limitation on number of services suppliers will exist on 1 January 2007. --Foreign services suppliers will be permitted to establish joint venture enterprises and provide services by 1 January 2007 at the latest. Foreign participation permitted through a joint venture with up to 75% equity participation. (4) Unbound except as indicated in the horizontal section.	(1) None. (2) None. (3) None, except the majority of the members of the Board of Directors of a joint venture should be Teleland nationals. (4) Unbound except as indicated in the horizontal section.	Teleland undertakes the obligations contained in the Reference Paper attached hereto.

(B) VALUE-ADDED TELECOMMUNICATION SERVICES			
(h) Electronic mail (7523**) (i) Voice mail (7523**) (j) On-line information and data base retrieval (7523**) (k) Electronic data interchange (7523**) (l) Enhanced/value-added facsimile services, incl. store and forward, store and retrieve (7523**) (m) Code and protocol conversion (CPC n.a.) (n) On-line information and/or data processing (843**) (o) Others	(1) None. (2) None. (3) None. (4) Unbound except as indicated in the horizontal section.	(1) None. (2) None. (3) None. (4) Unbound except as indicated in the horizontal section.	

ANNEX: REFERENCE PAPER

ADDITIONAL COMMITMENT BY TELELAND

Scope

The following are definitions and principles on the regulatory framework for the basic telecommunications services.

Definitions

Users mean service consumers and service suppliers.

Essential facilities mean facilities of a public telecommunications transport network or service that

(a) are exclusively or predominantly provided by a single or limited number of suppliers; and
(b) cannot feasibly be economically or technically substituted in order to provide a service.

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) control over essential facilities; or
(b) use of its position in the market.

1. Competitive safeguards

1.1 Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2 Safeguards

The anti-competitive practices referred to above shall include in particular:

(a) engaging in anti-competitive cross-subsidization;
(b) using information obtained from competitors with anti-competitive results; and
(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

2. Interconnection

2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.

2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided.

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favorable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

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

(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

2.3 Public availability of the procedures for interconnection negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available.

2.4 Transparency of interconnection arrangements

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

2.5 Interconnection: dispute settlement

A service supplier requesting interconnection with a major supplier will have recourse, either;

(a) at any time or
(b) after a reasonable period of time which has been made publicly known

to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

3. Universal service

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

4. Public availability of licensing criteria

Where a license is required, the following will be made publicly available:

(a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a license

(b) the terms and conditions of individual licenses.

The reasons for the denial of a license will be made known to the applicant upon request.

5. Independent regulators

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

6. Allocation and use of scarce resources

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.

Indicative references:

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

World Trade Organization Cases:

- *Mexico - Telecom* (WT/DS204)
- *US - Gambling* (WT/DS285)
- *EC - Bananas III* (WT/DS27)
- *Canada – Autos* (WT/DS139,142)
- *EC – Asbestos* (WT/DS135)
- *US - 1916 Act* (WT/DS136,162)

Other Documents:

- United Nations, Statistical Papers, Series M, No. 77, Provisional Central Product Classification, 1991 http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1 (please use this website to download the detailed explanatory notes for CPC Prov.)
- Services Sectoral Classification List: Note by the Secretariat, (WTO document MTN.GNS/W/120), 10 July 1991.
- Chairman's note of 16 January 1997 (WTO document S/GBT/W/2/Rev.1) on Scheduling Basic Telecommunication Services Commitments.
- Chairman's note of 3 February 1997 (WTO document S/GBT/W/3) on Market Access Limitations on Spectrum Availability.
- Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001. Please note that the above three WTO documents are included in S/L/92.